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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY CLARK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S 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.

## **II. ISSUES PRESENTED**

1. Whether the trial court abused its discretion when it allowed Ms. Thomas to testify to her fear of the defendant based on her observation of the defendant hitting walls, throwing objects, and yelling at others, where the trial court properly analyzed the ER 404(b) issue on the record?
2. Whether error, if any, with respect to the admission of ER 404(b) evidence was harmless?
3. Whether the trial court abused its discretion when it determined that the crimes of felony harassment and unlawful imprisonment did not constitute the same criminal conduct for sentencing purposes?
4. Whether appellate costs should be assessed against the defendant if the State is the substantially prevailing party?

## **III. STATEMENT OF THE CASE**

On December 6, 2017, the State charged the defendant, Anthony Clark, by amended information, with one count each of second degree

assault – domestic violence, unlawful imprisonment – domestic violence, felony harassment – domestic violence, fourth degree assault – domestic violence, and violation of a domestic violence no contact order. CP 102-03. The three felony offenses were alleged to have occurred on or about between August 22, 2017, and August 28, 2017. CP 102. The misdemeanor assault was alleged to have occurred on or about June 30, 2017. CP 103. The violation of a no contact order was alleged to have occurred on or about July 12, 2017. Each charge involved the same victim, Laura Thomas. CP 102-03. The matter proceeded to a jury trial.

Substantive facts.

Laura Thomas met Anthony Clark at the Spokane Falls Community College where both were enrolled as students. RP 124. They began dating on May 4, 2017. RP 125.

On June 30, 2017, Ms. Thomas intended to break up with Mr. Clark. RP 126. After he insisted she come to his apartment, she did so, but arrived late. RP 127. He immediately started berating her. RP 127. She spent approximately three hours at his apartment, during which time she locked herself in his bathroom to escape his verbal abuse.<sup>1</sup> RP 128. He convinced

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<sup>1</sup> “The insult I think probably used most often with me was stupid. I remember there was one time he said if you’re not stupid then the sky’s not blue. He also told me what a terrible girlfriend I was for trying to end things

Ms. Thomas to unlock the door, and he continued to insult her in the bathroom. RP 129. Ms. Thomas took a shower “to get away” from him. RP 129. Shortly thereafter, while she was still in the shower, Mr. Clark sat on the bathtub ledge, continued to criticize her, “got in her face,” and when she tried to speak, put his hand over her mouth. RP 130. He pulled her hair and grabbed her face, and held her wrists against the floor of the tub so she was unable to leave. RP 131.

Terrified, Ms. Thomas sent a text message to her roommate, Laura Stephenson, hoping that Ms. Stephenson would come to Mr. Clark’s apartment and help her leave safely. RP 132, 137. Instead, Ms. Stephenson called the police. RP 135. When the police arrived, Mr. Clark answered the door, but tried to shut it once he realized the police were there. RP 327. Ultimately, the defendant was arrested for fourth degree assault, even though Ms. Thomas, believing Mr. Clark would change, did not want to “press charges.” RP 139-40.

After the defendant’s arrest, on July 1, 2017, the Spokane County District Court imposed a no contact order, directing the defendant to refrain from any contact with Ms. Thomas. RP 141-43. Despite the no contact

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and for arriving lat[e]. And that I was selfish and retarded and stupid and stubborn.” RP 132.

order, the two continued to meet and have contact over “Snapchat”<sup>2</sup> between July 12 and 25, 2017. RP 143-44. In the Snapchat messages, Mr. Clark directed Ms. Thomas how to act and what to say during her upcoming meeting with her victim advocate and the prosecutor assigned to the misdemeanor case. RP 144-45, 148-49. Ms. Thomas did not disclose the “Snapchat” messages during her meeting with the prosecutor and advocate. RP 149.

Believing Mr. Clark would change, Ms. Thomas requested that the no contact order be recalled. RP 150. The no contact order was recalled by the district court on August 15, 2017. RP 151.

