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No. 35760-1-III

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

STATE OF WASHINGTON,
Respondent,
v.
ANTHONY E. CLARK,
Appellant.

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

The Honorable Julie M. McKay

APPELLANT'S OPENING BRIEF

LAURA M. CHUANG, Of Counsel
JILL S. REUTER
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

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A. SUMMARY OF ARGUMENT

Anthony E. Clark was found guilty of fourth degree assault, unlawful imprisonment, felony harassment, and violation of a no contact order. All convictions were also found to be crimes of domestic violence.

Before trial, defense counsel moved to exclude testimony regarding Mr. Clark hitting walls, yelling at people, or throwing objects. The trial court abused its discretion by allowing testimony on the matter as it was more prejudicial than probative, the victim did not recant or attempt to deny events, and the acts were not directed at the victim. The trial court also did not conduct the proper prior bad acts evidence analysis. Because this testimony was erroneously admitted, and it affected the jury's verdict, the case must be remanded for a new trial without the admission of this evidence.

In the alternative, Mr. Clark's convictions for unlawful imprisonment and felony harassment must be remanded for resentencing because these crimes should have been counted as same criminal conduct by the trial court. The crimes of unlawful imprisonment and harassment involved the same victim, the crimes occurred in the same time and place, and the intent was the same in that the unlawful imprisonment furthered the crime of harassment. These two felonies should have been counted as the same criminal course of conduct.

Mr. Clark also preemptively objects to being assessed any costs associated with this appeal.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by allowing Ms. Thomas to testify regarding Mr. Clark's prior bad acts, including hitting walls, yelling at others, and throwing objects; the testimony was more prejudicial than probative.

2. The sentencing court abused its discretion when it did not count unlawful imprisonment and harassment as same criminal conduct.

3. Mr. Clark preemptively objects to any costs associated with this appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred by admitting evidence Mr. Clark struck walls, threw objects, and yelled at others when such prior bad acts were not directed at Ms. Thomas, Ms. Thomas did not recant during her testimony, and the evidence more prejudicial than probative.

Issue 2: Whether the trial court erred by finding Mr. Clark's convictions for harassment and unlawful imprisonment were not same criminal conduct where one crime furthered the commission of the other and the acts were charged by the State as a continuous stream of events lasting over several days.

Issue 3: Whether this Court should deny costs against Mr. Clark appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

Laura Thomas and Anthony E. Clark were around eighteen years of age when they began dating in May of 2017. (RP 124, 125; CP 193, 200). Both were students and met at a community college in Spokane. (RP 124).

A few months into their relationship, Ms. Thomas thought she wanted to end it. (RP 126). On June 30, 2017, Ms. Thomas went over to Mr. Clark's apartment, which he shared with his mother. (RP 126). Ms. Thomas and Mr. Clark had been planning to go hiking, and Ms. Thomas wanted to talk. (RP 126). She was late that morning to meet up with Mr. Clark. (RP 127). He was angry with Ms. Thomas for being late and wanting to end their relationship, and after several hours in his apartment, she became frightened and texted a friend about her concerns for her safety. (RP 127-134, 137). Ms. Thomas was concerned because during her time in the apartment Mr. Clark had held her hands down in a bathtub, covered her mouth, roughly grabbed her hair and face, and rubbed his unshaven face against hers. (RP 130-131). In response to Ms. Thomas's text message, Ms. Thomas's friend contacted law enforcement. (RP 318-321). Two sheriff's deputies arrived at Mr. Clark's apartment shortly thereafter and arrested Mr. Clark. (RP 135, 138-140).

On July 1, 2017, a no contact order was put into effect. (RP 141-142; Pl.'s Ex. 9). A few weeks after, sometime between July 12 and July 25, Ms. Thomas and Mr. Clark began communicating again by exchanging electronic communications and meeting in person. (RP 144-149). Eventually, Ms. Thomas requested the court lift the protection order, and the court did so on August 15. (RP 149-151). Thereafter, Ms.

Thomas and Mr. Clark began spending a regular amount of time together. (RP 151-152).

