

Supreme Court No. 79332-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KHA DANH MAGERS,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Stephanie A. Arend, Judge

SUPPLEMENTAL BRIEF OF ^{Respondent} APPELLANT

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A. ISSUES ON REVIEW

1. When evidence of a defendant's prior bad acts is offered to challenge the credibility of a complaining witness who denies that the defendant assaulted her, is the evidence inadmissible as propensity evidence excused by ER 404(b)?

2. Should evidence of prior bad acts, in instances where the complaining witness has acted inconsistently with or denies being a victim, be limited to whatever light it sheds on the witness's state of mind at the time of the inconsistent act or statement rather than the general credibility of the alleged victim??

3. Should the admission of evidence of prior bad acts to prove the reasonableness of the alleged victim's fear of harm be limited to those instances in which the victim knew of the prior bad acts and the knowledge contributed to the victim's fear of harm, as opposed to admitting such evidence to generally impeach an alleged victim who denies that the crime occurred?

4. Where the state is permitted to introduce evidence of the defendant's prior bad acts to argue that the alleged victim was afraid to testify against him because she feared that he would harm her when he got out of custody, is the defendant denied his state and federal constitutional rights to defend at trial where the trial court excludes evidence that, if convicted, the defendant would serve life without parole, under the three strikes law, and never be released from prison?

5. Where it is undisputed that the alleged victim considered and lied to the police by telling them that the defendant was not at the house when they arrived, were her subsequent statements to the police not admissible as excited utterances?

6. Is testimony by a police officer that he could tell that something had happened to the alleged victim that traumatized her, was the officer's testimony an impermissible personal opinion that the alleged assault had taken place?

7. Did the prosecutor's misconduct in giving an erroneous statement of the law in opening statement, that "an assault can also be an

intention to create fear and apprehension of bodily harm," and in urging the jurors in closing argument to consider what they personally knew of the patterns of domestic violence of their friends and family, facts not in evidence, deny the defendant a fair trial?

8. Is the Persistent Offender Accountability Act (POAA) unconstitutional because it allows the judge rather than a jury to find facts other than prior convictions to impose a sentence greater than authorized by the jury's verdict?

9. Is a defendant's sentence of life without the possibility of parole under the POAA cruel and unusual punishment for crimes which are only seriousness level three and four out of fifteen seriousness levels and where life without parole is authorized for only level fifteen, aggravated murder?

B. STATEMENT OF THE CASE

1. Overview and testimony

Kha Danh Magers was convicted of second degree assault of Carissa Ray, unlawful imprisonment of Ms. Ray and violation of a no-contact order; and sentenced to life without the possibility of parole as a persistent offender. CP 146-150, 163-167.

Shortly after the police were called to her house by her stepfather and throughout the proceedings, Ms. Ray explained how it started with a "fib" to her parents, and that she had continued lying to the police because she feared that she would be put in jail and have her children taken from her for encouraging Mr. Magers to violate a no-contact order. CP 5-7.

Ms. Ray explained at trial that she grew up in Olympia, Washington in a sad and non-functional home. RP 258-261. Her stepfather Mike McCullough started molesting her when she was eleven years old, and her mother Tammy would not believe her when she reported his abuse.¹ RP 345-3486. She ran away from home repeatedly when she was a teenager in an attempt to avoid her stepfather's continuing sexual abuse. RP 345-348. Ms. Ray met Mr. Mager during the period in which she was a runaway; Mr. Mager was the father of her two children. RP 262-265, 350-351. She insisted throughout her testimony that Mr. Mager was a good person who loved their children; she insisted that their arguments were normal family arguments and that he was not physical with her during arguments. RP 266-269, 368. She denied that Mr. Mager hurt her, threatened her or kept her from leaving at the time her stepfather called the police to her house, January 16, 2004. RP 368, 370, 376.

Ms. Ray wrote a letter five days after the incident, stating that on January 16 Mr. Mager came to her house at her invitation to watch their

¹ Defense investigator Bob Crow confirmed that he found two cases in Thurston County in which Mike McCullough was listed as the suspect and Ms. Ray as the victim. RP 544-546. The trial court, however, would not allow the defense to introduce the police reports confirming Ms. Ray's testimony that she had reported the abuse to the police long before the incident which gave rise to the charges against Mr. Mager. RP 181-185.

children while she went to a job interview. RP 356. She knew that there was a no-contact order in place, but she had no one else to watch the children and the interview was very important to her. RP 356. After Ms. Ray returned home, she received a call from her mother and stepfather wanting her to come to their house. RP 358. She lied to them and said that Mr. Magers would not let her leave; she did not want to be near her stepfather. RP 358-359.

Ms. Ray wrote in the letter that she drove to the store and phoned her mother from a pay phone. RP 359. During the call, she exaggerated her first lie. RP 359-360. She reported to her parents that Mr. Magers had a knife; she explained that she did not want her mother and stepfather to be angry because she would not come to their house and she did not want her stepfather to have a reason to keep her from seeing her mother. RP 385-386.

Ms. Ray reiterated at trial that she had told her parents that she and Mr. Magers were fighting because they wanted her to come and take her mother to the hospital. RP 286. When she called again from the store later, she said he had a knife to make up a further excuse. RP 287.

When the police came to her door on January 16 and asked her if Mr. Magers was there she said, "no," because she did not want to get him

into trouble because of the outstanding no-contact order. RP 292. Her son who came to the door with her said that Mr. Magers was there. RP 293. Ms. Ray insisted that after her son alerted the police, she asked them to tell Mr. Magers that she told them he was there so that he would come out. RP 294-295.

She had been surprised when the police arrived because she did not think her parents would call the police given that her stepfather hit her mother and sister. RP 360, 385. When asked about the details of the January 16 incident, after the police arrived, Ms. Ray testified that she could not recall anything other than Mr. Magers' getting arrested and sitting in a police car with her children for a very long time. RP 284-285.