Between August 15 and August 20, 2017, the two went on elaborate dates, making Ms. Thomas believe Mr. Clark had changed and would treat her better. RP 151. Between August 19 and 21, 2017, however, Mr. Clark demanded six requirements from Ms. Thomas or else he would “ruin her life.” RP 155, 158. Mr. Clark directed Ms. Thomas to: (1) obtain a psychiatric evaluation stating that fear and anxiety caused her to imagine

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<sup>2</sup> “Snapchat” is a messaging application whereby users may send photographs, videos or text that disappear after they are viewed by the recipient; however, users may take a screen shot with their cellular device to preserve an image before it disappears. *See*, Brett Molina, *Snapchat: Parents, this is what it is and how to use it*, USA Today, May 2, 2017, available at <https://www.usatoday.com/story/tech/news/2017/05/02/snapchat-parents-what-and-how-use/101163650/> (last accessed October 1, 2018).

the events of June 30, 2017, and provide documentation to Mr. Clark's defense attorney to aid in the dismissal of the criminal charge; (2) inform Laura Stephenson to "back the fuck off of [their] relationship and to mind her own business;" (3) convince her family and friends that Mr. Clark was not abusive and that she had fabricated the events of June 30, 2017; (4) speak about the events of June 30, 2017 only using the specific version of events provided by Mr. Clark; (5) remain in the relationship; and (6) not to talk to anyone, *especially law enforcement*, about "any of this." RP 155-57.

Mr. Clark threatened Ms. Thomas that, if she failed to follow his conditions, he would sue her for defamation, reveal private information in an effort to turn her family and friends against her, convince her family and friends she was a liar, and, lastly, he threatened he would fabricate a criminal complaint against her. RP 157. Later, between August 22 and 23, 2017, his threats escalated: he threatened to torture and kill Ms. Thomas if she did not follow his conditions. RP 159. He threatened to waterboard her, slice her repeatedly with a razor blade, pour rubbing alcohol in her wounds, break each of her fingers, rip out her fingernails, slice off one or both of her ears, break her arms, and bite off her lips. RP 160-61. He then threatened to kill her, resuscitate her, and kill her again. RP 161.

Ms. Thomas believed Mr. Clark to be capable of carrying out his repeated threats. RP 160-61. She believed she had no option other than to follow his directives because she had already been assaulted by Mr. Clark, she had seen him hit walls, throw things, and yell at other people, and she was afraid he would kill her. RP 161. She feared him because of the difference in their sizes – he was 5’11” and 200 pounds, and she was 4’11” and 90 pounds. RP 133. She feared him because he knew where she lived, worked, and studied. RP 162.

The threats continued to escalate during the 24<sup>th</sup> and 25<sup>th</sup> of August. RP 162. The defendant again threatened to kill Ms. Thomas by strangulation, and claimed he would then resuscitate her, torture her more, and once again kill her by beating her to death. RP 162. At times, Ms. Thomas did as she was told, and at other times, she told the defendant she would not lie for him. RP 167.

On August 27, 2017, the two were again at Mr. Clark’s apartment in the shower. He again pulled her hair and called her a “stupid stubborn bitch” after she told him that she could not follow his rules. RP 164. He told her he needed to “fix [her] bitchy attitude.” RP 164. He showed her where he would punch her, and then took one hand, placed it around her neck, and pressed his thumb against her airway, “cut[ting] off some breathing” several times. RP 164.

On August 28, 2017, Ms. Thomas saw him again because she was afraid not to (since one of his conditions was that she could not leave the relationship). RP 166. She told him that she could not follow the first condition because she refused to lie in court for him. RP 167. Again, he called her names, and then slapped her three or four times across the face. RP 168. He punched her with a closed fist as she sat on the bed; her head spinning, she tried to get off the bed, but he grabbed her legs and yanked her back onto the bed. RP 169. He pinned her down so she was unable to leave, bent her index finger backward, and bit her nose. RP 170. Mr. Clark then strangled Ms. Thomas.<sup>3</sup> RP 171. Mr. Clark subsequently forced Ms. Thomas' face into a pillow, muffling her attempts to scream.<sup>4</sup> RP 172.

Ms. Thomas told the defendant that she wanted to leave, but he instructed her that they would take a bath together. RP 173. He elbowed her in the sternum, and took her right arm and bent it backwards, until she agreed to bathe with him. RP 173. After their bath, Mr. Clark gave Ms. Thomas a massage for "being cooperative" and then allowed her to go home. RP 174.