A few days after the no contact order was lifted, around August 20, Ms. Thomas noticed Mr. Clark began acting differently. (RP 152-153). He began to encourage Ms. Thomas to lie or stop talking to the State about the incident on June 30 in order to assist in his defense of any charges stemming from that day. (RP 152-153). He outlined six conditions he wanted Ms. Thomas to follow otherwise he threatened to "ruin" her life. (RP 155). Specifically, Mr. Clark wanted Ms. Thomas to take several actions to try to mitigate what had allegedly happened on June 30, such as not talk to law enforcement or friends and family about what had occurred. (RP 155-157). Mr. Clark would threaten Ms. Thomas in different ways, such as promising to sue her for defamation, threatening to contact law enforcement and lying about her assaulting him, and revealing her private information to family and friends. (RP 157-158). Ms. Thomas noticed the situation escalated around August 22 or 23, in that Mr. Clark said if she did not follow through with his six conditions he would ruin her life and torture and kill her. (RP 159-161). Mr. Clark made these threats repeatedly. (RP 161). Ms. Thomas was particularly frightened because she had seen Mr. Clark hit walls, yell at other people, and throw things, so she knew what he was capable of. (RP 161).

Around August 24 or 25, the threats further escalated. (RP 162). Mr. Clark began to become more specific as to the ways he would torture her and kill her if she did not follow his conditions. (RP 162). Ms. Thomas waivered in her response to his threats, sometimes agreeing to the conditions and sometimes stating she could not follow them. (RP 163).

On August 27, Ms. Thomas and Mr. Clark were at his apartment when Ms. Thomas told Mr. Clark she could not follow his conditions, would not lie. (RP 163-164). At this point, Mr. Clark restricted her airway with his hand. (RP 164-166). Ms. Thomas was scared, and later left the apartment. (RP 166).

Ms. Thomas returned again the next day. (RP 166). This time, Mr. Clark's mother, Francis Bean, was in the apartment watching TV. (RP 168). Again, Ms. Thomas told Mr. Clark she would not lie about what happened on June 30. (RP 167). Ms. Thomas said the door to the bedroom was shut but that Mr. Clark threatened her to be quiet and started by slapping her several times. (RP 168). He then punched Ms. Thomas in the head 3 to 4 times with a closed fist. (RP 169). Ms. Thomas sat on the edge of the bed with her ears ringing and room spinning, and tried to get off of the bed, but each time she did Mr. Clark would grab her legs and pull her toward him. (RP 169). Mr. Clark also allegedly pinned her down, bent back her pointer finger, bit her nose, grabbed her neck and restricted

her airway several times, and pushed her face into a pillow. (RP 169-171). Ms. Thomas screamed into the pillow in hopes Ms. Bean would hear her. (RP 172). Ms. Thomas then told Mr. Clark she wanted to leave, but he refused to allow her, forcing her onto the bed, elbowing her in the sternum, and bending her right arm backwards. (RP 173). Mr. Clark would not release her arm until Thomas agreed to bathe with him, which she did. (RP 173-174). Ms. Thomas went home later that evening to care for her roommates' dogs. (RP 174, 296).

The day after, Thomas was in a lot of pain, especially in her head and neck. (RP 179). She also noted her head felt fuzzy as if she could not "think straight." (RP 179). However, she went to work. (RP 179). She happened to have a meeting with her victim advocate that afternoon, who encouraged her to seek medical treatment, which she did. (RP 180-181). She did not call the police, aware Mr. Clark had told her if she did he would torture and kill her. (RP 182).

After all of this, Ms. Thomas once again returned to Mr. Clark's apartment the evening of August 29. (RP 182-183). She once again told Mr. Clark she could not lie or meet his six conditions. (RP 183-184). After Mr. Clark noticed the hospital bracelet from Ms. Thomas's treatment, he pulled her hair, bent back her right thumb, and struck her in

the head and neck several times. (RP 184-186). Ms. Thomas left after being at the apartment for about 45 minutes. (RP 183-186).