The prosecutor was allowed to ask Ms. Ray if she recalled telling the police that Mr. Magers held a knife to her neck and if she had told the police that Mr. Magers had just been released from prison for domestic violence and had been coming and going from the house since that time.² RP 297, 299. In response, Ms. Ray insisted that at the time her children were screaming and yelling, that she felt a lot of pressure when giving her

² Prior to trial the court ruled that evidence of a prior dismissed domestic violence charge, evidence of Mr. Magers' prior convictions for violent offenses, and testimony by a police officer that Ms. Ray said that Mr. Magers had been released from prison for domestic violence and had been coming and going from Ms. Ray's residence since his release were admissible under ER 404(b). RP 13-18, 20-21, 22-33, 170, 174-177

written statement because the police were saying that they hoped they had not gone through everything for nothing and that she felt pressure from her parents. RP 298, 329-330.

During cross examination, Ms. Ray testified that she could barely remember an earlier time in December 2003 when the police said she and Mr. Magers were fighting. RP 270-271. She had not called the police. RP 276. The state was permitted to show Ms. Ray a copy of the police report from December and ask her about her statements in the report and the statements of the police that they saw Mr. Magers shoving and pushing her. RP 274-277. The prosecutor was permitted to elicit from Ms. Ray that Mr. Magers was in prison for fighting when their first child was born.³ RP 263. When the prosecutor pressed Ms. Ray for details of his "legal troubles," she responded that she had seen some papers indicating that he had been fighting. RP 265.

Ms. Ray testified that she was feeling under pressure during her testimony as well as at the time the police came to her house because she had spent three days in jail for failing to appear in court, because she had

³ Over defense objection, the court instructed the jury that it could consider Mr. Magers's prior bad acts as relevant to Ms. Ray's state of mind *and* credibility. RP 224, 553-562. Defense counsel asked that consideration be limited to Ms. Ray's state of mind. RP 553-562, 569.

been forced to post cash bond for her release and because she was required to call the prosecutor every Friday. RP 343-344. Ms. Ray testified that she had been afraid throughout that she would be put in jail and her children taken from her. RP 374, 377.

Veteran Tacoma Police Officers David Alred and Alan Morris described Ms. Ray as acting "peculiar" and "a little distraught" during her interaction with the police. RP 493, 583. On cross examination, Officer Alred explained that earlier on January 16, 2004, there had been a call based on allegations that Mr. Magers was refusing to leave. RP 500-504. The caller, Mike McCullough, told the 911 operator that there were three swords in the house. RP 505. The so-called "knife" was, in fact, one of three decorative swords purchased from a store where Ms. Ray worked. RP 318-320. Alred and Morris described it as dull and as if it had never been honed to sharpness. RP 514-542.

In contrast to Alred and Morris, Officer Jim Lang testified that when Ms. Ray answered the door, from her demeanor he "knew something was terribly wrong." RP 401, 405-409. He testified further, over defense hearsay objection, that as soon as he had Ms. Ray and the child who was beside her step outside, he could see she was relieved and told him that Mr. Magers was inside. RP 409-410.

Outside the presence of the jury, Lang testified that Ms. Ray was terrified; she was not hysterical, but she was crying and acting as if "her brain was overloaded." RP 413. He described her as like a dog cowering in the corner. RP 416. Based on this testimony, the court ruled that Ms. Ray's hearsay statements were admissible as excited utterances. RP 419.

After this ruling, the state elicited from Lang that Ms. Ray said that Mr. Magers was going to hurt her and that he was violent. RP 430. Lang testified that she rambled about how violent he was. RP 430, 435. He testified that she said Mr. Mager put a sword to the back of her head and threatened to cut her head off. RP 435. Lang testified that Ms. Ray did not know her right from her left because she was "obviously traumatized." RP 436. Over further objection that the state was eliciting double hearsay, Lang was permitted to testify that Ms. Ray said that Mr. Magers told her that if she listened to him and did what he said, they would be happy, but if she did not he was going to be mean and cut her head off. RP 442-443. Lang continued that Ms. Ray was afraid that Mr. Magers would get out of jail and hurt her and that she was crying and repeating that he was violent and had just gotten out of jail. RP 443, 447.

Defense counsel requested to be allowed to inquire if Ms. Ray knew that Mr. Magers faced a third strike conviction if the state were permitted

to argue that Ms. Ray recanted because she was afraid of Mr. Magers; a third strike conviction would put Mr. Magers in prison for life with no further possibility of contacting her. RP 154, 174, 194, 219. The trial court ruled that defense counsel could examine Ms. Ray about whether she knew that Mr. Magers was facing a lengthy sentence but could not use the term "three strikes" or life without parole. RP 221-224.

2. Prosecutor's opening statement

Over defense objection, the court permitted the prosecutor to inform the jury of the elements of the charged crimes during opening statement, and to give an erroneous and incomplete definition of assault: "You will be furnished with the definition of assault, and the State will be arguing in the end that an assault can also be an intention to create fear and apprehension of bodily harm." RP 248-250.

3. Prosecutor's closing argument

In closing, the prosecutor argued that the issue for the jury to decide was Ms. Ray's credibility. RP 572. The prosecutor reiterated throughout the argument Ms. Ray's alleged statements that Mr. Magers was violent, going to kill her, and threatened her. RP 573-575, 583, 610, 613. The prosecutor said that Ms. Ray could not remember Mr. Magers' prior history although she knew he had been in and out of jail. RP 579. The

prosecutor told the jurors they could consider Mr. Magers' prior history of domestic violence in considering Ms. Ray's credibility and the reasonableness of her apprehension and fear of bodily injury. RP 583, 585. The prosecutor argued that Ms. Ray did what she needed to do to stay safe. RP 583.