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<sup>3</sup> The jury found the defendant not guilty of second degree assault by strangulation arising from these facts. However, it did find Mr. Clark guilty of fourth degree assault. CP 142-43.

<sup>4</sup> Mr. Clark's mother was at home during the incident and did not hear the altercation between her son and Ms. Thomas. RP 354-56.

The next morning, despite being in pain,<sup>5</sup> Ms. Thomas went to work at the community college. RP 179. Later in the afternoon, she met with her victim advocate, who advised her to seek medical attention; she did so, taking a friend with her to a Rockwood Clinic. RP 180. Professionals at the clinic advised her to seek help at the Sacred Heart emergency room. RP 180. While at the emergency room, she received text messages from Mr. Clark, asking where she was. RP 181. Because she was afraid he would follow through with his earlier threats, she told the medical professionals that she did not want police involvement. RP 182.

That evening, August 29, 2017, Ms. Thomas returned to Mr. Clark's apartment. RP 182. She inadvertently left her hospital bracelet on her wrist, which he noticed; Ms. Thomas told Mr. Clark that she had not told anyone about the incident the night before. RP 183-84. Mr. Clark grabbed Ms. Thomas' hair, and bent her right thumb back until she was afraid it would break. RP 184-85. He hit her neck four to five times, knocking the wind out of her, and punched her in the head. RP 185-86.

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<sup>5</sup> "My whole body was in pain, it almost felt like I had been hit by a bus. Everything hurt. I remember my head especially hurting. I was dizzy... [M]y words would come out slurred or just incoherent. I just remember my brain feeling fuzzy like I couldn't think straight. And everything hurt, everything hurt, I was in so much pain. And especially my head and neck." RP 179.

She was able to leave the apartment, and returned home. RP 186. The following day, she told her co-workers what had occurred, and was directed to speak to a campus security officer. RP 187. That security officer involved law enforcement, to whom Ms. Thomas later gave a statement. RP 187.

Procedural facts.

The defendant moved, in limine, to “prohibit [the State] from admitting testimony that Ms. Thomas has observed Mr. Clark hitting walls, throwing items, or yelling at people in an aggressive manner.”<sup>6</sup> CP 33. His written memorandum in support of the motion did not contain any argument, other than citations to ER 401, ER 402, and ER 404(b). CP 33. On the first day of trial, counsel argued that the testimony was not relevant and was inadmissible character evidence under ER 404(b). RP 12.

The State argued that the testimony was admissible and relevant to Ms. Thomas’ state of mind, her fear of the defendant, and her reluctance to report the abuse. RP 13. The State argued that the evidence was admissible

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<sup>6</sup> The defendant also moved, in limine, to exclude any evidence regarding a camping trip Mr. Clark and Ms. Thomas took a week before the June 30, 2017 incident, during which Mr. Clark threw Ms. Thomas out of their tent, abandoned her, and took her medications and other belongings with him. RP 94. The court granted that motion, finding that there was no indication that the incident placed Ms. Thomas in fear of Mr. Clark, and was too attenuated from the charged incidents. RP 107.

as res gestae, and, under *State v. Nelson*, 131 Wn. App. 108, 125 P.3d 1008 (2006), to explain why the victim acted the way she did. RP 13-14.

The defense conceded that in domestic violence cases,

[T]here's a lot more flexibility when it comes to admitting past bad acts to cover the defendant's state of mind. However, in this case, I think if the court was to find that an allegation of Mr. Clark, in the past, hitting walls is relevant, I think its outweighed by its probative – or its outweighed by its prejudicial value... So, when it comes to this particular piece of evidence, I would ask it's inadmissible under [ER] 403 if the court were to find it relevant.

RP 14.

Before the court ruled, Ms. Thomas testified that there were a number of incidents during her relationship with Mr. Clark where she observed him striking or hitting walls. RP 92. She described these incidents as “intimidating,” and that she knew “what he was capable of when he was mad.” RP 93.

Defense counsel again argued:

I stand by my motion in limine regarding the camping trip. I don't feel it's relevant, I don't feel there's anything aggressive or violent in nature that occurred on that date that would impact Ms. Thomas' subjective view that Mr. Clark is a threat.