The next day on campus, Ms. Thomas spoke with campus staff who reported the incidents to the police. (RP 186-187).

The State charged Mr. Clark with five crimes: second degree assault by strangulation on or about August 22 to August 28 (Count 1); unlawful imprisonment on or about August 22 to August 28 (Count 2); felony harassment on or about August 22 to August 28 (Count 3); fourth degree assault on June 30 (Count 4); and misdemeanor violation of a protection order on or about July 12 (Count 5). (CP 102-103).

A jury trial was held on these counts. (RP 123-360). Ms. Thomas testified at trial consistent with the facts stated above. (RP 123-211; 263-310).

Prior to trial, defense counsel moved in limine to exclude evidence Mr. Clark had previously hit walls, threw items, or yelled at people in an aggressive manner. (CP 32-35; RP 14, 105). The court listened to testimony from Ms. Thomas prior to issuing its ruling on the issue. (RP 14, 92-93). Ms. Thomas testified she saw Mr. Clark hitting and striking walls and saw him break his stereo out of anger, which was intimidating to her. (RP 93). The trial court denied Mr. Clark's motion, stating the probative value of the evidence outweighed the prejudice. (RP 107).

At trial Jennifer Pop, a registered nurse from Multicare Rockwood Urgent Care, testified she took triage notes in the process of treating Thomas on August 29, 2017. (RP 212-216). Ms. Thomas told Ms. Pop of her injuries, but Ms. Pop could not recall if she observed any physical injuries on Ms. Thomas. (RP 217). Ms. Thomas informed Ms. Pop her boyfriend choked her, smothered her with a pillow, punched her in the head several times, punched in her in the sternum, bent her right index finger back, and she had a headache with photophobia and sensitivity to sound and movement. (RP 217-218). Despite these allegations, the treatment notes indicated bruising on Thomas's forearms and no other outward signs of physical injury. (RP 219, 227). Based on Ms. Pop's experience, if a person had been slapped 3 to 4 times, backhanded, finger bent backwards, punched in the head 3 to 4 times, manhandled, held down, legs restrained, bitten on the nose, strangled several times with hands, arm bent backwards, and punched and elbowed in the sternum, there would have been some external physical indications of injury. (RP 233-234). Ms. Thomas was later referred to the hospital. (RP 231).

Charity Elmendorf, a nurse practitioner from Sacred Heart Medical Center who treated Ms. Thomas, also testified. (RP 237-238). She noted Ms. Thomas did not have any broken bones, and she was not able to corroborate photophobia or intermittent visual changes because those were

self-reporting ailments. (RP 243, 253-254). She also stated that if someone's right arm was bent backwards, it would not affect their left shoulder blade (although the left scapula is where Ms. Thomas complained of having pain). (RP 252, 254). The nurse practitioner did not observe any bruising on Ms. Thomas's neck nor external evidence of head injury. (RP 254, 256-257). Ms. Thomas also denied having any dizziness and did not make any statements that she was having trouble expressing words or thoughts or concentrating. (RP 252). Ms. Elmendorf offered Ms. Thomas resources for assistance with domestic violence, but she declined the offer. (RP 258).

At trial, Ms. Thomas admitted she has a history of headaches and cervical issues. (RP 265-266). She admitted she kept spending time with Mr. Clark over a period of 5 or 6 days, despite his threats to torture and kill her. (RP 286). And despite all of the physical abuse which she alleged occurred on August 28, 2017, Ms. Thomas stated she tried to stifle her screams so Ms. Bean would not hear her, because Mr. Clark threatened her to be quiet. (RP 292-293). Despite several physical complaints including trouble concentrating, speaking clearly, dizziness, and sensitivity to light and sound and movement, Ms. Thomas did not seek medical attention right away, and still went to work on August 29. (RP 293-297).

Ms. Bean, mother to Mr. Clark and also a registered nurse, also testified. (RP 351). She never noticed anything abnormal about the relationship between her son and Ms. Thomas. (RP 351). However, she was aware of Ms. Thomas' allegations from June 30, and when the no contact order was lifted Ms. Bean made an extra effort to be home more frequently to observe the couple's interactions. (RP 352). Ms. Bean was home from work in the evenings and did not notice anything strange about the couple during the time frame of August 20 to August 28. (RP 353).