The prosecutor asked the jurors to consider the dynamics of domestic violence relationships, as had been discussed during voir dire. RP 581. When the prosecutor asked the jurors to rely on their experiences of domestic violence with friends, family and themselves, defense counsel's objection that this argument was based on facts not in evidence was sustained. RP 581. The court, however, allowed the prosecutor to argue that jurors could decide "knowing what you know about domestic violence," and that they could "ask yourself if the case is an example of domestic violence relationships and dynamics within them." RP 581.

C. ARGUMENT

1. IF THE PURPOSE OF ADMITTING PRIOR BAD ACTS OF THE DEFENDANT IS TO ATTACK THE CREDIBILITY OF A VICTIM WHO DENIES THAT THE CRIME TOOK PLACE, EVIDENCE OF PRIOR BAD ACTS IS PROPENSITY EVIDENCE EXCLUDED BY ER 404(B).

The admission of evidence that a defendant committed an act similar to the charged act carries with it a substantial risk that the jurors will

wrongfully convict. They may convict because they feel that the defendant is the type of person who would commit the charged crime. Some jurors may decide that the defendant should be punished for the prior bad acts, even if he is not guilty of the charged act. For these reasons, ER 404(b) expressly prohibits admission of "other crimes, wrongs, or acts" to show an accused person's propensity to commit the crime; *i.e.*, to prove a person's character and that the person acted in conformity with that character in committing the charged crime. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even where the evidence of prior bad acts is admissible for purposes other than to show propensity, the prior bad acts must be proven by a preponderance of the evidence, be logically relevant to a material issue at trial, and be of greater probative value than its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362.

"Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In this case, the primary evidence used against Mr. Magers was his alleged prior violent acts. Clarissa Ray wrote letters and testified at trial

denying that Mr. Magers committed the crimes where she was the named victim. She explained how she used Mr. Magers as an excuse to her mother and stepfather to avoid having to encounter the stepfather who had sexually abused her. She explained that when the police arrived she was afraid that she would be prosecuted and have her children taken away from her. She feared this because she had invited Mr. Magers to watch the children while she went to a job interview, even though there was an outstanding no-contact order. She explained that the police pressured her and the prosecutor pressured her.

Because Ms. Ray did not support the state's charges, the state based its case on statements Ms. Ray allegedly made to the police and on evidence that Mr. Magers had been accused of domestic violence in the past and had been convicted of crimes involving "violence." RP 13-18, 20-23, 263, 270, 279. After permitting the state to introduce this evidence, the trial court instructed the jurors, over defense objection, that this ER 404(b) prior bad acts evidence was relevant to *both* Ms. Ray's credibility and her state of mind. RP 553-562, 569. Thus, the jury was permitted to infer from the evidence that Ms. Ray was not truthful or credible in denying that Mr. Magers committed the charged crime.

By the court's instruction, the jury was permitted to make the inference prohibited by ER 404(b). The inference that Ms. Ray was not truthful arises only after an initial inference that Mr. Magers committed the charged crime because he had a violent character as established by his prior bad acts. Without that first inference, the prior bad acts show nothing about Ms. Ray's credibility in denying the charged acts.

In arguing that prior bad acts were relevant to Ms. Ray's credibility, the prosecutor was asking the jury to conclude that because Mr. Magers had been violent in the past and violent toward Ms. Ray, it was in his character to commit the charged crime. Therefore, Ms. Ray was not truthful or credible in denying his guilt. This is why the court held in State v. Cook, 131 Wn. App. 845, 851-852, 129 P.3d 834 (2006) and in Mr. Magers' case, that ER 404(b) evidence is not generally relevant to the credibility of a witness.

If a jury is told it can consider prior abuse to assess an alleged victim's credibility, the jury could structure its analysis as follows:

Is the wife telling the truth when she testified that the injuries were the result of an accident? The wife initially said that her husband assaulted her; now she denies it. The husband beat her in the past, therefore, it is likely that he beat her this time and her testimony that he did not is false.

Such a potential analysis violates ER 404(b) because it focuses on a husband's prior conduct and assumes that because he did it before, he did it now.

Cook, 131 Wn. App. at 853.

The analysis in Cook is essentially consistent with the analysis in State v. Grant, 83 Wn. App. 98, 106, 920 P.2d 609 (1996), the case relied on by the state.³ The Cook court held that, while not generally relevant to credibility, evidence of prior assaultive behavior may be relevant to the witness's state of mind at the time of an inconsistent statement.

. . . [I]f a jury is told it can consider prior abuse to assess an alleged victim's state of mind at the time of an inconsistent act, for example, a trial recantation, the jury would structure its analysis as follows:

What is her state of mind while testifying?
Why would the wife report an assault but testify that no assault occurred? The couple has a history of domestic violence, so she might be afraid that if she testifies against him, he will retaliate. Maybe she feels responsible for the incident. Maybe she is

³ The court in Grant relied on the case of State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991), review denied, 117 Wn.2d 1010 (1991). In Wilson, the court held that evidence of a prior physical assault against the alleged victim was admissible to explain why she submitted to abuse and failed to report it, and to explain the defendant's intent to dominate the alleged victim. The Wilson court held that the prior assault was properly admitted to show something other than propensity, in essence to show the alleged victim's state of mind. Grant's apparent holding that the prior bad acts were admissible to establish credibility was an overly broad statement of the holding in Wilson. Cook clarified Wilson.

financially dependent upon him and feels conflicting obligations.

In this second circumstance, the jury's analysis focusses on the state of mind of the witness and the possible bias, fear of retaliation, and conflicting interests she may have in testifying against her husband . . . the jury can use the evidence for that purpose without improperly assuming that "he did it before, he must have done it this time too."

Cook, at 853-854.

In Grant, the court held that where a spouse-victim is testifying at trial about an assault allegedly committed against her by her husband, evidence of prior assaults may be admissible and relevant "to explain [the wife's] statement and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge." In other words, evidence of the prior assaultive behavior against her might illuminate her state of mind at the time of the inconsistent statement or conduct.

