

68074-9

68074-9

NO. 68074-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LONG PHUC TRAN a.k.a. HUNG PHI DINH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

A handwritten signature, possibly 'B', is written over a faint, circular stamp or seal on the right side of the page.

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	8
1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING EVIDENCE THAT WAS PROBATIVE OF WHETHER THE VICTIM'S FEAR OF THE DEFENDANT WAS REASONABLE	8
2. ANY POSSIBLE ERROR IS HARMLESS BECAUSE THE EVIDENCE HAD NO EFFECT ON THE JURY'S VERDICT	13
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	9
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000).....	10
<u>State v. Binkin</u> , 79 Wn. App. 284, 902 P.2d 673 (1995).....	10
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	9
<u>State v. Dent</u> , 123 Wn.2d 467, 869 P.2d 392 (1994).....	13
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	9
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	14
<u>State v. Kilgore</u> , 147 Wn.2d 288, 53 P.3d 974 (2002).....	10
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	10
<u>State v. Ragin</u> , 94 Wn. App. 407, 972 P.2d 519 (1999).....	10
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	9
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	9

Statutes

Washington State:

RCW 9.61.230..... 14

RCW 9A.46.020 14

Rules and Regulations

Washington State:

ER 404 1, 4, 8-10, 12-15

A. ISSUES PRESENTED

1. Whether the trial court exercised its discretion properly in ruling that limited evidence regarding the defendant's physical abuse of the victim's children was admissible under ER 404(b) because the evidence was relevant and probative of whether the victim's fear that the defendant would carry out his threats to kill her was reasonable.

2. Whether any possible error in admitting the evidence of child abuse was harmless because the jury acquitted the defendant of felony harassment, and thus, the evidence had no effect on the verdict.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Long Phuc Tran, a.k.a. Hung Phi Dinh, with the following crimes based on a series of events that occurred in January, March, and April 2011:

Count I: Theft in the Second Degree (victim Marius Sutara);

Count II: Theft of a Motor Vehicle – Domestic Violence (victim Lan Phan);

Count III: Felony Harassment – Domestic Violence (victim Lan Phan);

Count IV: Telephone Harassment – Domestic Violence (victim Lan Phan);

Count V: Burglary in the Second Degree (victim Neil Ing, Aurora Auto Repair);

Count VI: Theft of a Motor Vehicle (victim Berhane Abraha).

CP 23-26.

Tran's motion to sever counts V and VI for trial was granted. RP (10/5/11) 15-17. A jury trial on counts I through IV commenced in October 2011 before the Honorable Douglass North. At the conclusion of the trial, the jury convicted Tran of second-degree theft, theft of a motor vehicle, and telephone harassment as charged. The jury also returned special verdicts that theft of a motor vehicle and telephone harassment were crimes of domestic violence. The jury acquitted Tran of felony harassment. CP 72-77.

After the trial on counts I through IV, Tran pled guilty as charged to counts V and VI. CP 79-100. The trial court imposed standard range sentences on all counts. CP 101-09. Tran now appeals. CP 115-25.

2. SUBSTANTIVE FACTS

On January 12, 2011, Marius Sutara drove to his workplace in Building 44 on the Microsoft campus in Redmond in his wife's Mercedes-Benz. He parked the car in the parking garage under the building. RP (10/19/11) 24-28. When Sutara returned to the car to go to lunch, he discovered that both wheels and tires were missing on the passenger's side and that the car was supported by a jack. RP (10/19/11) 31. Sutara paid nearly \$2500 to replace the wheels and tires at a Mercedes dealership. RP (10/19/11) 36-37. Video surveillance footage from the garage showed that the tires and wheels were stolen by a male suspect driving a Lexus. RP (10/19/11) 15-17.