To build off that point, I feel, again, hitting walls does not qualify. Now, if she had seen him get in a fight with somebody and saw a propensity for him to be physically violent towards another human being, I believe there would be a bet [sic] argument there. But again, just punching walls and raising his voice, I don't believe is enough. And again,

if the court was to find that it was probative, I feel that it is outweighed by its prejudicial impact.

RP 105.

The trial court ruled:

With regards to the striking of walls, and other acts of violence, a little bit different situation there. Ms. Thomas did indicate she has observed the defendant hitting and striking walls. That started at the beginning of their relationship, it was intimidating to her and it indicated to her what he was capable of when he was mad, so I think that it is tied sufficiently from a probative standpoint and while obviously most evidence coming into a case is prejudicial in some form or another, I do think the probative nature of this, based upon the nature of the charge, the domestic violence nature of the charge outweighs the prejudice and so I am going to allow her to testify with regards to that.

RP 107.

As indicated above, Ms. Thomas testified during direct examination that she felt as though she had no option but to follow the defendant's "rules" because she knew "what he was capable of," having seen him hit walls, throw things, and yell at other people. She also explained her fear was based on the difference in their sizes, and the abuse she had already sustained. RP 161.

At sentencing, the defendant requested the court find that the harassment and unlawful imprisonment charges constituted the same criminal conduct, arguing that the two offenses "bled together" over the course of the charging period, and that mens rea of each offense was the

same – both were “knowingly” committed crimes. RP 470-71. The court determined that the two felonies were not the same criminal conduct, and calculated the defendant’s offender score to be “4” for each felony. RP 472-75. Notwithstanding that determination, the Court waived imposition of a standard range sentence,<sup>7</sup> sentenced the defendant using a first-time offender sentencing alternative, and imposed 90 days each on the felony convictions. CP 196.

This appeal timely followed.

#### IV. ARGUMENT

##### **A. THE TRIAL COURT PROPERLY ANALYZED THE ER 404(b) ISSUE; HOWEVER, IF IT DID ERR, ANY ERROR WAS HARMLESS.**

Evidence Rule 404(b) provides that “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.” This list is not exhaustive or exclusive.

In determining whether evidence is admissible under ER 404(b), a trial court must undertake the following analysis on the record: (1) find by

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<sup>7</sup> The standard range for the felonies was 12+ to 16 months of incarceration. CP 195.

a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be admitted; (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). The bar to the admission of evidence under this rule applies only when the proponent of the evidence seeks its admission as substantive evidence. *See, e.g., State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991).

The decision to admit ER 404(b) evidence is reviewed for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). Error in admitting evidence under ER 404(b) is not of constitutional magnitude and is subject to harmless error analysis. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002); *State v. Powell*, 166 Wn.2d 73, 88-89, 206 P.3d 321 (2009) (Stephens, J. concurring). A trial court's failure to conduct the balancing analysis on the record is also subject to harmless error analysis. *See, e.g., State v. Sublett*, 156 Wn. App. 160, 196, 231 P.3d 231 (2010).

In *State v. Magers*, our Supreme Court held that “prior acts of domestic violence, involving the defendant and the crime victim, are admissible to assist the jury in judging the credibility of a recanting victim.”

164 Wn.2d 174, 186, 189 P.3d 126 (2008). The Court agreed with Tegland's assessment that the jury "was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." *Id.*

In *State v. Nelson*, 131 Wn. App. 108, 125 P.3d 1008 (2006), and *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996), the Court of Appeals addressed similar issues, and held that "a pattern of domestic violence was ... admissible to rebut an inference that the victim's inconsistent statements and conduct called into question the credibility of her account of the crime." *Grant*, 83 Wn. App. at 108; *Nelson*, 131 Wn. App. at 116 ("As in *Grant*, evidence of the history of abuse was relevant to establish a plausible explanation for [the victim's] inconsistent statements and to rebut [the defendant's] claim that it showed she fabricated the assault. The admission thus fell within the requirements of ER 404(b)"); *see also, Wilson*, 60 Wn. App. at 891 (evidence of physical assaults on victim was relevant in sexual assault case where the evidence of the physical assaults explained why the victim delayed in reporting the sexual abuse and to rebut the implication that the molestation did not occur).