Cook and Grant are consistent in their analyses because both justify the admission of evidence of prior bad acts as probative of the wife's state of mind at a particular time. A limiting instruction which focuses on the complainant's state of mind rather than credibility should be mandated. This would help protect against the jury's use of the evidence of prior bad acts

for the purpose forbidden by ER 404(b) and preserve the presumption of innocence.

Further, prior assaults should be admissible in cases where domestic violence is charged only where the prior assaults can be shown to have actually affected the alleged victim's state of mind at a relevant time and in a manner that is probative of her actions or statements. Prior assaults should not be automatically admissible based on speculation that they explain something about a theoretical domestic violence relationship.

Both Grant and Cook speculate about what the victim may have felt. In Grant, at footnote 5, the court describes several possible dynamics: that the defendant assaulted the victim *after* the charged incident to coerce her not to testify, that the defendant promised that the violence would stop, or that the victim mistrusted the judicial system to protect her. In Cook, the court theorized that the alleged victim might fear retaliation or might even feel responsible for the incident. But these examples are simply profiles of stereotypical domestic violence victims, and not necessarily explanatory of the actual witness's state of mind. Such evidence based on a presumed "victim profile" should be no more admissible than "perpetrator profile" evidence.

In State v. Braham, 67 Wn. App. 930, 841 P.2d 785 (1992), for example, the court rejected the state's argument that expert testimony about the "grooming process" -- whereby a child molester supposedly established a relationship with an intended victim -- was only "general" expert testimony "offered to provide background information on the nature of child abuse." Braham, 67 Wn. App. at 937. The Braham court concluded: "Expert testimony implying guilt based on the characteristics of known offenders is the sort of testimony deemed unduly prejudicial and therefore inadmissible." Braham, at 937; see also, Haakanson v. State, 760 P.2d 1030, 1036-1037 (Alaska Ct.App. 1988) (prejudicial effect of profile evidence based on grooming process outweighed probative value); State v. Hansen, 743 P.2d 157, 161 (1987) (same); United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (clinical psychologist should not have been permitted to testify that defendant's background matched that of a "typical" child molester; "testimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial").

The Braham court concluded, however, that "victim profile testimony, unlike perpetrator profile testimony, does not directly cast the accused in a prejudicial light," and was not objectionable in the same way

as perpetrator profile testimony. Braham, at 939, n. 6. But, in cases with facts like Grant and Cook, the "victim profile" evidence is no less prejudicial than the "perpetrator profile" evidence. The victim would fit the profile only if the defendant was a perpetrator. And, even though the jurors might not hear testimony about some of the general dynamics of domestic violence under Grant or Cook, they would hear evidence of prior assaultive acts of the defendant and be instructed that this evidence could be relevant to the state of mind of the complainant at the time she acted inconsistently with being a victim. Absent some actual nexus between the inconsistent act or recantation and the prior behavior, the admission of the evidence predicated on a presumption that the complainant and defendant are in a "typical" domestic violence relationship robs the defendant of the presumption of innocence and begs the very question the jurors are charged with answering. Absent a state of mind at the relevant time which actually is probative of the complainant's action or statements, the evidence of prior bad acts presumes the defendant as well as the victim fit a particular profile and presumes his guilt.

In any event, unlike the defendants in Grant or Cook, Mr. Magers did not have a significant history of prior domestic violence. There was one alleged incident which was dismissed; the rest of the 404(b) evidence

consisted of alleged behavior unrelated to Ms. Ray or any domestic relationship. Evidence of such non-domestic violence is pure character evidence.

In summary, any rule that would make evidence of prior bad acts admissible to impeach the credibility of any witness who did not testify consistently with the state's theory of the case would destroy the presumption of innocence. The admission of prior bad acts should be limited to instances in which (a) the victim had acted inconsistently or made inconsistent statements, and (b) the evidence would help the jury understand the witness's actual state of mind at the time of the inconsistent act or statement. This would be consistent with ER 404(b) and help protect against the unfair and inherent prejudice engendered by evidence that the defendant committed similar acts in the past.

This Court should adopt the rule of Cook that prior bad acts are not admissible either to attack or support the general credibility of a witness in a domestic violence case, and are admissible only where helpful to the jury in understanding the witness's state of mind at the time of making an inconsistent statement or taking an inconsistent action.

Since the jury was expressly instructed in this case that it could consider the prior bad acts evidence in assessing Ms. Ray's credibility, the

jury was permitted to convict Mr. Magers on propensity evidence and his conviction was properly reversed.

2. THE ADMISSION OF PRIOR BAD ACTS TO ESTABLISH THE REASONABLENESS OF THE VICTIM'S FEAR OF HARM, WHERE THIS IS AN ELEMENT OF THE CHARGED CRIME, SHOULD BE LIMITED TO INSTANCES IN WHICH PROOF OF THE CHARGED ACT DOES NOT ESTABLISH THE REASONABLENESS OF THE FEAR AND WHERE THE EVIDENCE IS NOT ADMITTED SOLELY TO IMPEACH THE COMPLAINING WITNESS.

Neither State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1994), nor State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), the cases relied on by the state to support the admission of the ER 404(b) evidence in this case, hold that prior bad acts are *per se* admissible in any case where the reasonableness of the victim's fear of harm is an element of the crime or authorize the admission of evidence of prior bad acts in Mr. Magers' case. In Ragin and Barragan, the defendants were charged with harassment, a charge requiring the state to prove beyond a reasonable doubt that a reasonable person would have believed the defendant could carry out the threat. But, unlike Mr. Magers' case, each victim's knowledge of the defendant's prior bad act in Ragin and Barragan supported his claim at trial of reasonable fear that the threat would be carried out. Ragin, 94 Wn. App. at 411-412; Barragan, 102 Wn. App. at 759. Therefore, the purpose

for which the evidence was admitted was not to establish character at all; it was to establish the reasonable and essential state of mind of the victim at the time of the charged incident.

