70054-5

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ORIGINAL

No. 70054-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

MATTHEW BLAIR SMITH, Appellant.

AMENDED BRIEF OF RESPONDENT

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2. Whether the use of the term "domestic violence crime" in the to-convict instruction was prejudicial where the jury was required to make a finding as to whether the offenses were "domestic violence" and the evidence demonstrated that the defendant committed a crime of domestic violence.

3. Whether the trial court abused its discretion in admitting photographic evidence of the victim's bruises from a prior act of domestic violence perpetrated by defendant where the victim recanted both the prior assault and the charged assault and violation of no contact order and where her credibility was at issue.

4. Whether the "abiding belief" language in WPIC 4.01, endorsed by the Supreme Court as the instruction courts are to give regarding reasonable doubt, dilutes the State's burden of proof where that language has been previously approved in other cases.

5. Whether the judgment and sentence should be amended to remove any reference to the vacated fourth degree assault conviction where State v. Turner directs that references to vacated convictions should not appear in a judgment and sentence due to double jeopardy concerns.

C. FACTS

1. Procedural facts

On October 11, 2012 Appellant Matthew Smith was charged with Felony Violation of a No Contact Order (Domestic Violence), in violation of RCW 26.50.110, and Assault in the Fourth Degree (Domestic Violence), in violation of RCW 9A.36.041(1) for his acts on or about Oct. 4th, 2012. CP 4-6, 9-11. The information further alleged that the offenses were domestic violence crimes pursuant RCW 9.94A.030, 10.99.020 and 26.50.010. Id. A jury found Smith guilty of both offenses and of the domestic violence allegation, which had been alleged as an "element" in the to-convict instructions on the offenses. CP 25, 34, 42.

At sentencing, the court vacated the fourth degree assault conviction due to double jeopardy concerns. CP 76; RP 310. Smith had no felony criminal history and thus an offender score of 0. CP 75. The court imposed a standard range sentence of nine months on the no contact order count and permitted work release for all but one month of that time. RP 268-69; CP 76.

2. Substantive Facts

Around midnight of Oct. 3rd/4th, Smith's girlfriend and the mother-to-be of his child[1], Cassandra Mitchell, called 911 and reported that Smith had violated a no contact order and had hit her in the stomach and the head. RP 27; Ex. 1. During the call, Mitchell was crying and very upset and complained that her head hurt. Ex. 1[2]. She reported that Smith had been drinking and, after checking with her friend Tashena Martin who was present during the 911 call, described what Smith had been wearing that night. Ex.1; RP 38. At trial, although she described the 911 call as accurate, she asserted that she had lied when she reported that Smith had been at the house and that he had hit her. RP 33-34. She testified that she had called 911 because she was angry with Smith because he hadn't answered his phone when she had called him a number of times earlier in the evening, although she was aware of the no contact order prohibiting him from having contact with her. RP 29, 31, 34-37.

Mitchell signed a written statement, under penalty of perjury, that night that stated:

> Matthew came to the house he started drinking, after finishing a bottle of liquor we got into a arguement (sic) he said our Baby wasn't his and hit me in the stomach when I turned around he also

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[1] Mitchell was 20 weeks pregnant at the time. RP 27, 72.
[2] The entire 911 recording was played for the jury. RP 53.

punched me in the back of my head he ran away because I told him I was calling the cops.

Ex. 3. She also talked with paramedics that night and what she told them was consistent with what she had told 911. RP 42. She told the emergency room doctor who examined her that she had been hit numerous times with fists in her head and abdomen, and she complained of pain in her stomach and head during the exam. RP 70-72.

Earlier that evening, Tashena Martin, a friend of Mitchell's, had come over to Smith's house where Mitchell was residing[3], in order to have Mitchell give her a tattoo. RP 34-35, 138, 140. Smith arrived at the house soon thereafter and had brought liquor with him. RP 141. Martin, Mitchell and Smith were drinking and at one point Smith and Mitchell started arguing about whether the baby was Smith's or not. RP 142-43, 160, 165. Smith left at one point and then came back, and he appeared very intoxicated and angry. RP 148-51. Smith and Mitchell went upstairs and Martin went to sleep on the couch in the living room. RP 144-48. Martin woke up to the sound of breaking glass. RP 146, 148, 161. Martin heard Mitchell say, "He's hurting me," and "He hit me." RP 152. Mitchell yelled for Martin to call 911. RP 151. As Martin jumped up, she saw Smith run out the door. RP 152. Mitchell was sobbing and holding the

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[3] Smith apparently was residing with his sister because of the no contact order. RP 82.

back of her head and her stomach when she called 911. RP 152-53. Martin didn't see Smith hit Mitchell, but she did hear two things that sounded like a hit and heard Smith cursing Mitchell. RP 152.

