Supreme Court No. 100625-0
COA No. 82009-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

QUINTON MARQUETTE HARRIS,

Petitioner.

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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A. IDENTITY OF PETITIONER AND DECISION BELOW

Quinton Harris asks this Court to accept review of a published Court of Appeals opinion affirming his convictions for felony violation of a no-contact order and two counts of misdemeanor violations of a no-contact order. The Court of Appeals issued the opinion on November 22, 2021.[1] Mr. Harris filed a motion for reconsideration, which the Court of Appeals denied on January 7, 2022.[2]

B. ISSUE PRESENTED FOR REVIEW

1. In *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014), this Court stated that in a domestic violence case where the State wishes to introduce evidence of a complainant's prior assault, the State must present certain evidence before the court can admit the evidence of the prior assault. Specifically, the State must present evidence that provides context that

[1] Appendix A.
[2] Appendix B.

illustrates why the prior assault renders the witness less credible. This may come in the form of expert testimony describing the dynamics of domestic violence relationships, but the State can also establish how the prior assault renders the complainant less credible through other means.

(a) The Court of Appeals' opinion misunderstands Mr. Harris's argument, instead narrowly holding that expert testimony is unnecessary in domestic violence prosecutions for the court to admit prior assaultive incidents.

(b) The Court of Appeals' erroneously limits *Gunderston*'s holding to circumstances where the complainant's story was always consistent. This is wrong because nowhere in *Gunderson* did this Court limit its holding in this manner. RAP 13.4(b)(1), (2).

C. STATEMENT OF THE CASE

Quinton Harris and Jessica Bohannan are in a romantic relationship, and he is the father of their two children. 10/6/20RP 268. On June 28, 2020, Ms. Bohannan went to a

cannabis shop while Mr. Harris watched the children. 10/6/20RP 272-73. When Ms. Bohannan returned, the two had an argument, and Ms. Bohannan told him to leave. 10/6/20RP 274-75. A neighbor called the police after hearing screaming and thumping in the apartment. 10/7/20RP 429, 434, 440-41.

When the police arrived, Ms. Bohannan hesitated before letting them inside. 10/6/20RP 330-31. Ms. Bohannan refused to allow the police to take photographs of her, and she also declined to provide a written statement. 10/6/20RP 336. The police claimed to have observed red marks on her arm and blotches on her chest. 10/6/20RP 336-37. An officer also claimed Ms. Bohannan reported that Mr. Harris grabbed her and squeezed her around her neck. 10/6/20RP 340-41. A court previously entered a no-contact order prohibiting Mr. Harris from contacting Ms. Bohannan due to a prior conviction for assault in the fourth degree. CP 53.

The police arrested and jailed Mr. Harris. 10/6/20RP 384. Ms. Bohannan received several calls from the jail while Mr.

Harris was incarcerated. 10/8/20RP 639. The State charged Mr. Harris with one count of felony violation of a no-contact order and two counts of misdemeanor violations of a no-contact order based on the phone calls. CP 226-27. The State predicated the felony violation of a no-contact order based on the purported assault. CP 226.

At trial, Ms. Bohannan admitted Mr. Harris violated the no-contact order and admitted she got in an argument with Mr. Harris, but she vehemently denied Mr. Harris assaulted her. 10/6/20RP 271, 274-275, 278, 293, 303-04. Ms. Bohannan explained she refused to allow the police to take pictures and did not provide a statement because nothing happened. 10/6/20RP 314. She also said the redness the police observed was likely due to eczema and carrying around her small children. 10/6/20RP 293-94.

The State moved to impeach Ms. Bohannan's credibility with evidence of Mr. Harris' prior conviction for assault in the fourth degree. 10/6/20RP 229. Mr. Harris strenuously objected,

arguing the evidence was inadmissible propensity evidence. CP 256-61. The court allowed the State to admit this evidence. 10/6/20RP 243-45. The jury convicted Mr. Harris as charged. CP 176-81.

D. ARGUMENT

This Court should accept review because the Court of Appeals' opinion is contrary to precedent and erroneously limit this Court's holding in *Gunderson*.

1. Courts cannot admit evidence of a person's prior assaults unless the proponent establishes the evidence is relevant for a purpose other than propensity and that the evidence is not unduly prejudicial.