Nothing in Ragin or Barragan permits the introduction of prior bad acts evidence to establish that the alleged victim was *unreasonable* in denying at trial that the acts occurred at all. Again, to be relevant to establish the reasonableness of the victim's fear, the jury would have to decide that the defendant must have committed the charged crime because it was consistent with his or her character to have committed the crime, and therefore the alleged victim is unreasonable in denying that the act occurred or in denying fear.

Most importantly here, as this Court held in State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), if proof that the act was committed establishes the mens rea, then ER 404(b) evidence should not be admitted; in such cases the probative value of the evidence is substantially outweighed by its prejudicial impact. Here, if the jury believed that Mr. Magers really did hold a knife to Ms. Ray's neck and threatened to kill her, then no further evidence of prior bad acts was necessary to establish Mr. Magers's intent or the reasonableness of the fear of a person subjected to this treatment. Mr. Magers effectively conceded this. His defense was that

he never held the knife or made the threat, not that he did so but that Ms. Ray should not have been afraid. Defense counsel expressly argued that even a dull knife could cause harm and would likely have left a mark, and there was no evidence of such an injury or mark. RP 598.

In State v. Conley, 873 S.W.2d 233, 236-237 (Mo.banc 1994), the court agreed with this Court's decision in Powell, that if the evidence demonstrates the charged act, the proof of the act establishes the mens rea element and prior bad acts to establish the mens rea are not admissible. The Conley court noted in particular that "a fundamental principle of our system of justice is that an accused may not be found guilty or punished for a crime other than the one on trial." Conley 873 S.W.2d at 236. Other Missouri opinions track the ER 404(b) analysis of Washington appellate decisions: "In all cases in which evidence of uncharged misconduct is offered the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny."⁴ State v. Burns, 978 S.W.2d 759, 761 (Mo.banc 1998). "The inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the mind of the jurors." State v. Reese, 274

⁴ Missouri cases are cited as examples of precedent from other jurisdictions. Appellate counsel found no cases holding that prior bad acts are admissible *per se* in any case where there is an element involving the reasonableness of the victim's fear.

S.W.2d 307, 307 (Mo.banc 1954). Therefore, absent a clear connection between the prior bad act and the charged crime, the defendant should be given the benefit of the doubt. Reese, 274 S.W.2d at 307.

This court should reject a *per se* rule that any time the reasonableness of a victim's fear that the defendant might carry out a threat is an element of the charged crime, the defendant's prior bad acts are admissible. It may be a reasonable and consistent with ER 404(b) to admit prior bad acts where proof of the charged act does not establish the relevant mens rea or where the reasonableness of the fear of the complaining witness is attacked by the defense, if the trial court finds that the probative value of the evidence outweighs its unfair prejudice. But it is sheer propensity evidence, forbidden by ER 404(b), where it is admitted to impeach the credibility of the complaining witness's testimony. This is because the inference is that the complaining witness must be untruthful in denying the crime occurred because the prior bad acts establish that a person of the defendant's character would have committed the charged crime. The decision of the Court of Appeals should be affirmed.

D. ARGUMENT ON MR. MAGERS' ISSUES

- 1. THE DEFENSE WAS ENTITLED, UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT, TO INTRODUCE EVIDENCE THAT MS. RAY KNEW MR. MAGERS FACED A THIRD STRIKE CONVICTION TO REBUT THE STATE'S THEORY THAT MS. RAY WAS AFRAID HE WOULD GET OUT OF PRISON AND HARM HER IF SHE TESTIFIED AGAINST HIM.**

The exclusion of the evidence that Mr. Magers faced convictions for third strike offenses and a sentence of life without the possibility of parole denied him his federal and state constitutional rights under the Fourteenth, Fifth and Sixth Amendment, and Const. art. 1, § 22, to present evidence in his own behalf. See Harris v. New York, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643, 645 (1971); Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); Const. art. 1, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

The state was permitted to introduce extremely and unfairly prejudicial evidence, prior bad acts of Mr. Magers, to establish its theory that Ms. Ray was afraid Mr. Magers would get out of jail and injure her if she testified against him at trial. RP 24-25,28, 40, 180. Given this

theory and inferences from testimony elicited by the state, Mr. Magers was entitled to ask Ms. Ray if she knew that he was facing a third strike and a sentence of life without parole if convicted. If Ms. Ray were truly afraid of him, as the state argued she was, then she could be motivated to make sure that he was never out of prison again. Denying Mr. Magers the right to present this evidence denied him his fundamental right to present a defense at trial and elicit testimony from a witness at trial. If Ms. Ray's state of mind was at issue, the defense was entitled as a matter of constitutional right to present evidence on this issue.

Mr. Magers had a right to present evidence to meet the state's case. Cross-examination on a topic introduced in direct examination may be essential to the jury's ability to find the truth. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); K. Teglund, Wash. Prac., Evidence, section 11 (3rd ed. 1989). Where the state opens the door by presenting evidence, as a matter of fundamental fairness, the defense must be given the opportunity to inquire further on the subject. State v. Lougin, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (citing State v. Gefeller, 76 Wn.2d at 455).

The United States Supreme Court has, in fact, consistently held in a number of contexts that state procedural and evidentiary rules must

give way to a criminal defendant's rights under the Fifth, Sixth and Fourteenth Amendments to appear, testify and defend at trial, and to present witnesses in his or her own behalf. See, e.g., Washington v. Texas, supra (a statute preventing defendants from testifying if tried jointly with others unconstitutionally denied those defendants their right to testify at trial); Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) (a state hearsay rule prohibiting a party from impeaching his or her own witness precluded the defendant from examining a witness who had confessed to the crime and unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime); Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) (an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally burdened the defendant's right to testify at trial).