On the evening of August 28, her day off, Ms. Bean rented a movie. (RP 354). According to Ms. Bean's testimony, both Ms. Thomas and Mr. Clark were in the apartment and Ms. Thomas was not feeling well because she was ill. (RP 354). Ms. Thomas took a nap in Mr. Clark's bedroom while Mr. Clark made dinner. (RP 355). Ms. Bean testified her son went in the bedroom, Thomas came out, "they had dinner at the table, they ate. They went back into the bedroom for a minute, they went—they had a bath or a shower, went back into the room and hung out on the laptop." (RP 355). Ms. Bean did not hear any strange noises that evening, and testified the apartment has two bedrooms, two bathrooms, and thin walls through which she can hear talking and some of the neighbors' activities. (RP 355). She did not hear yelling, crying, banging, loud noises or other signs of struggle. (RP 356).

The jury found Mr. Clark not guilty as to second degree assault by strangulation on or about August 22 to August 28 in Count 1, and not guilty as to the fourth degree assault on June 30 in Count 4. (CP 142, 146; RP 444). However, the jury found Mr. Clark guilty of the lesser included offense of fourth degree assault in Count 1 (occurring on or about August 22 to 28), unlawful imprisonment in Count 2 (occurring on or about August 22 to 28), felony harassment in Count 3 (occurring on or about August 22 to 28), and misdemeanor violation of a no contact order in Count 5 (occurring on or about July 12). (CP 142-147; RP 444-445). The jury also found by special verdicts that domestic violence applied to each conviction. (CP 148-150, 152; RP 444-445).

At sentencing defense counsel requested felony harassment and unlawful imprisonment be counted as same criminal conduct. (CP 167-169; RP 470-471). Defense counsel argued that because the State charged Mr. Clark's behavior as continuous behavior over the span of about a week, the court should find same time and place applied to meet the same criminal conduct test. (CP 168; RP 470-471). The sentencing court declined to count the two felonies as same criminal conduct, appearing to analyze same criminal conduct by comparing the elements of the crimes rather than by considering criminal intent or purpose. (RP 471-475).

The trial court found Mr. Clark indigent for purposes of appeal and granted him a right to review at public expense. (CP 191-192).

Mr. Clark timely appeals. (CP 213).

E. ARGUMENT

Issue 1: Whether the trial court erred by admitting evidence Mr. Clark struck walls, threw objects, and yelled at others when such prior bad acts were not directed at Ms. Thomas, Ms. Thomas did not recant during her testimony, and the evidence more prejudicial than probative.

Over defense counsel's objection, the court admitted allegations Mr. Clark struck walls, yelled at others, and threw objects in anger. This conduct was not directed at Ms. Thomas, nor did Ms. Thomas recant during her testimony. The court abused its discretion by admitting such evidence because it was more prejudicial than probative to the charged crimes, and the court did not perform the proper ER 404(b) analysis for its admission.

As a threshold matter, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014). "'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.'" *Id.*

(citation and internal quotations omitted). In close cases, the balance must be tipped in favor of the defendant. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct:

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

ER 404(b).

In order to admit evidence under ER 404(b), the trial court must follow four steps: "'(1) find by a preponderance of the evidence that the misconduct 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.'" *Slocum*, 183 Wn. App. at 448 (citations and internal quotations omitted). This analysis must be conducted on the record. *Id*. (citation omitted).

"The question to be answered in applying ER 404(b) is whether the bad acts are relevant for a purpose other than showing propensity." *Slocum*, 183 Wn. App. at 456; *see also* ER 402, ER 403. Evidence of prior opportunistic crimes is relevant but inadmissible due to ER 404(b).

Id. But "evidence that a charged crime was carried out in a manner devised by the defendant and used by him more than once has a distinct and additional probative value [other than showing propensity] that justifies its admission." *Id*. at 456 (holding defendant's opportunistic and dissimilar incidents involving molestation of victim's mother and aunt were inadmissible).