Smith's sister picked up Smith about a mile from the house after receiving a phone call from Smith around midnight. RP 97-98, 116. When she picked him up, Smith appeared to have been drinking heavily and didn't have any shoes on. RP 98. When she took Smith back to the house later that night, the police were still there. RP 99, 114. When Smith got out of the car, he was wearing clothing that matched the description Mitchell had given to the 911 dispatcher. RP 99, 114.

Mitchell testified that she called Smith after Martin went to sleep, that she planned the call to 911, woke up Martin and told her the story before she called 911. RP 40-41, 84. She said Martin wasn't in on her plan to get back at Smith. RP 53-55. She said her crying and complaints about her stomach and head hurting were an act. Id.

Martin didn't have any issues with Smith and knew him through Mitchell. RP 37, 166. Martin wrote a letter recanting what she had originally told the police, but testified she did so because Mitchell asked her to, which Mitchell denied. RP 52, 153-54, 158. Although the plan had been to stick with the recantation story, Martin testified that the letter was false. RP 155-58.

D. ARGUMENT

1. Although "domestic violence" was not an element of the offenses, its inclusion in the instructions without objection rendered it the law of the case, and Smith cannot raise this issue for the first time on appeal.

Smith asserts that use of the term "domestic violence" was irrelevant and prejudicial and therefore it should not have been included in the jury instructions. Smith failed to raise this issue below and therefore may not raise it for the first time on appeal unless he can demonstrate that it is a manifest error of constitutional magnitude. He has failed to do so. While the "domestic violence" allegation was not an element of the offense and therefore was not required to be included in the to-convict instruction, its inclusion rendered it the law of the case since Smith failed to object to its inclusion below. Moreover, the State, having plead the domestic violence allegation, was required to prove the allegation even though, given Smith's actual criminal history, there was no increase in punishment for Smith.

a. The inclusion of the "domestic violence" allegation in the instructions without objection rendered it the law of the case

Challenges to jury instructions cannot be made for the first time on appeal unless they are manifest errors affecting a constitutional right. RAP 2.5(a); State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). "It is well-settled law that *before error can be claimed on the basis of a jury instruction* given by the trial court, an *appellant must first show that an exception was taken to that instruction* in the trial court." Id. at 181 (quoting State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). Courts may refuse to review alleged instructional errors if no meaningful exception was made below. State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); Salas, 127 Wn.2d at 182. Under the law of the case doctrine, "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." Hickman, 135 Wn.2d at 102.

Here, defense counsel did not object to the inclusion of the term "domestic violence" in the to-convict instruction. The prosecutor initially raised the issue of the jury instructions related to the domestic violence allegation by informing the court that the instructions were complicated by the State's need to plead and prove the allegation. RP 14. After the prosecutor informed the court that he had submitted some proposed jury

instructions, he explained that the instructions were out of the ordinary due to the change in the SRA regarding proving the domestic violence "element" that had been charged. RP 90. He noted the instructions would also need to include a definition for "domestic violence" and that there wasn't a specific WPIC for that. RP 90-91. Defense counsel only proposed two instructions: one regarding the defendant not testifying and another regarding impeachment evidence. RP 90; CP 12-14.

The court inquired of defense counsel whether he had a position as to whether State's proposed instruction should refer to violation of a court order or specify the restraint provisions within the statutory language, noting that there was no reference to domestic violence in the statutory language. RP 93. Defense counsel indicated he did not have a position either way at that point in time. Id. He also indicated he didn't see anything glaring with the State's proposed instructions. Id.

The State's proposed to-convict instructions on violation of a no contact order (domestic violence) and assault in the fourth degree (domestic violence) included as the fifth and second "elements" respectively that the crime was a "domestic violence crime." Supp CP __; Sub Nom. 28 at "P. 10, 12." They also included the RCW 10.99.020 definition for "domestic violence crime" and the WPIC definition for "family or household member." Id. at "P. 16, 17." At the oral request of

defense counsel, the court later included a lesser included instruction for misdemeanor violation of a no contact order, which ultimately included the same domestic violence language in that to-convict instruction. RP 124-26, 168-81; CP 28.