ER 404(b) categorically bars the admission of evidence of prior bad acts to show the accused has a propensity to commit the crime at issue. *See State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule "prevent[s] the State from suggesting a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime

charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The State may introduce evidence of the defendant's prior bad acts, like a prior assault, for purposes other than proving propensity. ER 404(b). However, evidence of a prior bad act is not admissible simply because the State claims it would like to use it for a purpose other than propensity. ER 404(b); *See State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Before a trial court admits evidence of prior acts for another purpose, a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the State's purpose for introducing the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *Id*. at 853.

A court must carefully weigh the probative value of the evidence against its prejudicial effect because evidence of prior misconduct is likely to be highly prejudicial. *Id*. at 862. This is

particularly true in domestic violence cases because the risk of unfair prejudice is very high. *See State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). Evidence is unduly prejudicial if it is "likely to stimulate an emotional response rather than a rational decision." *Salas*, 168 Wn.2d at 671 (*referencing State v. Powell*, 126 Wn.2d 244, 264, 898 P.2d 615 (1995)). The State must establish its own "overriding" probative value to the "prior bad acts" evidence it seeks to admit. *Id*. "In doubtful cases, the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

This Court reviews a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *Id*. at 922. A court abuses its discretion when its decision is based on untenable grounds or untenable reasons, if it rests on facts the record does not support, or if the court applied the wrong legal standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

2. The Court of Appeals erred in affirming the court's ruling that allowed the State to introduce evidence that Mr. Harris previously assaulted the complainant because the State failed to demonstrate this previous assault rendered the complainant not credible.

The court erred when it admitted evidence of Mr. Harris' prior assault conviction. The mere fact that Mr. Harris was previously convicted of assaulting Ms. Bohannan does not, in and of itself, render Ms. Bohannan less credible. Victims of crimes are not, as a matter of law or fact, less credible. The State did not provide any evidence or context that informed the jury what it was precisely that rendered Ms. Bohannan less credible due to her previous assault.

Consequently, the bare fact that a witness has previously experienced an assault is irrelevant. Without providing any

context for this evidence, the jury likely deduced this evidence was just propensity evidence. This, coupled with the inherently prejudicial nature of this evidence, undermined Mr. Harris's right to a fair trial.

Gunderson is instructive. In *Gunderson*, Mr. Gunderson's ex-girlfriend, Christina Moore, obtained a restraining order. 181 Wn.2d at 919. When Mr. Gunderson met with Ms. Moore to exchange custody of their daughter, someone else accused him of assaulting Ms. Moore. 181 Wn.2d at 919. Ms. Moore did not speak to the police when they arrested Mr. Gunderson, and she denied Mr. Gunderson assaulted her at trial. *Id*. at 920. The State sought to impeach Ms. Moore with Mr. Gunderson's previous convictions for assaulting her on two occasions. *Id*. at 920-21. The court deemed the evidence admissible for purposes of challenging Ms. Moore's credibility, and it instructed the jury to use the evidence of the prior assaults only to assess Ms. Moore's credibility. *Id*. at 921.

On appeal, this Court held the prejudicial effect of this evidence outweighed its probative effect. *Id*. at 923. The court distinguished Mr. Gunderson's case from other cases where the court deemed evidence of prior assault convictions admissible**.** *Id*. at 923-24. For example, in *State v. Grant*, 8 Wn. App. 98, 920 P.2d 609 (1996), this Court held it was permissible for the court to admit evidence of the defendant's prior assaults towards the complainant to impeach the complainant's credibility. The State sought to admit this evidence to "explain her statements and conduct which might otherwise appear inconsistent with her testimony of the assault at issue[.]" *Grant*, 83 Wn. App. at 107.

This Court noted the key difference between Mr. Gunderson's case and *Grant* was that in *Grant*, the State admitted evidence of the prior assaults through the testimony of the complainant's therapist. *Gunderson*, 181 Wn.2d at 924, n.2. The therapist provided context to describe the dynamics in the relationship between Mr. Grant and the complainant and

explain why those dynamics might result in the complainant minimizing the assault as issue. *Id*. Indeed, in *Grant*, this Court concluded, "the jury was entitled to evaluate [the complainant'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.*" 83 Wn. App. at 108 (emphasis added). Because the State did not admit evidence to help the jury understand how Ms. Moore's prior assaults rendered her less credible, this Court rejected the contention that *Grant* was analogous to Mr. Gunderson's case. *Gunderson*, 181 Wn.2d at 924, n.2.