After an investigation in a different case in Kirkland revealed that Tran was a possible suspect in the tire theft case in Redmond, Kirkland Police Detective David Quiggle interviewed Tran in March 2011 at the Snohomish County Jail.¹ RP (10/20/11) 75-77. Quiggle introduced himself, advised Tran of his rights, and showed Tran a crime bulletin that contained still photographs taken from the video surveillance footage of the tire theft. RP (10/20/11) 78-80. Tran put his finger on the image of the suspect in the still

¹ The jury was not told that Tran was in jail at the time of the interview.

photograph and said, "That's me." RP (10/20/11) 80-81. Tran claimed he had gone into the parking garage to change a tire on his wife's car; he denied stealing the wheels and tires. RP (10/20/11) 83-84.

Lan Phan works nights as a janitor on the Microsoft campus in Redmond. RP (10/19/11) 97. Phan has eight children; Tran is the father of the two youngest children. RP (10/19/11) 95-97. Phan and Tran were in a relationship from early 2002 until March 2011. RP (10/20/11) 135-36. Although Tran had never physically assaulted Phan, Tran was verbally abusive. He shouted and cursed at her and threatened to "take it out on the kids" on a "daily basis." RP (10/20/11) 126-27.

In addition, Tran physically assaulted Phan's children in her presence on numerous occasions. As will be discussed in the first argument section below, Phan described two specific incidents during her testimony over the defendant's objections in accordance with the trial court's ruling under ER 404(b). Phan first described an incident involving one of her older daughters, K.K. Tran made K.K. kneel on the floor and hold five VHS videocassettes in each hand, and then he slapped her in the head. RP (10/20/11) 128-30. Tran also kicked K.K., causing her to fall. Phan intervened at that

point; she said, "Hit me. Don't hit my daughter." RP (10/20/11) 131-32. A few days prior to the incident involving K.K., Tran had also assaulted two of the younger children. RP (10/20/11) 133; RP (10/24/11) 116-17. Phan explained that Tran made them kneel and hold videocassettes in their hands while he hit the bottoms of their feet with a stick. RP (10/20/11) 133-35. These incidents were also witnessed by Lan Phan's 19-year-old daughter, Hang Phan. RP (10/24/11) 70-78.

Tran moved out of Phan's house in September 2009 because K.K. reported to the police that Tran had hit her,² although Tran and Phan continued to see each other after Tran moved out. RP (10/26/11) 26, 32-34. Tran made Phan more "fearful day by day." RP (10/20/11) 136. Phan finally moved her family to a different house in March or April 2011, and she did not tell Tran their new address. RP (10/24/11) 64-65.

On April 7, 2011, Phan received three phone calls from a woman who said that Tran was in the hospital, and that she needed Phan's address. Phan refused to provide her address. RP (10/19/11) 105-06. That evening, Phan drove to work in her

² Tran was convicted of assault in the fourth degree for the incident involving K.K. RP (10/17/11) 50. As will be discussed below, the trial court suppressed the conviction, so the jury was not aware of it.

silver Dodge Caravan, and she parked in the garage under Building 109 on the Microsoft campus. RP (10/19/11) 99. Phan returned to the garage during her lunch break at approximately 10 p.m. Her van was gone, and there was glass on the floor where her van had been parked. RP (10/19/11) 100-01. Phan notified Microsoft security, and security called the police. RP (10/19/11) 101. Video surveillance footage showed a male suspect entering the garage on foot shortly after 7 p.m. and Phan's van leaving the garage approximately ten minutes later. RP (10/20/11) 36-37. When Phan got her van back several days later after it was recovered by the police, it had a smashed window and a damaged ignition. RP (10/19/11) 101-02.

Phan immediately suspected that Tran had stolen her van. RP (10/19/11) 105-06. Her suspicions were confirmed when Tran began leaving a series of voice messages on her cell phone, and in one of the messages Tran threatened to turn the van into a "a piece of junk" that "will never start again." RP (10/26/11) 15-16. Tran also called Phan a "scumbag," a "pig," a "bitchy whore," and other insults. RP (10/26/11) 12-14. Tran also repeatedly threatened to kill Phan, stating, "I'll kill you right now," "I'll cut your throat wherever I see you," and "I'll kill you at work. I'm going there now.

I wait for you there.” RP (10/26/11) 14-16. Phan was afraid, and took Tran’s threats seriously; after receiving the messages, she contacted the police. RP (10/24/11) 104.