Defense counsel only excepted to the domestic violence definition instruction and to one of the verdict forms. RP 119-26; Supp CP __, Sub Nom 28 at "P. 16." The court overruled the defense objection to the definitional instruction, which defense counsel had asserted was not helpful and prejudicial, based on the need to have a definition of "domestic violence" and that the language tracked the statutory definition. RP 121. The felony violation of no contact order (domestic violence) became Inst. no. 8; the assault in the fourth degree (domestic violence) Inst. no. 16; the definition of "domestic violence crime" Inst. no. 14; and the definition of "family member" Inst. no. 15. CP 25, 32-34; RP 181-85.

The State does not dispute that "domestic violence" is not a statutory element of the crimes of felony violation of a no contact order or assault in the fourth degree. However, when the factor was added to the to-convict instructions for those offenses, without objection, they became the law of the case, and the State bore the burden of proving them.

b. Smith has failed to demonstrate why he may raise this issue for the first time on appeal.

Smith asserts that he should be able to raise this issue for the first time on appeal claiming that he did not receive a fair trial because the "domestic violence" term was used in the instructions. He does not specify how his trial wasn't fair, except to say that use of the term was prejudicial. He, however, acknowledges in a footnote that the State was required to prove the domestic violence allegation, but notes that should be done via bifurcated instructions. Appellant's Brief at 9 n. 2. To the extent that Smith asserts the proof of the domestic violence allegation was not relevant, Smith waived that evidentiary objection by failing to object below. To the extent that Smith asserts the prejudicial nature of the term "domestic violence" denied him a fair trial, the placement of the domestic violence allegation within the to-convict instruction as opposed to a special verdict or other instruction is not an error constitutional magnitude. It can hardly be considered prejudicial when the jury is required to consider whether the offenses committed were "domestic violence" offenses, and the jury was required to review all the jury instructions.

A failure to request a jury instruction and/or failure to object to an instruction waives the error regarding the instruction unless the alleged error is a manifest one of constitutional magnitude. RAP 2.5(a); State v.

O'Hara, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009). In order to raise an error for the first time on appeal under RAP 2.5(a), the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. Id. at 98. " 'Manifest' under RAP 2.5(a) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In order to show actual prejudice appellant must demonstrate that the asserted error had practical and identifiable consequences in the trial of the case. Id. Exceptions to RAP 2.5(a) are to be construed narrowly. Id.

An alleged unpreserved instructional error must be analyzed on a case by case basis to determine whether it was a manifest error affecting a constitutional right. *See*, O'Hara, 167 Wn.2d at 100. Errors in definitional instructions are not errors of constitutional magnitude and must be raised below or are deemed waived. *See*, State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992) ("As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.").

Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997) *cert. denied*, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998). Instructions are sufficient if they properly inform the jury of the applicable

law without misleading the jury and permit each party to argue its theory of the case. State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656, *rev. den.*, 133 Wn.2d 1014 (1997). When examining the effect of a particular phrase in an instruction, courts must consider the instruction as a whole and in the context of all instructions. Id. at 54.

While it is permissible to bifurcate instructions in order to limit the potential prejudicial effect on the jury of an instruction, the use of a special verdict form is not required. *See,* State v. Mills, 154 Wn.2d 1, 10, 109 P.3d 415 (2005); State v. Oster, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002).

> We emphasize, however, that while such bifurcation is constitutionally *permissible,* it is not constitutionally *required.* There would have been no constitutional violation had the trial court provided one "to convict" instruction including the [elevating factor] element."

Mills, 154 Wn.2d at 10 n.6; *see also*, State v. Davis, 154 Wn.2d 291, 307 n.5, 111 P.3d 844 (2005), *aff'd on other grounds, sub. nom.* Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 2d 224 (2006) (no constitutional violation if elevating factor of assault in felony violation of no contact order had been included in the "to convict" instruction). Moreover, in order to warrant a bifurcated trial, there must be some showing of specific prejudice from a unitary trial. State v. Jeppesen, 55 Wn. App. 231, 239, 776 P.2d 1372, *rev. den.*, 113 Wn.2d 1024 (1989).

Where there is authority for a bifurcated trial, "[b]ifurcation is inappropriate if a unitary trial would not significantly prejudice the defendant or if there is a substantial overlap between the evidence relevant to the proposed separate proceedings." State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006).