Most recently in Holmes v. South Carolina, 126 S. Ct. 1727 (2006), the Supreme Court held that the state's rule excluding evidence of third-party guilt if the prosecution's case was strong violated a defendant's constitutional rights to present a complete defense grounded in the due process, confrontation, and compulsory process clauses.

Even when evidence is not otherwise admissible, a defendant has a due process right to rebut arguments presented by the state. Simmons v. South Carolina, 512 U.S. 154, 164-165, 224 S. Ct. 487, 129 L. Ed. 2d 133 (1994); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); Ake v. Oklahoma, 470 U.S. 68, 83-87, 97 S. Ct. 1197, 51 L. Ed. 2d 383 (1985).

The purpose of introducing evidence that Mr. Magers was facing a third strike and sentence of life without parole, under the circumstances of the case, was unrelated to his actual sentencing and not excludable because it touched on sentencing. See State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) (it is error to inform the jurors during voir dire in a non-capital case that the death penalty is not at issue); State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1969) ("the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases"); Shannon v. United States, 512 U.S. 573, 579, 129 L. Ed. 2d 459, 114 S.Ct. 2419 (1994).

Mr. Magers was constitutionally entitled, under the state and federal constitutions, to defend at trial against the state's case by introducing evidence that he faced a third strike and that, therefore, Ms. Ray could if

she truly feared him make sure that he was never out of custody again. This rebutted the state's theory of the case and he was entitled to present it to the jury. Denial of the right to present this evidence denied him a fair trial.

2. MS. RAY'S STATEMENTS TO THE POLICE WERE NOT EXCITED UTTERANCES BECAUSE HER ABILITY TO FABRICATE PROVED THAT SHE WAS NO LONGER UNDER THE INFLUENCE OF A STARTLING EVENT.

The trial court erred in admitting as excited utterances statements allegedly made by Ms. Ray to the police. Ms. Ray's statements were not excited utterances because, under the state's theory of the case, she had the capacity to consider her situation and decide to respond untruthfully that Mr. Magers was not at the house. Under the state's theory, Ms. Ray was not under the stress of the moment to the degree that she could not consider the consequences to her answer to the police. This precludes a finding that the statements were excited utterances.

Most recently in State v. Young, No. 76533-2 (filed July 12, 2007), this Court clarified the holding in State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995): Brown does not establish a bright-line rule that a later recantation defeats a finding that a statement is an excited utterance, "Brown stands for the proposition that when there is undisputed evidence

that a declarant fabricated her hearsay statements, the second element of an excited utterance -- that the statement was made under the influence of a startling event -- is not satisfied."

In Young, the declarant later recanted her statements which were admitted as excited utterances. This Court held that the proper analysis by the trial court, where there is a disputed later recantation, was a weighing of the credibility of the recantation against the credibility of the spontaneous statements. The Young court noted as crucial the difference between undisputed fabrication, as in Brown, and a later recantation as in Young.

Here, Ms. Ray's statements fall under Brown, rather than Young. It was undisputed that Ms. Ray, when confronted by the police, said that Mr. Magers was not at the house. This was untrue; it is undisputed that it was untrue. She denied that he was at the house because she did not want to get either herself or him in trouble for violating a no-contact order. It follows that she was not still under the influence of a startling event to the degree that she could not reflect and fabricate. Therefore the trial court erred in admitting her statements to the police as excited utterances.

3. OFFICER LANG'S TESTIMONY WAS IMPROPER OPINION AS TO GUILT WHICH COULD BE RAISED FOR THE FIRST TIME ON APPEAL BECAUSE IT WAS AN EXPLICIT STATEMENT CONVEYING HIS PERSONAL OPINION THAT AN ASSAULT HAD OCCURRED.

Officer Lang testified that when he asked Ms. Ray if Mr. Magers was at the house that he could tell that "something was terribly wrong." RP 409. He testified that Ms. Ray was "obviously traumatized." ER 409. This testimony constituted impermissible testimony as to guilt because it represented his opinion that she was traumatized as a result of Mr. Magers' having committed the assault and unlawful imprisonment of her. It went beyond a description of Ms. Ray's demeanor or an opinion that she was upset; it implied causation. As such it was constitutional error under the state and federal constitutions. See United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 54 L. Ed. 2d 1 (1985) (it is misconduct for a prosecutor to invade the province of the jury by expressing a personal opinion that the defendant is guilty). It was manifest constitutional error which could be raised for the first time on appeal, under State v. Kirkman, 159 Wn.2d 918, 956-937, 115 P.3d 125 (2007), because it was "an explicit or almost explicit statement" by Officer Lang that the assault had been committed and had a practical and identifiable consequence to the jury verdict below.

The statements by Lang were impermissible opinion testimony as

to guilt because they were statements made by a police officer in a domestic violence situation in which the complaining witness's credibility was central to the determination of guilt or innocence; the only evidence before the jury supporting the state's case were hearsay statements of the complaining witness and the testimony of the police officers.⁵ Lang's testimony varied considerably from the testimony of the other two veteran officers and Ms. Ray had a plausible explanation for why she was fearful when the police arrived. Ms. Ray told the jurors that she was fearful of losing her children and going to jail because she had invited Mr. Magers to come to her house in spite of a no-contact order. Under all these circumstances, testimony that "something was terribly wrong" and that she was obviously "traumatized" was impermissible opinion testimony as to guilt. ER 409. Unlike in Kirkman, the testimony was not relevant to other issues at trial; it went far beyond a description of Ms. Ray's demeanor. Lang's testimony clearly implied that something had happened to Ms. Ray that traumatized her, and the alleged assault and imprisonment were obviously the only alleged things to be wrong or traumatic.

⁵ This Court held in Kirkman, 159 Wn.2d at 928, that the relevant factors are:)1) the type of witness; (2) the specific nature of the testimony; (3) the crimes charged; (4) the defense; and (4) the other trial evidence.