Here, the only difference between *Magers*, *Grant*, and *Nelson* and Mr. Clark's case, is that, in those cases, ER 404(b) evidence was admitted to explain why a victim of domestic violence would recant or give

inconsistent statements in a case in which he or she was the charged victim of the abuse. In contrast, here, the evidence was admitted to explain why a the victim of domestic violence feared the defendant, agreed to follow his “rules,” and failed to report the abuse.

Although perhaps inartfully analyzed, the trial court found that the prior acts of violence had been sufficiently proven. RP 107 (“Ms. Thomas did indicate [in her testimony] she has observed the defendant hitting and striking walls. That started at the beginning of their relationship”). The court found the prior acts were relevant to explain Ms. Thomas’ fear of the defendant. RP 107 (“That started at the beginning of their relationship, it was intimidating to her and it indicated to her what he was capable of when he was mad”). The trial court found that the testimony was relevant to the crimes charged. RP 107 (“[I]t was intimidating to her and it indicated to her what he was capable of when he was mad”).<sup>8</sup> The trial court found that the probative value of the evidence outweighed the prejudicial effect. RP 107 (“I think that it is tied sufficiently from a probative standpoint, and while obviously most evidence ... is prejudicial ... I do think that the probative nature of this, based on the nature of the charge, the domestic violence

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<sup>8</sup> In order to prove felony harassment, the State needed to prove that the defendant “knowingly threatened to cause bodily injury ... to another person and ... places the person threatened in reasonable fear that the threat will be carried out...” CP 128-29.

nature ... outweighs the prejudice”). The trial court did not err in allowing this evidence to be introduced at Mr. Clark’s trial.<sup>9</sup>

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<sup>9</sup> The State questions whether, based on this record, the defendant abandoned his claim that the evidence was inadmissible under ER 404(b), shifting his objection to the evidence to ER 403 grounds. The record is, at best, ambiguous on this point. Defendant made no argument (other than a single citation to ER 404(b) in his motions in limine) that the trial court failed to properly undertake an ER 404(b) analysis, nor did he even set forth the proper test the court should use in undertaking its ER 404(b) analysis. Instead, Defense counsel twice indicated that his objection was based upon the prejudicial nature of the evidence compared to its little probative value:

I’m aware that in domestic violence cases there’s a lot more flexibility when it comes to admitting past bad acts to cover the defendant’s state of mind. However, in this case, I think if the court was to find that an allegation of Mr. Clark, in the past, hitting walls is relevant, *I think it’s outweighed by its probative -- or it’s outweighed by its prejudicial value.*

RP 14 (emphasis added).

To build off that point [that the camping trip did not “impact Ms. Thomas’ subjective view that Mr. Clark is a threat”] I feel, again, hitting walls does not qualify. Now, if she had seen him get in a fight with somebody and saw a propensity for him to be physically violent towards another human being, I believe there would be a bet[ter] argument there. But again, just punching walls and raising his voice, I don’t believe is enough. *And again, if the court was to find that it was probative, I feel that it is outweighed by its prejudicial impact.*

RP 105 (emphasis added).

While an ER 404(b) analysis necessarily requires the trial court to weigh the probative value against the prejudicial nature of the evidence as in ER 403, if error occurred in the trial court’s analysis of the ER 404(b) issue, it is attributable to defendant’s apparent concession that the issue should be analyzed under ER 403.

The defendant claims, notwithstanding the court's explicit findings above, that the trial court failed to properly conduct the ER 404(b) analysis on the record. Br. at 14. *State v. Pirtle* is instructive. 127 Wn.2d 628, 904 P.2d 245 (1995). In *Pirtle*, the defendant claimed the trial court failed to carefully consider the prejudicial effect of his prior bad acts against its probative value under ER 403. *Id.* at 650. The court stated, "[W]e believe the trial court's weighing was sufficient. The court's statement immediately followed extensive arguments by both sides with regard to the ER 403 balance... We think it clear from the record that the trial court agreed with the prosecutor and did not need to reiterate the prosecutor's argument." *Id.* As in *Pirtle*, the court's ruling in this case immediately followed both Ms. Thomas' testimony regarding her opportunity to observe the defendant's prior conduct, and trial counsel's lengthy arguments as to the admissibility of that testimony. RP 12-14, 92-94, 97-99, 104-07. While perhaps inartfully stated, the findings were sufficient.