In *Gunderson*, the court also rejected the contention that the case was analogous to *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). In *Magers*, a court issued a no-contact order restraining Kha Magers from contacting Carissa Ray after the police arrested Mr. Magers for domestic violence for allegedly shoving Ms. Ray. 164 Wn.2d at 177. The State later charged Mr. Magers with second degree assault and unlawful

imprisonment due to a purported incident where Ms. Ray told the police Mr. Magers forbade her from leaving her residence and threatened her with a sword. *Id*. at 179. The officer who talked to Ms. Ray after the alleged assault said Ms. Ray appeared to be "obviously traumatized," and she told the police she believed Mr. Magers was violent and would hurt her. *Id*. She asked the police not to tell Mr. Magers what she had told them. *Id*. at 178-79.

Ms. Ray recanted at trial, and the State successfully introduced evidence of Ms. Mager's prior arrest for domestic violence to impeach her credibility. *Id*. at 179-80, 184. In a plurality decision,[3] this Court held the court properly admitted the evidence. This Court distinguished *Magers* in *Gunderson* by explaining that in *Magers*, the State introduced evidence of the witness' trauma. 181 Wn.2d at 924, n.2. Thus, the State linked Mr. Magers' prior arrest for allegedly assaultive conduct with evidence that Ms. Ray's trauma—which may have resulted

[3] *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012).

from the first domestic violence incident—might have led her to recant. In contrast, in *Gunderson*, the State admitted no evidence the complainant was traumatized. *Id*.

After contrasting *Magers* and *Grant* with the circumstances in *Gunderson*, this Court held, "the mere fact that a witness has been the victim of domestic violence *does not relieve the State of the burden of establishing why or how the witness' testimony is unreliable." Id*. at 924-25. (emphasis added). Consequently, the mere fact the accused previously assaulted the complainant does not, in and of itself, render the accused's prior assault of the complainant admissible. The State still has to introduce evidence establishing why the previous assault renders the complainant unreliable.

Because the State failed to establish why Ms. Bohannan's testimony may be less credible due to Mr. Harris' prior conviction, the State critically failed to establish the relevance of Mr. Harris' prior assault. The State moved to introduce evidence of Mr. Harris' prior assault of Ms. Bohannan, arguing,

"this case is squarely in line with what *Gunderson* said was properly admissible." 10/6/20RP 229. The State claimed the evidence of the prior assault was admissible because it interpreted *Gunderson* to hold that as long as the complainant in a domestic violence case recants her initial story at trial, the State is free to impeach her with any of the defendant's prior assaults. 10/6/20RP 229-30.

Mr. Harris filed a motion in limine asking the court to bar the admission of this evidence, arguing this evidence was impermissible propensity evidence under ER 404(b). CP 256-61. Mr. Harris argued his prior conviction "does not assist the jury in determining if this assault occurred," and argued, "the purpose of trying to elicit [evidence] of the prior incident is solely for propensity evidence and thus totally barred by the evidentiary rules." CP 259-61. Mr. Harris emphasized the prior assault did not assist the jury in assessing Ms. Bohannan's credibility because she did not recant in the prior case, and she was actually fully cooperative with law enforcement.

10/6/20RP 232-33. Instead, the evidence suggested that "because an assault occurred previously, one likely occurred on this occasion[.]" CP 261.

Additionally, Mr. Harris highlighted the evidence's prejudicial nature, which was likely to interfere with the jury's ability to consider the evidence impartially. CP 259; 10/6/20RP 232-33.

In response, the State argued that *Gunderson* established that a "recant is what was necessary" to admit evidence of a prior assault. 10/6/20RP 235.

The court disagreed with the State's proposition that the court may always admit evidence of a prior assault if the complainant recants. 10/6/20RP 240-41. The court also opined the case law was not "fully developed or clear," and that it had "some concerns" about how the case law discusses pairing the evidence with expert testimony. 10/6/20RP 241.

Nevertheless, the court conducted ER 404(b)'s analysis and allowed the State to use the evidence. 10/6/20RP 243-45. In

relevant part, the court found the prior assault admissible to impeach Ms. Bohannan's credibility or to "explain[n] why her statements might change, as discussed in case law;" it also found the probative value of the evidence outweighed its prejudicial effect. 10/6/20RP 244-45. Based on the court's ruling, Mr. Harris requested a limiting instruction directing the jury to consider the evidence of the prior assault only to assess Ms. Bohannan's credibility. 10/6/20RP 231. The court issued the instruction. CP 205.