Here, the defense moved to exclude evidence of Mr. Clark's prior striking of walls, throwing objects, and yelling at persons, arguing the evidence of prior misconduct was more prejudicial than probative. (CP 33; RP 14, 105). The trial court allowed admission of these prior bad acts and did not complete the proper four-part ER 404(b) analysis, thus abusing its discretion by applying the wrong legal standard. (RP 107); *see Slocum*, 183 Wn. App. at 448 (listing four-part ER 404(b) analysis courts must follow). The trial court also abused its discretion in finding these prior bad acts were more probative than prejudicial. (RP 107).

First, the trial court did not find by a preponderance of the evidence that the misconduct occurred. (RP 107); *Slocum*, 183 Wn. App. at 448. Second, the court did not identify the purpose for allowing the evidence to be introduced under ER 404(b). (RP 107). The only "purpose" the trial court identified was to show Mr. Clark's actions were intimidating to Ms. Thomas, and those actions "indicated to her what he

was capable of when he was mad". (RP 107). Yet this evidentiary "purpose" did nothing but show a Mr. Clark's propensity for violent behavior and action in conformity therewith. (RP 107); *see also* ER 404(b). Notably, these acts of rage were not directed at Thomas. (RP 92-93, 161).

Third, the trial court never explained how this propensity evidence was relevant to prove specific elements of any of the charged crimes. (RP 107). Rather, the trial court made a cursory reference to how the probative nature of the domestic violence charge outweighed the prejudicial effect. (RP 107). Ms. Thomas' allegations that Mr. Clark struck walls, yelled at others, threw objects, and broke his stereo were unspecific as to time and place, were not actions directed at Ms. Thomas, and did not give any context to show how they related to the charged crimes other than they involved violence. (RP 92-93, 161). Most importantly, these allegations did not actually reflect *domestic* violence versus ordinary acts of rage. *See Slocum*, 183 Wn. App. at 456.

Fourth and finally, although the trial court did analyze whether the probative value of the evidence was outweighed by its prejudicial effect, the court abused its discretion by determining the evidence was more probative than prejudicial. (RP 107). The striking of the walls, yelling at others, throwing items, and even the breaking of the stereo were vague and

very unspecific acts. (RP 92-93, 161). Again, none of those acts were directed at Ms. Thomas, and the prior bad acts did nothing more than show Mr. Clark was capable of being angry. (RP 92-93, 161). The trial court abused its discretion in finding the evidence was more probative than prejudicial. This is especially true because the risk of prejudice of prior acts in domestic violence cases is very high. *See State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

A similar case is analogous to this point. In *Gunderson*, the State sought to admit the defendant's two prior convictions for domestic violence against the same victim in the case. *Gunderson*, 181 Wn.2d at 921. The trial court allowed the prior convictions into evidence for the purpose of impeaching the victim's testimony—yet the victim never recanted nor contradicted her statements during trial. *Id*. at 922. The Court acknowledged impeachment can be a proper purpose for admitting prior bad acts under ER 404(b), but found the trial court abused its discretion. *Id*. at 922. The Court cautioned "courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high." *Id*. at 925 (citation omitted). The Court stated:

> To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise

> inexplicable recantation or conflicting account of events…. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

Id. at 925 (citations omitted).

Ms. Thomas's allegations that Mr. Clark struck walls, yelled at people, threw things, and broke his stereo[1] were all inadmissible prior bad acts used merely to show propensity. The trial court abused its discretion by not following and analyzing the ER 404(b) requirements prior to admission of the bad acts evidence. *See Slocum*, 183 Wn. App. at 448. The trial court abused its discretion by admitting the prior misconduct because the evidence did not have a valid purpose, the evidence was not relevant to prove an element of any crimes charged, and the evidence was certainly more prejudicial than probative. Moreover, Ms. Thomas never recanted. *See Gunderson*, 181 Wn.2d at 925 (narrowly limiting the purposes for which ER 404(b) evidence is admissible in domestic violence cases). Evidence of the prior acts should have been excluded by the trial court under ER 404(b).

"Evidentiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, such errors are not harmless when, "within reasonable

[1] Appellant acknowledges that the broken stereo incident was not evidence specifically presented to the jury; but the other acts were. *See* RP 92-93, 161.

probabilities . . . the outcome of the trial would have been different if the error had not occurred." *Id*. (citation omitted).

Here, the error in admitting the ER 404(b) evidence was not harmless. It is within reasonable probabilities the evidence Mr. Clark acted in a violent manner in different scenarios affected the outcome of the trial. Though the State charged Mr. Clark in Count 1 with second degree assault by strangulation, and in Count 4 with fourth degree assault occurring on June 30, 2017, the jury found him not guilty on both counts.[2] (CP 142-147; RP 444-445). The only evidence presented at trial about what really happened between Mr. Clark and Ms. Thomas was from Ms. Thomas herself. Yet the jury must not have believed all of or some of Ms. Thomas's testimony due to its verdict and finding Mr. Clark "not guilty" on two counts. (CP 142, 146; RP 444). Medical personnel acknowledged some of Ms. Thomas's alleged injuries did not comport with her numerous allegations. (RP 219, 227, 233-234, 252-254). And Mr. Clark's mother, a registered nurse, testified she did not witness or hear any physical altercations between Mr. Clark and Ms. Thomas on August 28, an evening where they were all in the same thinly-walled apartment together. (RP 354-356).

[2] For Count 1, the jury found the defendant guilty of a lesser-included offense. RP 444; CP 143.

The trial court abused its discretion by admitting evidence of Mr. Clark's prior bad acts. The error was not harmless and it is within reasonable probabilities the erroneous admission affected the outcome of the trial. The case must be remanded for a new trial.

Issue 2: Whether the trial court erred by finding Mr. Clark's convictions for harassment and unlawful imprisonment were not same criminal conduct where one crime furthered the commission of the other and the acts were charged by the State as a continuous stream of events lasting over several days.

The trial court erred in finding Mr. Clark's convictions for unlawful imprisonment and harassment were not same criminal conduct. The trial court misapplied the law, using the wrong legal test for determining whether the crimes had the same criminal intent. Under the correct legal test, the crimes were same criminal conduct. The case should be reversed and remanded for resentencing, to sentence the unlawful imprisonment and harassment as same criminal conduct.

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

> …whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Id*. at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id*. at 539.

Mr. Clark's convictions for unlawful imprisonment and harassment were "same criminal conduct." *See* RCW 9.94A.589(1)(a) (defining same criminal conduct). First, the offenses involved the same victim, Ms. Thomas. (RP 123-211, 263-310, 472).

Second, these crimes were committed at the same time and place. (RP 159-174, 178-186; CP 102, 126, 129). The State charged unlawful imprisonment and felony harassment as occurring on or about the same date range of August 22 to August 28, 2017. (CP 102, 126, 129). The crimes took place over the span of a few days, and the State chose to charge those crimes as occurring in a continuous stream of action. (CP 102, 126, 129; RP 159-174, 178-186). The

testimony does not clarify which location the harassment took place in, but at notable points Ms. Thomas stated she and Mr. Clark were in his apartment. (RP 163, 167-168, 172, 182-186). The incidents leading to unlawful imprisonment also took place at Mr. Clark's apartment. (RP 169-174). The two crimes of unlawful imprisonment and harassment occurred in a continuous sequence of events, evidenced by the way the State charged the case over a period of several days. (CP 102, 126, 129); *see also Porter*, 133 Wn.2d at 183 ("same time" element of "same criminal conduct" statute was proven where sequential drug sales occurred as closely in time as they could without being simultaneous because the sales were part of a continuous, uninterrupted sequence of conduct over a short period of time). Once Ms. Thomas told Mr. Clark she would not lie despite his threats to kill her, he would not let her leave his apartment. (RP 162-163, 167-174). The crimes happened in a continuous sequence.