Washington courts have required the ER 404(b) on-the-record balancing requirement to facilitate appellate review and ensure the judge gives thoughtful consideration to the issue. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). Both of those objectives have been satisfied here. This is especially so, because the court considered the allegations regarding the camping trip also under ER 404(b), and excluded

that testimony, finding that incident did not place her in fear of the defendant, citing *Nelson* and *Grant*. RP 106-07. This would indicate that the trial court thoughtfully considered the admissibility of both pieces of evidence in issuing its ruling.

Even if the court erred in the manner in which it conducted the ER 404(b) hearing, or in its findings, such an error is subject to harmless error analysis. An evidentiary error requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. *Everybodytalksabout*, 145 Wn.2d at 468-69. An error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *Id.*

The minor, passing reference to the defendant striking walls and yelling at others, did not materially affect the outcome of the trial. The jury acquitted the defendant of the misdemeanor assault from the June 30, 2018 incident, and found him not guilty of strangulation, finding, instead that during the August 22-28, 2017 time frame, the state had only proven a misdemeanor assault occurred.<sup>10</sup>

The striking of walls and yelling at people has little to do with the repeated and very specific threats Mr. Clark made to Ms. Thomas' life if

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<sup>10</sup> These verdicts are likely attributable to the relative lack of physical injuries apparent in the photographs taken of Ms. Thomas.

she did not comply with his demands. It also has little to do with the facts regarding the unlawful imprisonment – that the defendant restrained Ms. Thomas despite knowing she wanted to leave, forced her to take a bath with him, and then rewarded her for her compliance with a “massage” prior to allowing her to leave. Any error in admitting Ms. Thomas’ testimony regarding her fear of the defendant, based on her observance of him striking walls, was harmless.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE CRIMES OF UNLAWFUL IMPRISONMENT AND HARASSMENT ARE NOT THE SAME CRIMINAL CONDUCT.**

1. Standard of review.

An appellate court reviews a trial court’s determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). A trial court abuses its discretion if it makes a manifestly unreasonable decision based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

When sentencing a person for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or

all of the current offenses encompass the same criminal conduct, then those offenses may only be counted as one single crime. RCW 9.94A.589(1)(a).

Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Graciano*, 176 Wn.2d at 537.

The scheme – and the burden – could not be more straightforward: each of a defendant’s convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

*Id.* at 540 (citation omitted) (emphasis in original).

“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. However, where the record adequately supports several conclusions, the matter lies in the trial court’s discretion. *Id.* at 538. An appellate court narrowly construes the same criminal conduct analysis to disallow most assertions of same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” See, *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). In this context, “intent” does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, review denied, 178 Wn.2d 1012, 311 P.3d 26 (2013); but see *Chenoweth*, 185 Wn.2d 218. Rather, it means the defendant’s “objective criminal purpose in committing the crime.” *Davis*, 174 Wn. App. at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”)). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

In order to determine that two crimes are the same criminal conduct, all three of the factors under RCW 9.94A.598(1)(a) must be present. *State v. Price*, 103 Wn. App. 845, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

2. The crimes for which the defendant was convicted are not the “same criminal conduct.”

The trial court did not abuse its discretion in determining that the crimes of unlawful imprisonment and harassment were not the same criminal conduct in this case. The trial court found that the events did not necessarily occur at the same time and place, RP 472, and that they did not share the same criminal intent, as one requires a defendant to knowingly restrain another, and the other requires the defendant to knowingly threaten to cause bodily injury or threaten to kill another, 473-74. The trial court was correct in its findings.