The State asked Ms. Bohannan about the prior assault, and Ms. Bohannan admitted it happened. 10/6/20RP 302-03. Unlike in *Grant*, the State did not present any expert testimony informing the jury how any prior assault rendered Ms. Bohannan less credible. Similarly, unlike in *Magers*, the State presented zero evidence of any trauma Ms. Bohannan appeared to experience due to the prior assault.

The court erred in admitting this evidence. Contrary to *Gunderson's* mandate, the State failed to present any evidence

establishing why the prior assault made Ms. Bohannan was less credible. Instead, the State simply assumed the jury would deduce the prior assault rendered her less credible. But the bare fact that Ms. Bohannan was previously assaulted is irrelevant. Without making the critical link between the prior assault and Ms. Bohannan's supposed inability to testify truthfully, the State left the jury with the confusing task of deciding how to interpret Ms. Bohannan's prior assault. Without the appropriate context, the jury likely used this evidence as inappropriate propensity evidence. And because the evidence of the prior assault was completely irrelevant, the court erred in concluding the probative value of the evidence outweighed its prejudicial effect.

Nevertheless, the Court of Appeals misapprehended Mr. Harris's argument to mean that he was arguing a court may not admit evidence of a complainant's previous experience with domestic violence without also introducing expert testimony

explaining how the prior experience affects the complainant's credibility. Op. at 5-7.

But this was not Mr. Harris's argument. Mr. Harris's argument was that if the State wishes to introduce evidence of a witness's prior assault, the State must also present evidence that provides context that illustrates why the prior assault renders the witness less credible. Reply Br. at 2-3. This may come in the form of expert testimony that describes the dynamics of domestic violence relationships and explains why a witness might lie on the witness stand. *Gunderson*, 181 Wn.2d at 924-25, n.2; *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609 (1996).

However, the State can **also** establish how the prior assault renders the complainant less credible through other means. For example, subject to the evidentiary rules, the State could present evidence that the complainant told another witness that she feared the defendant after the prior assault. The logical inference from such evidence would be that the

complainant's fear, linked to her prior assault, might cause her to be dishonest at trial. Or, subject to the evidentiary rules, the State could present evidence that the defendant previously threatened the complainant after she testified against the defendant at a previous trial for assault. The logical inference from such evidence would be that the complainant's testimony is less credible due to the threat.

In contrast, no logical inference exists between previously being subjected to domestic violence and lying on the witness stand.

3. The Court of Appeals' opinion erroneously limits *Gunderson's* holding.

Additionally, the Court of Appeals' does not apply this Court's holding in *Gunderson*, which requires the State to establish why or how a complainant's testimony is unreliable given the fact that she previously experienced domestic violence. 181 Wn.2d at 924-25. Instead, the Court of Appeals opined *Gunderson* was "inapplicable to the present case"

because in *Gunderson*, the complainant's story was always that the defendant did not assault her on the date in question; in contrast, here, differing accounts existed regarding the complainant's allegations, with some stating she admitted Mr. Harris assaulted her while the complainant herself denying making such statements. Op. at 2-3, 6, n.2.

However, the holding in *Gunderson* is not limited to circumstances where the complainant's story is consistent. Nowhere in *Gunderson* does the court limit its holding to circumstances where the complainant's story never changes. This Court knows how to limit its holding to the narrow facts of cases, and yet it did not so in *Gunderson*. *See, e.g., State v. Collins*, 121 Wn.2d 168, 177, 847 P.2d 919 (1993) (court expressly limiting its holding to certain circumstances); *Spivey v. City of Bellevue*, 187 Wn.2d 716, 735, 389 P.3d 504 (2017) (court declining to adopt a general rule and limiting its holding).

The Court of Appeals unnecessarily narrows *Gunderson's* holding. This error should compel this Court to accept review.

E. CONCLUSION

For the reasons stated in this petition, Mr. Harris respectfully requests that this Court accept review.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of the words exempted by the rule, as 3,268 words.

DATED this 7th day of February, 2022.

Respectfully submitted,

/s Sara S. Taboada
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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. QUINTON MARQUETTE HARRIS, Appellant.	)	No. 82009-5-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — Quinton Harris appeals the trial court's judgment and sentence finding him guilty of three counts of violation of a no-contact order. Harris argues that the trial court erred by admitting evidence of a prior assault. Harris also argues that he should be resentenced in light of our Supreme Court's opinion in State v. Blake, 197 Wn.2d 170, 183, 491 P.3d 521 (2021). We agree in respect to Harris's sentence and remand for resentencing under Blake. We otherwise affirm.