Smith waived his issue regarding the inclusion of the "domestic violence" allegation in the manner it was included in the instructions by failing to raise it below. Smith only asserted an objection to the domestic violence definition instruction below, not to the term's inclusion in the to-convict instruction. The State charged the domestic violence allegation under RCW 9.94A.525 and thus was required to prove the allegation. While it wasn't required to be placed in the to-convict instruction, the State was required to prove it, and the jury instructions would have referred to the allegation anyway. The location of the required jury finding is not an issue of constitutional magnitude. Therefore, Smith cannot raise this for the first time on appeal.

c. The use of the "domestic violence" term in the instructions wasn't prejudicial.

The domestic violence allegation was relevant as the State had plead that allegation in the information, and was required to plead and prove the allegation if it desired to increase Smith's sentence on this

offense or for domestic violence offenses in the future. Therefore, while Smith may consider the term "pejorative," it was not unduly prejudicial in the context of this case where Smith was accused of committing domestic violence offenses.

In 2010, the legislature amended provisions of the Sentencing Reform Act ("SRA") and other statutes related to domestic violence. Its intent in the amendments was to

> ... improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable, coordinated measures to prevent domestic violence from occurring. The legislature intends to give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable. The legislature intends to: Increase the safety afforded to individuals who seek protection of public and private agencies involved in domestic violence prevention; improve the ability of agencies to address the needs of victims and their children and the delivery of services; upgrade the quality of treatment programs; and enhance the ability of the justice system to respond quickly and fairly to domestic violence. ...

In addition to strengthening no contact orders, it amended RCW 9.94A.525 to provide:

> *If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven,* count priors as in subsections (7) through (20) of this section; however, count points as follows:
> (a) Count two points for each *adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses*: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking

> offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;
> (b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.525(21) (emphasis added). Domestic violence under RCW 9.94A.030 is defined via the definitions in RCW 10.99.020 and 26.50.010. RCW 9.94A.030(20). It is clear from the legislation that the increase in the offender score for a domestic violence finding can only occur if: 1) "domestic violence" is plead and proven for the *current* offense; *and* 2) "domestic violence" was plead and proven on the *prior* conviction, after August 1, 2011. While the "domestic violence" allegation of the offense in this case did not trigger an increase in Smith's offender score since he had no "domestic violence" criminal history, the legislature intended to provide prosecutors with the statutory ability to plead and prove the "domestic violence" allegation. If Smith had had "domestic violence" criminal history, the State would not have been able to seek an increase in

his offender score if it not had plead and proven the allegation on his current offenses. Far from being simply "prejudicial," the domestic violence allegation was highly relevant, and since it had been plead, the jury was required to make a finding on it. Moreover, any prejudice from the use of the term "domestic violence" itself would have been harmless because the jury heard testimony and evidence via the 911 call (and the "Domestic Violence No Contact Order" that was entered Ex. 2) that clearly established that domestic violence had occurred. *See*, State v. Hagler, 150 Wn. App. 196, 208 P.3d 32 (2009) (any error in informing jury of domestic violence designation was harmless where there was "ample direct evidence" of force and threats, thus the domestic violence evidence within the "general understanding of the term" was undisputed).

2. The court did not err in admitting the photos showing bruising from Smith's prior arrest because the evidence was relevant to the victim's general credibility and the validity of her recantations.

Smith asserts that the trial court erred in admitting photographic evidence of bruising to Mitchell's shoulder and a room with upended items in it without establishing that the event had occurred by a preponderance of the evidence and because it was not relevant and was unduly prejudicial. The photographic evidence was admissible under ER

404(b) to assist the jury in assessing the victim's recantations and her credibility as a domestic violence victim generally. Moreover, any error in admitting the evidence was harmless as the other evidence presented was overwhelming that Smith violated the no contact order and in the course of doing so, assaulted Mitchell.

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. ER 404(b) provides:

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

In order to admit evidence under ER 404(b), the evidence of other wrongs or misconduct must be admissible for a purpose other than to prove character or actions in conformance therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1955). However, the rule's list of purposes for admission of the misconduct evidence is not exclusive. State v. Baker, 162 Wn. App. 468, 472-73, 259 P.3d 270, *rev. den.*, 173 Wn.2d 1004 (2011).