First, the times in which the crimes occurred were not the same. The mere fact that the charging periods contained within the information overlap is not dispositive of whether the time of their occurrence was the same for same criminal conduct analysis. See *Graciano*, 176 Wn.2d at 541 (suggesting that in order for crimes to occur at the same time, the incidents must be “continuous, simultaneous, or happened sequentially within a short time”); *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997) (multiple rapes against the same victim do not constitute same criminal conduct where other activities occurred between each rape and each rape was committed by different means). Defendant’s citation to *State v. Tedder*,

194 Wn. App. 753, 378 P.3d 246 (2016),<sup>11</sup> is unhelpful because the facts of *Tedder* significantly differ from the facts presented here. In *Tedder*, the defendant confined the victim to their apartment over the course of a week. Nothing in the opinion suggests that the events that occurred during that week were interrupted by the victim being “allowed” to leave and later return, as occurred here. Furthermore, the simple fact that one court found, under other circumstances, that harassment and unlawful imprisonment constituted the same criminal conduct for purposes of sentencing in that case does not mean that the trial court abused its discretion in this case when it made a contrary ruling based upon different facts.

Here, the evidence demonstrated that the defendant committed the crime of unlawful imprisonment during the August 28, 2017 incident. During that incident, Mr. Clark punched Ms. Thomas with a closed fist as she sat on the bed and when she tried to get off the bed, he grabbed her legs and yanked her back toward him. RP 169. He pinned her down so she was unable to leave. RP 170. When Ms. Thomas told the defendant that she wanted to leave, he refused, told her that they would take a bath together,

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<sup>11</sup> Although inadvertently not disclosed by the defendant, *State v. Tedder* is published only in part. The portion of *Tedder* which involves the defendant’s sentencing hearing is found within the unpublished portion of the opinion. Pursuant to GR 14(a) a party may cite to an unpublished opinion of the Court of Appeals filed on or after March 1, 2013 as nonbinding authority.

elbowed her in the sternum, and took her right arm and bent it backwards, until she agreed to bathe with him. RP 173. After their bath, Mr. Clark gave Ms. Thomas a massage for “being cooperative” and then allowed her return home. RP 174.

This conduct occurred on a very specific date. The harassment, however, occurred over the course of multiple days and at multiple times. Between August 22 and August 25, 2017, the defendant threatened Ms. Thomas multiple times. Between August 22 and 23, 2017, his threats escalated: he threatened to torture and kill Ms. Thomas if she did not follow his conditions. RP 159. He threatened to waterboard her, slice her repeatedly with a razor blade, pour rubbing alcohol in her wounds, break each of her fingers, rip out her fingernails, slice off one or both of her ears, break her arms, and bite off her lips. RP 160-61. He then threatened to kill her, resuscitate her, and then kill her again. RP 161. Between August 24 and 25, the defendant again threatened to kill Ms. Thomas by strangulation, and claimed he would resuscitate her, torture her more, and then, once again, kill her by beating her to death. RP 162.

The crimes of unlawful imprisonment and harassment did not occur at the same time as is necessary for a finding they constitute the same criminal conduct. The trial court did not abuse its discretion in determining that the crimes did not occur at the same time and place. RP 472.

Likewise, the trial court did not abuse its discretion in determining the defendant had different criminal intent in committing the crimes of unlawful imprisonment and harassment. The defendant's objective criminal purpose in committing the unlawful imprisonment was to prevent Ms. Thomas from leaving his residence. His objective criminal purpose in committing the harassment was to instill fear, so that Ms. Thomas would not cooperate with the misdemeanor prosecution and would not end the relationship. Relying on *Wilson*, 60 Wn. App. 887, the Court noted that the same criminal conduct rule is to be narrowly construed, disallowing most findings of same course of conduct. RP 473. The court also orally set forth the proper analysis for same criminal conduct inquiries, acknowledging that the test requires the same criminal intent, same time or place, and same victim. RP 472.

The defendant claims that the trial court erred in analyzing the issue pursuant to the analysis set forth in *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016), and in failing to consider the objective criminal intent of the defendant in the commission of the crimes. Br. at 22. First, this Court should note that *Chenoweth* was not cited by either the State or the defense in their respective sentencing briefs, and was not mentioned by the trial court at sentencing. CP 162-70; RP 471-75. Second, *Chenoweth* did not create a different analysis for determining whether two crimes constitute the

same criminal conduct.<sup>12</sup> It used the same time/place, victim, and intent test, as is required by RCW 9.94A.589(1). 185 Wn.2d at 220. While it is true that, in *Chenoweth*, the Supreme Court looked to the statutory language of the rape of a child third degree and incest statute, it also concluded that, “objectively viewed, under the statutes, the two crimes involve separate intent. The intent to have sex with someone related to you differs from the intent to have sex with a child.” *Id.* at 223. *Chenoweth* did not create a new “standard” in cases involving only child rape or incest offenses or infer that the trial court should look to the statutory intent of the crimes at issue, as claimed by the defendant. Br. at 24.