Tran testified at trial. He admitted assaulting K.K. and the two younger children in the manner that Lan and Hang Phan had described. He said that this was how he was punished by his parents as a child. RP (10/26/11) 26-31. Tran also admitted that he left the voice messages on Phan’s phone. However, he claimed that his threats to kill her were not serious, and that this was just how he spoke to Phan when he was angry. RP (10/26/11) 59-60. Tran also claimed that the messages had been edited somehow. RP (10/26/11) 54, 56, 62.

Tran denied stealing Phan’s van. In fact, Tran claimed that he was in the hospital on April 7, 2011 until late at night. RP (10/26/11) 67-69. When Tran was confronted with his medical records, which reflected that he had been discharged at 4:17 p.m., Tran claimed he did not actually leave the hospital until 10 p.m. because his foot was swollen, he could not walk, and he did not have transportation. RP (10/27/11) 20-22. Tran’s medical records further showed that he had no swelling, and that the hospital social worker had provided him with bus tickets. RP (10/27/11) 37-40.

Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING EVIDENCE THAT WAS PROBATIVE OF WHETHER THE VICTIM'S FEAR OF THE DEFENDANT WAS REASONABLE.

Tran claims the trial court erred in admitting evidence that he had assaulted some of Lan Phan's children, and he argues that this evidence was so prejudicial that he was deprived of a fair trial. Brief of Appellant, at 11-17. This claim should be rejected. The trial court exercised its discretion appropriately in admitting limited evidence of Tran's physical abuse of the children under ER 404(b), because it was relevant and probative evidence regarding a material issue, *i.e.*, whether Phan's fear that Tran would carry out his threats to kill her was reasonable. The trial found that the prior assaults had occurred, ruled that the evidence was more probative than prejudicial, limited the testimony to two specific incidents, and gave appropriate limiting instructions. Tran has not shown an abuse of discretion, and this Court should affirm.

Under ER 404(b), evidence of the defendant's other crimes, wrongs, or acts is admissible if it is relevant to prove identity, motive, preparation, plan, absence of mistake or accident, or for any purpose other than showing the defendant's criminal character or propensity to commit criminal acts. State v. Russell, 125 Wn.2d 24, 66, 882 P.2d 747 (1994). Before admitting evidence under ER 404(b), the trial court must find by a preponderance of the evidence that the prior acts occurred, identify the purpose for which the evidence is offered, determine its relevancy for this purpose, and weigh its probative value against the prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court's decision to admit evidence under ER 404(b) is reviewed for manifest abuse of discretion. State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). The trial court abuses its discretion only if its decision is made on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, the trial court's decision will be overturned only if no reasonable judge would have ruled as the trial court did. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

When a defendant is charged with felony harassment, evidence of prior violent acts or threats may be admitted to show that the victim's fear of the defendant was reasonable. State v. Binkin, 79 Wn. App. 284, 287-93, 902 P.2d 673 (1995), *overruled on other grounds by* State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). Moreover, the prior acts admitted under ER 404(b) need not have been committed directly against the victim of felony harassment, so long as the prior acts are probative of the victim's fear of the defendant.

For example, in Binkin, the defendant had previously threatened to harm the victim's unborn child; he said he would "drag that animal out of [her] body and trample it under [his] feet." Binkin, 79 Wn. App. at 288. In State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), the evidence of prior bad acts included the victim's testimony that the defendant "had been in trouble for fighting" in the past. Id. at 183. In State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), the victim testified that the defendant had bragged about committing violent assaults against others. Id. at 759. And in State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999), the victim testified that the defendant told him "he had been convicted of armed robbery, had been involved in a 'domestic

violence situation' with his wife, was 'well known' by the Bellevue Police Department, and suffered from episodic rages." Id. at 409. In all of these cases, the evidence in question was properly admitted to prove that the victim's fear of the defendant was reasonable.