Under ER 404(b), the court applies a four factor test:

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which

> the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If a court fails to conduct the balancing process on the record, the error is harmless if the record is sufficient to allow effective appellate review. State v. Bradford, 56 Wn. App. 464, 468, 783 P.2d 1133 (1989); *see also*, State v. Herzog, 73 Wn. App. 34, 867 P.2d 648, *rev. den.,* 124 Wn.2d 1022 (1994) (failure to weigh prejudice on the record harmless if reviewing court can determine from the record that the trial court would have admitted the evidence if it had conducted the balancing). As long as the court correctly interprets the evidence rule, a trial court's decision to admit or exclude the evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Prior to admission of the photographs, the State established that a no contact order had been issued on July 30, 2012 prohibiting Smith from having contact with Mitchell. RP 28-30. The no contact order itself indicated that the Bellingham Municipal Court had found that Smith had been arrested for a domestic violence offense. Ex. 2. Mitchell denied having any contact with Smith since the entry of that order. RP 31-32. She admitted that she had called 911 on Oct. 4, 2012 and reported that Smith had hit her in the head and stomach at the Sweetbay Court

residence. RP 32-33. She testified however, that she had lied when she called 911 because she had been angry that he hadn't returned her phone calls, and that he hadn't been at the residence. RP 34-35. Mitchell also testified that she knew that it was likely Smith would be arrested because of her phone call, that this had been her idea and that it was revenge. RP 37. She also admitted she had signed a statement at the hospital, under penalty of perjury, stating that Smith had hit her, but that it had been a lie. RP 43-44; Ex. 3. She testified that she wrote a letter to the prosecutor stating that Smith had never assaulted her in any way shape or form and testified that Smith had not assaulted her in July or in October, or any time in between. RP 46-49; Ex. 4. She denied being assaulted by Smith on October 4th or telling Martin to recant her statement. RP 52-53.

a. *The photos were admissible to assist the jury in assessing Mitchell's recantation and her credibility as a domestic violence victim.*

Prior evidence of domestic violence between the defendant and the victim is admissible to assist the jury in assessing a recanting victim's credibility. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)[4]. In Magers the defendant had previously been arrested for assaulting the victim of the charged offense, but the charge filed relating to the previous

[4] The concurrence agreed with the majority regarding the admissibility of the prior domestic violence evidence under ER 404(b) but disagreed about the admissibility of other evidence of fighting. Magers, 164 Wn.2d at 194-95 (J. Madsen concurring).

arrest was ultimately dismissed. One month after the arrest the defendant was arrested again for second degree assault of the victim (and unlawful imprisonment). Id. at 177. After the defendant was arrested the second time, the victim submitted two letters to the prosecutor's office recanting her prior statements to law enforcement. Id. at 179. At trial she testified consistent with her prior recantations, asserting that her statements to law enforcement had been a lie. Id. at 180. A jury instruction was submitted, over defendant's exception, that directed the jury to consider the evidence of defendant's prior bad acts only for the purpose of the victim's state of mind and credibility and for no other purpose. Id.

On review, the court found that the defendant's prior arrest for domestic violence and that a no contact order had been entered after the arrest was relevant to assess the credibility of the victim given her conflicting statements about the defendant's acts. Id. In so finding the court cited with approval the rationale set forth in State v. Grant:

> The jury was entitled 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.

Id. (quoting State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)); *see also,* State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270, *rev. den.*, 173 Wn.2d 1004 (2011) (defendant's prior assaults on the victim were relevant so the jury could assess the victim's credibility with full knowledge of the

dynamics of the domestic violence victim's relationship with the defendant even though the victim hadn't recanted). In Grant, the State sought to admit evidence of defendant's prior assaults on the victim to "explain her statements and conduct which might otherwise appear inconsistent with her testimony" regarding the charged assault. Grant, 83 Wn. App. at 106.

Here, the State also sought to admit the evidence of the victim's prior report of the assault and evidence of the assault in order to assist the jury in evaluating the reliability of Mitchell's recantation and credibility of her testimony, and that was the basis for the court's admission of the photos. At trial the prosecutor stated he was seeking to admit Exhibit 6, the photos, because it was relevant to Mitchell's credibility and gave context to her recantation since she had reported being assaulted in July and October, but recanted both times, and Ex. 6 demonstrated that an assault occurred at the prior incident. Defense counsel objected based on relevancy and prejudice grounds. RP 58-59. When the court inquired of defense counsel why the photos didn't address the credibility of the victim's recantations, defense counsel stated that the photos didn't prove that she was assaulted and it was irrelevant to the violation of the no contact order. RP 59. The prosecutor argued that the photos should come in to help explain Mitchell's testimony where her credibility was at issue,

and explained he was not going to argue that Smith committed prior assault, therefore he committed the charged one.[5] RP 60-61. The court ruled it would admit the prior assault for impeachment purposes. RP 76.