Third, the crimes involved the same criminal intent. In making its contrary ruling, the trial court relied upon analyzing the elements of the crimes and their similarity, rather than examining the defendant's criminal intent or purpose behind committing unlawful imprisonment and harassment. (RP 473-474). The trial court appeared to rely upon *State v. Wilson*, concluding that assault and felony harassment do not have the same criminal intent. (RP 473-474); *see also State v. Wilson*, 136 Wn. App. 596, 614-616, 150 P.3d 144 (2007).

The trial court's analysis appears to be similar to that of *State v. Chenoweth*. *See State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016).

In *Chenoweth*, the defendant was convicted of six counts of third degree child rape and six counts of incest, based on six incidents, each involving a single act. *Chenoweth*, 185 Wn.2d at 219. On appeal to our Supreme Court, the defendant "argue[d] that child rape and incest, based on a single act, as a matter of law constitute the same criminal conduct for purposes of calculating his offender score." *Id*. at 221. The only element of the same criminal conduct analysis at issue was whether the two offenses shared the same criminal intent. *Id*.

The Court held "the same act constituting rape of a child and incest is not the same criminal conduct for purposes of sentencing." *Id*. at 224. In reaching this holding, the Court looked to the statutory criminal intents for third degree child rape and incest, stating that "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." *Id*. at 223. The Court reasoned that the defendant's "single act is comprised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of 'same criminal conduct.'" *Id*. In reaching its holding, the Court relied upon two other cases involving rape of a child and incest. *Id*. at 221-24 (citing *State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009); *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995)).

Prior to *Chenoweth*, the test applied to determine whether crimes had the same criminal intent for purposes of the same criminal conduct analysis was whether, when viewed objectively, the criminal intent did not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (citing *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). "In determining whether multiple crimes constitute the same criminal conduct, courts consider 'how intimately related the crimes are,' 'whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,' and 'whether one crime furthered the other.'" *Id*. at 546–47 (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411 (citing *Dunaway*, 109 Wn.2d at 215). When one crime furthers another, same criminal conduct applies. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993); *see also Dunaway*, 109 Wn.2d at 217. And, "if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, the trial court misapplied the law in its same criminal conduct analysis. (RP 473-474). The standard set forth in *Chenoweth*, looking to the statutory criminal intents for determining whether the two offenses shared the same criminal intent, does not apply in this case. *See Chenoweth*, 185 Wn.2d at 220-25. The same criminal intent test set forth in *Dunaway* has not been expressly overruled by our Supreme Court, and *Chenoweth* applies only to cases involving rape of a child and incest offenses. *See State v. Santos*, No. 75614-1-I, 2018 WL 1110496, at *3 n.1 (Wash. Ct. App. Feb. 26, 2018); *State v. McDonough*, No. 75337-1-I, 2018 WL 1611616, at *3-4 n.1 (Wash. Ct. App. Apr. 2, 2018); *but see State v. Yusuf*, No. 75571-4-I, 2018 WL 1168724, at *6-7 (Wash. Ct. App. Mar. 5, 2018) (applying *Chenoweth* to convictions for assault and harassment); *State v. Baza*, No. 48541-9-II, 2017 WL 589189, at *3-4 (Wash. Ct. App. Feb. 14, 2017) (applying *Chenoweth* to convictions for assault, felony harassment, and felony violation of a no-contact order).[3]

The proper standard for determining whether Mr. Clark's crimes had the same criminal intent or purpose is that set forth in *Dunaway* and subsequent cases, the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411, 885 P.2d 824 (1994) (citing *Dunaway*,

[3] These cases are cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

109 Wn.2d at 215). The trial court erred in looking to the particular statutory mens rea of the crimes, effectively applying *Chenoweth*.