FACTS

Harris and Jessica Bohannan have had a long romantic relationship. Bohannan has two young children, the youngest of which is the biological child of Harris. Due to prior domestic violence, there was a no-contact order prohibiting Harris from contacting

Bohannan directly or indirectly, or coming within 300 feet of her residence. Bohannan was against the existence of the no-contact order.

On June 28, 2020, Harris went to Bohannan's Everett apartment. Bohannan's neighbor, Debbie Alinen, was present that day. At one point, Alinen heard through her and Bohannan's shared wall thumping, screams for help from Bohannan, and pleas from her children for the commotion to stop. Alinen called 911 and described the ongoing events to the operator.

Police arrived shortly afterward, including Officers John Coats and Bronwyn Wallace. Bohannan eventually allowed the officers inside, where they noticed what appeared to be fingerprints on her neck. A later body check revealed red marks on Bohannan's arms and body. Bohannan ultimately told Wallace that Harris assaulted her, but did not want the statement in writing or photos of her injuries.

Shortly thereafter, Officer Paul Stewart was in his patrol vehicle when he saw Harris on the roadside. Aware of Harris's involvement in the incident with Bohannan, Stewart turned his vehicle around; Harris began sprinting away. Stewart ultimately found and arrested Harris using the assistance of a tracking canine.

While incarcerated, Harris had repeated telephone and video-call contact with Bohannan. The jail system that monitors calls captured the communications. The State charged Harris with three counts of violation of a no-contact order—count I being a felony for the incident at Bohannan's apartment and counts II and III being misdemeanors for Harris's communication with Bohannan from jail. The jury found Harris guilty as charged. In determining Harris's offender score for sentencing, the

court included in its calculations Harris's prior felony conviction for possession of a controlled substance.

Harris appeals.

ANALYSIS

A. Prior Assault

Harris argues that the trial court erred by admitting evidence of his prior assault of Bohannan. We disagree.

Prior to trial, the State notified the trial court through a motion in limine that, should Bohannan recant her statements to the police that Harris assaulted her, it intended to introduce Harris's prior conviction for assaulting Bohannan to assist the jury in evaluating her credibility. Harris moved to exclude this prior conviction. The trial court addressed the issue at length, ultimately determining that it could not rule on the motions at the moment if it did not know whether Bohannan would recant her statements to the police. The court did rule, however, that should there be evidence admitted ultimately recanting Bohannan's statements, it was "going to allow it to be shown that an assault occurred, but without going into the specifics of the assault."

Bohannan testified and recanted her statements to the police, stating that the confrontation with Harris was only verbal and that she did not tell the officers that he assaulted her. The State moved to cross-examine Bohannan consistent with the court's pretrial ruling that, if Bohannan recanted, the State could address the prior assault. The court ruled that the State could proceed and Bohannan testified that Harris had previously assaulted her.

This court reviews evidentiary rulings for an abuse of discretion. State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

Evidence Rule 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Evidence of a defendant's prior assault of a victim is generally inadmissible if the defendant assaults the victim on a later occasion. The evidence may, however, become admissible for reasons such as "assist[ing] the jury in judging the credibility of a recanting victim." State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008).

Before admitting ER 404(b) evidence, a trial court "must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value against its prejudicial effect." State v. Lough, 125 Wn.2d 847, 852, 889, P.2d 487 (1995). This analysis must be conducted on the record. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). If the evidence is admitted, a limiting instruction must be given to the jury. Lough, 125 Wn.2d at 864.

Here, the trial court supported its decision to admit Harris's prior assault, stating:

> Based on the totality of the circumstances, No. 1, I do find that the State can prove the prior assault by a preponderance.
>
> Two, I find that the State has shown a reason to admit this assuming there are inconsistent statements coming in for the purposes that are discussed in the case law as to her credibility, or a better way of putting it is explaining why her statements might change, as discussed in case law.

> No. 3, if it is brought in by a method that doesn't get into the specifics. I do find that the probative value would outweigh the prejudice, assuming again for the moment that we end up with inconsistent statements from this witness coming in.
>
> So I'm making my rulings under ER 404 and 403. I have done balancing considering the entirety of the facts.

The trial court also addressed a limiting instruction with the parties on two occasions: once during proceedings and once prior to jury instructions and closing arguments. Harris ultimately agreed with the limiting instructions proposed and subsequently delivered by the court.