In this case, Tran was charged with felony harassment, which required the State to prove that Lan Phan's fear that Tran's death threats would be carried out was reasonable. CP 24, 61. Accordingly, the State offered evidence that Tran had physically abused Phan's children in her presence on multiple occasions during their relationship, including one incident that had resulted in a misdemeanor assault conviction for Tran. More specifically, the State's offer of proof established that Tran had punished the children by making them kneel on the floor while holding videotapes in their hands while Tran hit the bottoms of their feet with a stick. RP (10/17/11) 42, 44-46, 48-50, 52-53.

As the trial court observed, Lan Phan's belief that Tran would carry out his threats to kill her was more reasonable in light of the fact that she had seen Tran use violence against her children in the past. RP (10/17/11) 51. This evidence was particularly relevant in this case because Phan testified that Tran had never

physically assaulted her. RP (10/20/11) 127. Therefore, this evidence was necessary for the State to prove that Tran's threats to kill Phan were not merely idle threats or empty words, and that she had reason to believe them because she had seen him harm her children. Thus, in accordance with the relevant case law, this evidence was properly admitted under ER 404(b).

Moreover, there was no dispute that these incidents had occurred; one incident resulted in a criminal conviction, and Tran admitted to punishing the children in this manner during his testimony. RP (10/26/11) 26-32. Therefore, the court properly found that the incidents had occurred by a preponderance of the evidence. RP (10/19/11) 89-90. Furthermore, the trial court ameliorated the prejudicial effect of the evidence by limiting the testimony to two specific incidents – the incident involving K.K. and the incident a few days earlier involving two of the younger children – and by excluding any evidence of Tran's assault conviction for hitting K.K. RP (10/17/11) 53-54; RP (10/19/11) 13; RP (10/19/11) 79-90.

Finally, the trial court gave appropriate limiting instructions, both during the testimony and at the end of the case, informing the jury that the evidence could be considered only for the purpose of

determining whether Lan Phan's fear was reasonable. RP (10/20/11) 127; RP (10/24/11) 72; CP 48. Juries are presumed to follow these instructions. State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994).

In sum, the trial court's ruling was an appropriate exercise of discretion. The trial court found that the prior acts of violence had occurred, identified a proper purpose for admitting the evidence under ER 404(b) in accordance with relevant case law, weighed the probative value against the prejudicial effect, ameliorated the potential for unfair prejudice by carefully limiting the evidence to two specific incidents, and gave appropriate limiting instructions to the jury. The trial court's ruling was proper, and this Court should affirm.

2. ANY POSSIBLE ERROR IS HARMLESS BECAUSE THE EVIDENCE HAD NO EFFECT ON THE JURY'S VERDICT.

Even if this Court were to decide that the trial court abused its discretion in admitting limited evidence of child abuse, this Court should still affirm because any error is harmless. The jury acquitted Tran of felony harassment; thus, the evidence admitted under ER 404(b) had no effect on the outcome of the trial.

The erroneous admission of evidence under ER 404(b) is not an issue of constitutional magnitude. Therefore, such error is harmless if there is no reasonable probability that the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

As discussed at length above, the limited evidence of child abuse was admitted to prove that Phan's fear that Tran would kill her was reasonable, which is an essential element of the crime of felony harassment. RCW 9A.46.020(1), (2). The jury was specifically instructed that the evidence that Tran hit the children could be considered only for the purpose of determining whether Phan's fear was reasonable.³ RP (10/20/11) 127; RP (10/24/11) 72; CP 48. The jury acquitted Tran of felony harassment. CP 75. Thus, because the jury acquitted Tran of the only charge that the ER 404(b) evidence was relevant to, the evidence clearly had no effect on the jury's verdict. Any possible error is harmless, and this Court may affirm on this basis as well.

³ A victim's reasonable fear is not an element of telephone harassment. RCW 9.61.230(1), (2).

D. CONCLUSION

The trial court acted within its discretion in admitting evidence under ER 404(b). But even if this Court were to conclude that the trial court erred, any error is harmless. This Court should affirm.

DATED this 26th day of September, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Wold Bouchey, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. LONG PHUC TRAN, AKA HUNG PHI DINH, Cause No. 68074-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

Date

9/26/12

COURT OF APPEALS
STATE OF WASHINGTON
2012 SEP 26 PM 3:28