In any event, if the trial court erred in its analysis of whether the crimes of unlawful imprisonment and harassment constitute the same criminal conduct, it was led into error by the defendant. In defendant’s sentencing memorandum, he relied solely on the *statutory* mens rea for harassment and unlawful imprisonment.

[T]he last element to be proved to establish ‘same criminal conduct’ is the intent element. Both Harassment and Unlawful Imprisonment have a mens rea requirement in so far as the state must prove each offense was done

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<sup>12</sup> In *Chenoweth*, the defendant was convicted of six counts of third degree rape of a child and six counts of first degree incest. These counts were based upon six incidents, with one count of third degree rape of a child and one count of incest charged for each incident. On appeal, the defendant contended that child rape and incest, based on a single act, as a matter of law constitute the same criminal conduct. 185 Wn.2d at 219-21.

‘knowingly.’ See RCW 9A.40.040; see also RCW 9A.46.020(1)(a). It is clear these two offenses require the same level of culpability.

RP 168.<sup>13</sup>

It is apparently based upon that argument that the trial court considered, at least in part, the statutory mens rea for each crime when deciding whether the crimes were the same course of conduct. Error that is invited is unreviewable.<sup>14</sup>

The trial court did not abuse its discretion in determining that the defendant’s crimes were distinct and did not amount to the same criminal conduct for purposes of determining his offender score. As indicated above, most claims of same criminal conduct are to be disallowed, and the burden of persuasion is on the defendant to demonstrate why his crimes constitute

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<sup>13</sup> See also, RP 469 (“[The defense] simply ... ha[s] argued, as I understand it, that since both unlawful imprisonment and harassment have a knowing mental state, that therefore they are the same course of conduct”); RP 471 (“I believe both require a knowing intent... Overall the culpability, the mens rea of each offense is knowingly”).

<sup>14</sup> A party may not set up an error at trial and then complain of it on appeal. *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). “The invited error doctrine is strictly enforced to prevent ‘parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally.’” *State v. Ortiz-Triana*, 193 Wn. App. 769, 777, 373 P.3d 335 (2016) (quoting *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), *rev’d on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

the same criminal conduct. He did not do so at his sentencing hearing, and has not done so here.

**C. UNLESS MR. CLARK'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.**

Effective January 31, 2017, RAP 14.2 provides, in pertinent part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party.

(Emphasis Added).

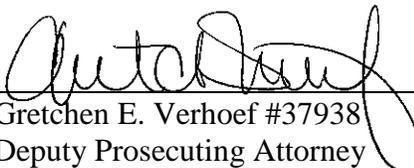
The trial court determined the defendant to be indigent for purposes of his appeal on December 15, 2017, based on a declaration provided by the defendant. CP 186-92. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

The trial court did not abuse its discretion in admitting ER 404(b) evidence after carefully analyzing the issue on the record. Even if error, the admission of that evidence was harmless. Additionally, the trial court did not abuse its discretion in determining that the felony harassment and unlawful imprisonment did not constitute the same criminal conduct for purposes of calculating the defendant's offender score. The State respectfully requests this Court affirm the jury verdict and judgment in this case.

Dated this 8 day of October, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Appellant.

NO. 35760-1-III

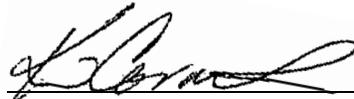
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 8, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Laura M Chuang and Jill S. Reuter  
[jill@ewalaw.com](mailto:jill@ewalaw.com); [admin@ewalaw.com](mailto:admin@ewalaw.com)

10/8/2018  
(Date)

Spokane, WA  
(Place)

  
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(Signature)

# SPOKANE COUNTY PROSECUTOR

October 08, 2018 - 11:35 AM

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