Here, Mr. Clark's criminal intent or purpose did not change from one crime to the next. *See Vike*, 125 Wn.2d at 411, 885 P.2d 824 (1994) (citing *Dunaway*, 109 Wn.2d at 215); *see also State v. Tili*, 139 Wn.2d 107, 119, 123, 985 P.2d 365 (1999). Mr. Clark's criminal purpose was to force Ms. Thomas to follow the conditions he set forth for her, otherwise he stated he would "ruin [her] life" and kill her. (RP 159). Mr. Clark's criminal intent was to force Ms. Thomas to follow his conditions. When Ms. Thomas said she would not lie and would not follow his conditions, unlawfully imprisoning Ms. Thomas furthered the commission of the crime of harassment—the threat to kill. The criminal purpose of threatening Ms. Thomas was maintained and furthered by her imprisonment. *See Garza-Villarreal*, 123 Wn.2d at 47; *also Dunaway*, 109 Wn.2d at 217 (when one crime furthers another, same criminal conduct applies).

Similar facts have lead at least one trial court to find same criminal conduct where felony harassment and unlawful imprisonment coexisted. *State v. Tedder*, 194 Wn. App. 753, 758, 378 P.3d 246 (2016). In *Tedder*, over what appeared to be a week-long event, the defendant threatened to kill the victim multiple times if she left the apartment. *Id*. The trial court thus concluded both second degree assault and felony harassment were the same criminal conduct as unlawful imprisonment. *Id*.

Similarly, the crimes of felony harassment and unlawful imprisonment constituted the same criminal conduct in this case. The two crimes involved the same victim, existed in the same time and place, and were based on the same criminal intent or purpose. *See* RCW 9.94A.589(1)(a) (defining same criminal conduct); *see also Dunaway*, 109 Wn.2d at 215. The trial court misapplied the law and abused its discretion in failing to find felony harassment and unlawful imprisonment were the same criminal conduct. *See Graciano*, 176 Wn.2d at 535-36.

The case should be reversed and remanded for resentencing, with the felony harassment and unlawful imprisonment convictions counted as one crime under same criminal conduct. *See* RCW 9.94A.589(1)(a).

Issue 3: Whether this Court should deny costs against Mr. Clark on appeal in the event the State is the substantially prevailing party.

Mr. Clark preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).[4]

[4] The undersigned counsel anticipates filing Mr. Clark's Report as to Continued Indigency within 60 days of filing this opening brief.

At sentencing, the trial court made no inquiry into Mr. Clark's ability to pay legal financial obligations, but imposed only mandatory legal financial obligations. (CP 198; RP 486). The trial court entered an Order of Indigency for purposes of appeal, granting Mr. Clark the right to review at public expense. (CP 191-192; RP 479).

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id*.

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results

in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Clark's indigency has been determined for purposes of this appeal. (CP 191-192; RP 479).

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "[t]he adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Clark met this standard for indigency. (CP 191-192).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); *see also* CP 191-192. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Clark to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id*.

There is no evidence Mr. Clark's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case.

Mr. Clark also requests this Court review any subsequently filed report as to his continued indigency and likely inability to pay an award of costs, as evidence of his inability to pay costs on appeal.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Clark respectfully requests his convictions for unlawful imprisonment, felony harassment, and fourth degree assault be reversed. The trial court improperly admitted prior bad acts evidence which within reasonable probabilities affected the outcome of the trial.

In the alternative, Mr. Clark respectfully requests this Court remand his case for resentencing. The trial court erred when it failed to find felony harassment and unlawful imprisonment were same criminal conduct. The State charged these crimes as the same continuous stream of acts and the criminal intent was the same.

Mr. Clark further requests this Court deny any of the State's requests for appellate costs.

Respectfully submitted this 20th day of August, 2018.

/s/ Laura M. Chuang
Laura M. Chuang, WSBA #36707

/s/ Jill S. Reuter
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
Attorneys for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35760-1-III
vs.	)	
ANTHONY E. CLARK	)	PROOF OF SERVICE
Defendant/Appellant	)	
_____	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 20, 2018, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Anthony E. Clark
12210 E MAXWELL APT E306
SPOKANE VALLEY WA 99206

Having obtained prior permission from the Respondent, I also served the same at SCPAappeals@SpokaneCounty.org using Division III's e-service feature.

Dated this 20th day of August, 2018.

/s/ Jill S. Reuter
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

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