The trial court did not abuse its discretion in admitting evidence of Harris's prior assault of Bohannan. The court determined that the State could prove the assault by a preponderance of evidence. The court also identified the purpose of introducing the prior assault—to challenge Bohannan's credibility. Finally, the court properly balanced the probative versus prejudicial value of introducing the prior assault, and delivered a limiting instruction to the jury. These actions do not rise to an abuse of discretion.

Harris further contends that his prior assault was inadmissible absent expert testimony informing the jury how any prior assault rendered Bohannan less credible. Harris explains that such testimony is required to establish why his prior assault made Bohannan less credible, causing the jury confusion. Contrary to Harris's contention, no Washington court has adopted such a requirement, and we decline to do so.

This court first addressed expert testimony's role in assault-victim credibility in State v. Grant, 83 Wn. App. 98, 101, 920 P.2d 609 (1996). There, the victim made inconsistent statements regarding the assault prior to trial, but did not recant any statements during testimony. The court allowed testimony from the victim's therapist to

"[entitle the jury] to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Grant, 83 Wn. App. at 108. While the court determined that expert testimony may be helpful in evaluating victim credibility, it did not adopt such testimony as a requirement for introducing prior assaults.

In a later decision, Division Two of this court expressly rejected any requirement that expert testimony must accompany evidence of prior assault for credibility determinations. In State v. Thach, 126 Wn. App. 297, 314, 106 P.3d 782 (2005), the court held that expert testimony regarding a domestic violence victim's attempts to appease their abusers by changing their prior statements at trial was an improper comment on witness conduct and thus impermissible.[1] Thach has since been expressly overruled by State v. Case, 13 Wn. App. 2d 657, 678, 466 P.3d 799 (2020). After extensive review of a number of jurisdictions, the Case court held that "expert witnesses may testify on general characteristics or conduct typically exhibited by survivors of domestic violence." But "such testimony must not state that a specific victim witness exhibits the responses or characteristics of a crime victim or state the expert's opinion of the victim's credibility." Case, 13 Wn. App. 2d at 678.[2]

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[1] Division Two upheld Thach in State v. Cook, 131 Wn. App. 845, 852-53, 129 P.3d 834 (2006). There, the court stated, "while expert testimony may assist a jury in understanding the intricacies of relationships marked by violence, we do not believe such testimony is necessary in order to assess the state of mind of an individual whose acts are inconsistent with a report of abuse. The jury may draw from its own common knowledge and the evidence . . . to determine if the victim's inconsistent behavior is the result of a fear of retaliation, misguided affection, internalized shame or blame, or a continuing dependence on the defendant." Cook, 131 Wn. App. at 852-53.

[2] Harris directs us to State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014). Gunderson is inapplicable to the present case. In Gunderson, the court declined to extend the introduction of prior acts of domestic violence to instances where the victim had neither recanted nor contradicted prior statements. 181 Wn.2d at 925. Rather, the evidence had been introduced to impeach a victim who was denying an incident of violence occurred altogether despite contradicting testimony otherwise. Gunderson, 181 Wn.2d at 920-21.

Based on our review of Washington precedent, we decline to adopt a requirement that expert testimony must accompany evidence of prior assault to assist assessment of witness credibility. We do not, however, expressly prohibit such expert witness testimony. Rather, it is within the purview of the trial court to assess the proposed introduction of expert testimony and its adherence to requisite evidentiary rules.

B. Offender Score

Harris argues that he should be resentenced, and that his prior narcotics convictions should not be included in his offender score. The State concedes this issue. We accept the State's concession.

The calculation of Harris's offender score included a prior felony conviction for possession of a controlled substance. The Washington Supreme Court has since held that the strict liability statute criminalizing unintentional, unknowing passive non-conduct is unconstitutional. Blake, 197 Wn.2d at 183. Because Harris's offender score included a prior conviction for violating a statute that has since been found unconstitutional, we remand to the trial court to resentence Harris without including the unconstitutional possession offense. See State v. Tili, 148 Wn.2d 350, 358-60, 60 P.3d 1192 (2003).

We remand for resentencing consistent with Blake. We otherwise affirm.

Mann, C.J.

WE CONCUR:

Coburn, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. QUINTON MARQUETTE HARRIS, Appellant.	)	No. 82009-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Quinton Harris moved to reconsider the court's opinion filed on November 22, 2021. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82009-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 7, 2022

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