As this Court reiterated in Kirkman, "no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Kirkman, at 927 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), and State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)); see also, State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994).

Because Officer Lang's testimony implicitly was his opinion that an assault, as reported by the 911 caller, had occurred, it invaded the province of the jury. Because his testimony was central to the state's case, the error was not harmless; it had practical and identifiable consequences for the jury's decision and should require reversal of Mr. Magers' conviction.

4. THE PROSECUTOR COMMITTED MISCONDUCT AT TRIAL BY GIVING AN ERRONEOUS JURY INSTRUCTION, WHICH USURPED THE ROLE OF THE JUDGE, DURING OPENING STATEMENT AND BY INVITING THE JURY TO RELY ON EVIDENCE NOT PRESENTED TO THEM AT TRIAL DURING CLOSING ARGUMENT.

The prosecutor committed misconduct at the outset of the trial. Over defense objection, the prosecutor was permitted to instruct the jury on the elements of the charged crimes and to provide an incomplete and erroneous

definition of assault. This instruction by the prosecutor gave the jurors an incomplete view of the law, denied Mr. Magers the opportunity to take exception to instructions and usurped the authority of the judge to instruct on the law, as set out in Article 4, § 16. CrR 6.15

At the time the state defined assault for the jury in opening statement, the prosecutor did not inform the jurors that they could consider lesser included offenses, nor did the prosecutor inform the jury of the burden of proof and other essential matters which govern jury deliberations. The prosecutor simply instructed the jurors that Mr. Magers could be found guilty of an assault solely by intending to create fear and apprehension of bodily harm, a clearly erroneous, incomplete and inadequate definition of an assault. RP 250. This definition left out that the fear had to be reasonable and that the victim actually had to experience the fear. Thus, throughout the trial, as the jury was hearing the evidence and before the court gave the jury the instructions which they were to consider as a whole, the jury was misled about what the state had to prove in order to convict Mr. Magers.

This denied Mr. Magers his federal constitutional right to a jur trial under the Sixth Amendment and his Fifth Amendment right to a fair trial with proper instructions by the court which set forth all of the elements

of the crime and the proper burden of proof. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Sullivan v. Louisiana, 508 U.S. 275, 279-80, 118 S. Ct. 1390, 140 L. Ed. 2d 649 (1998).

Where the prosecutor argues an erroneous statement of what constitutes a crime, an objection to the argument is sustained by the trial court and there is a substantial likelihood that the misstatement affected the jury, the misconduct should require reversal of the conviction. State v. Gotcher, 52 Wn. App. 350, 759 P.2d 1216 (1988); State v. Watson, 335 U.S. App. D.C. 232, 171 F.3d 695 (1999) (error to make statements in closing unsupported by evidence). Whether the error is reversible error depends on the closeness of the case, the centrality of the issue and the steps taken to mitigate the error. Watson, 171 F.3d at 760. The inquiry, under federal authority as in Washington, should focus not on the certainty of conviction, but where it can be said that the error did not affect the verdict; whether there is grave doubt that the verdict was unaffected, the convictions cannot be affirmed. Watson, at 760 (citing Kotteakas v. United States, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 2d 1557 (1946)).

Here, the inadequate and incomplete statement that Mr. Magers could be found guilty of assault merely by intending to create fear and apprehension of bodily harm likely affected the jury verdict. Even if the

jurors found that Mr. Magers actually threatened Ms. Ray with the ceremonial knife and that a person in her position could reasonably fear bodily injury from the threat, the jurors still had to find that Ms. Ray actually did fear Mr. Magers. She was not injured, there was no mark on her neck and she testified that she did not feel threatened or alarmed by Mr. Magers. The jurors might well have overlooked her testimony supporting a not-guilty verdict on the assault, finding only that Mr. Magers intended to create fear or apprehension of bodily harm. The prosecutor's misconduct under these circumstances should require reversal of Mr. Magers' conviction.

The prosecutor committed further misconduct in closing argument by inviting the jurors to rely on evidence that was not presented to them at trial: their own experiences or the experiences of friends and family involving domestic violence and the dynamics of domestic violence which had been discussed during voir dire. RP 581. Not only was there no evidence about the dynamics of domestic violence presented at trial, the trial court excluded expert testimony on the issue. RP 185-186. The trial court concluded that testimony on the "dynamics" of relationships involving domestic violence would constitute impermissible testimony as to credibility. RP 185-186. By inviting the jurors to rely on evidence outside

the evidence at trial, the prosecutor effectively told the jury that they could convict Mr. Magers based on unreliable evidence which the defense had no opportunity to confront. This was misconduct and denied Mr. Magers his state and federal rights to confrontation of witnesses and to a fair trial.

The decision in this case is in conflict with the decision of this Court in State v. Belgarde, 110 Wn.2d 504, 507-509, 755 P.2d 174 (1988), State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990) and State v. Heaton, 149 Wash. 452, 460-461, 271 P. 89 (1928). When a prosecutor argues facts not in evidence, he essentially testifies in front of the jury and denies the defendant the Sixth and Fourteenth Amendment rights to confront and cross-examine "witnesses." Belgarde, 110 Wn.2d at 509. The prosecutor's misconduct either in opening statement or closing argument, or together, should require reversal of Mr. Magers' convictions.

5. MR. MAGERS' SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNCONSTITUTIONAL.

Under the Persistent Offender Accountability Act (POAA), before a sentence of life without parole can be imposed, the trial court has to make additional findings, beyond the jury's verdict of guilty on the underlying charge, that (a) on two separate occasions, (b) the defendant has been convicted of felonies that meet the statutory definition of "most serious offense," (c) the defendant's prior conviction counts as offender score, and

(d) at least one conviction for a most serious offense occurred before any of the other most serious offenses was committed. RCW 9.94A.030(32)(a)(ii). These facts are not simply the fact of prior convictions, and the statute does not require that they be found beyond a reasonable doubt or by a jury. Therefore the POAA violates the Sixth Amendment, as construed by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), contrary to the decision in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006).

In Apprendi, the Supreme Court invalidated a criminal sentence on Sixth Amendment grounds because the defendant's maximum penalty after conviction of a crime had been enhanced by findings of fact made by a sentencing judge rather than the jury under a separate "hate crime" law. Apprendi, 530 U.S. at 470. The Apprendi court, in reversing the enhanced sentence, concluded it was not whether the legislature characterized the aggravating factor as a sentencing factor or an element that mattered, rather what mattered was the effect of the hate crime finding in increasing the maximum sentence available for the offense. Apprendi, at 490. The Court held that under the Sixth Amendment "[o]ther than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

Then in Ring v. Arizona, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984), the Supreme Court held that aggravating factors in capital cases operate as functional equivalents of an element of a greater crime. The Ring Court expressly rejected the argument that form could prevail over substance, and held that "the dispositive question . . . 'is not one of form, but of effect.' If the State makes an increase in the defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602.

Thereafter in Blakely, Court held that Apprendi and Ring compelled the conclusion that all facts "which the law makes essential to punishment" beyond the fact of a prior conviction be subject to Sixth Amendment protections. Blakely, 542 U.S. at 412 (quoting 1 J. Bishop, Criminal Procedure § 87 (2d ed. 1872)). Blakely, the court further held that the applicable sentence authorized by jury verdict is the top of the standard range. Blakely, at 302-304.

The relevant inquiries under Apprendi, Ring, and Blakely are: (1) What sentence could the court impose if there were no further fact-finding after the jury verdict on the underlying conviction? (2) Does the statute authorizing a greater sentence require any fact-finding beyond the mere fact of a prior conviction? If the answers to these questions are yes, then the further facts must be established by proof beyond a reasonable doubt and must be proven to a jury; the facts are equivalent to the elements of a crime. Washington v. Recuenco, ____ U.S. ____, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

In State v. Jones, 159 Wn.2d 231, 149 P.3d 231 (2006), this Court defined the scope of "fact of prior convictions" under Apprendi and Blakely to "encompass facts that follow necessarily or as a matter of law from the fact of prior convictions," and as "facts intimately related" to the prior conviction. Jones, at 239. Thus, Jones held that the judge not the jury could interpret the documents which comprised the record of the prior conviction and find that the defendant was on community placement as a condition of sentence and increase the standard range for that reason.

The facts necessary to impose a sentence of life without parole under the POAA, however, do not follow necessarily or as a matter of law from the fact of a prior conviction, nor are they integral to a prior

conviction. The timing facts -- whether convictions arose on separate occasions or whether one occurred before any of the others -- are facts unrelated to the fact of conviction, the elements of the crime of conviction or the conditions of the sentence. Whether a prior conviction meets the statutory definition of a "most serious offense" does not follow necessarily or as a matter of law from the fact of a prior conviction. Whether a crime meets the definition of the "most serious offense" definition is further fact-finding that is not inherent in the crime of conviction; and, most importantly, is a fact that was never submitted to a jury or found beyond a reasonable doubt. Since the POAA does not require these facts to be found by a jury or beyond a reasonable doubt, it unconstitutionally violates a defendant's rights under the Sixth Amendment.

In Ball, the court held that the POAA did not fall under Blakely on the rationale that Blakely was "specifically directed at exceptional sentences" and doesn't increase the penalty for a current offense. Ball, 127 Wn. App. at 959-960. Apprendi, Ring and Blakely, however, are expressly not limited to sentence enhancements or exceptional sentence, but rather to all facts "which the law makes essential to punishment." Blakely, 542 U.S. at 412. The POAA, of course, does increase the penalty for the current offense, which must constitute the "third strike" in order

to result in a sentence of life without parole. Accordingly, Ball conflicts with the analysis mandated in Apprendi, Ring, and Blakely and should be held to violate the Sixth Amendment.

Mr. Magers' sentence of life without the possibility of parole should also be vacated because it constitutes cruel and unusual punishment; it is grossly disproportional to the crimes he was convicted of committing. See Harmelin v. Michigan, 501 U.S. 957, 997, 111 S. Ct. 2680, 115 L. Ed. 836 (1991).

The Eighth Amendment's prohibition against cruel and unusual punishment is applicable to state action through the Fourteenth Amendment and proscribes disproportionate punishment. Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed 2d 758 (1962). Article 1, § 14, has been held to be even more protective than the Eighth Amendment. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). Under both the Eighth Amendment and Article 1, § 14, the sentence of life without parole was cruel punishment for convictions of second degree assault and false imprisonment. In Washington those crimes are not ranked as serious as most other felonies; they have a seriousness level of III and IV respectively out of fifteen discrete sentencing levels. RCW 9.94A.515. Therefore, the imposition of the longest possible sentence constitutes cruel punishment.

CERTIFICATE OF SERVICE

I certify that on the 10th day of Aug, 2007, I caused a true and correct copy of Respondent-Cross-Petitioner's Supplemental Brief to be served on the following via prepaid first class mail:

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August 10, 2007

Ronald R. Carpenter, Clerk
Supreme Court of Washington
P.O. Box 40929
Olympia, WA 98504-0929

RE: State v. Kha Magers, No. 79332-8

Dear Mr. Carpenter:

Please find enclosed the original and one copy of the Supplemental Brief and Motion for Overlength Brief to be filed in this case. These pleadings contains my affidavit of service of the prosecutor and Mr. Magers

I am enclosing an extra copies of the cover sheets and a self-addressed stamped envelope so that the covers can be date stamped and returned to me.

Thank you for your attention to this matter.

Sincerely,


Rita J. Griffith

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