The State then elicited testimony from Mitchell that she had reported that Smith assaulted her and broke some things in the home on July 30, 2012. She testified that it had been a false report although it was true that Smith and she had gotten into an argument that day. RP 76-77. She testified that she recognized the photos in Exhibit 6, that the police had taken the photos, and that the photos were accurate and showed bruising and some cuts. RP 77-78. She testified that she had the bruises from before. RP 79. Before the photos were admitted, the court advised the jury:

> ... when you view Exhibit 6 and the testimony that you have heard about Exhibit 6 is before the jury for a limited purpose and that purpose is to help the jury make a decision it must make about the credibility of this witness. The purpose and the information is admitted only for that purpose and not for the purpose of the jury assessing an issue that's not before the jury, which is the issue of what may or may not have happened in July, or the reasons for the July 30th order of the municipal court the jury's heard discussed in this trial, the reasons why that order was issued, those questions are not before the jury and they're not at issue in this trial. So you are to consider the information and testimony about the events of July 30th only for the purpose of assessing the credibility of this witness.

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[5] In fact in closing he explained to the jury that it could not consider Mitchell's allegation regarding the July assault in deciding whether she was assaulted on Oct. 4th. RP 225-26.

RP 80.[6]

While the court initially stated that it was admitting the evidence only for impeachment purposes, it's clear from the discussion with counsel and its oral limiting instruction to the jury that it was admitting it generally to assist the jury in determining the credibility of the victim's testimony. Under Magers, such evidence is relevant under ER 404(b). While the court did not explicitly find that the defendant had committed the prior assault by a preponderance of the evidence under the first ER 404(b) factor, the record supports such a finding on review because Mitchell testified that she had reported that Smith had assaulted her on July 30, 2012 and that the photos were accurate, and the no contact order reflected that the municipal court had found probable cause for issuance of the no contact order. The record reflects the court balanced the probativeness of the photos against the prejudice, even inquiring of defense counsel as to why the photos weren't relevant regarding the recantations.

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[6] The court also provided the following limiting instruction in the jury instructions, which instruction was a modification of the one proposed by defense counsel:

> Certain evidence has been admitted in this case for only a limited purpose. The evidence regarding Ms. Mitchell's statements to police on July 30, 2012 must be considered by you only for the purpose of assessing credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 14, 36.

b. *Any error in admitting the limited testimony regarding the prior threat was harmless.*

Erroneous admission of ER 404(b) evidence requires reversal "only if the error, within reasonable probability, materially affected the outcome." State v. Everybodytalksabout, 145 Wn. 2d 456, 469-70, 39 P.3d 294 (2002). Here, the evidence before the jury included Mitchell's statement to the police the night of the incident that Smith had been at the house and had hit her in the stomach and head. Martin testified that Smith had been at the house and that Mitchell and Smith had gotten into an argument and she heard sounds like something being hit and that Mitchell had been sobbing. The jury heard the 911 call in which Mitchell, crying and upset, reported that Smith had hit her in the stomach and head and that her stomach hurt. The doctor also testified that Mitchell stated she had been hit that night in the stomach and head and complained of pain in these areas. Even if the photos should not have been admitted under ER 404(b), any error was harmless as there isn't a reasonable probability that the evidence materially affected the outcome of the trial. *See*, Magers, 164 Wn.2d at 195 (J. Madsen concurring) (recanting domestic violence victim's brief testimony that defendant had been in trouble for fighting was harmless where it was of minor significance in relation to evidence properly admitted that defendant had been previously arrested for

domestic violence and that victim had told officer that defendant had held a sword to the back of her neck and threatened to cut off her head).

3. WPIC 4.01 does not dilute the State's burden of proof.

Next, Smith contends that the reasonable doubt instruction, WPIC 4.01, given in this case diluted the State's burden of proof. The Supreme Court has directed trial courts to use WPIC 4.01. The instruction has previously been challenged on numerous bases, including based on dilution of the burden of proof, and has been upheld. The instruction was a proper statement of the State's burden.

a. Smith may not raise this issue for the first time on appeal under RAP 2.5(a)

While due process implicates constitutional issues, pursuant to RAP 2.5(a) it is Smith's burden to demonstrate on appeal how his alleged error is a manifest one, *i.e.*, how it actually prejudiced his rights, and that the alleged error is truly of constitutional dimension. See argument, *supra* at 10-11. He has not done so, but simply states that because he is alleging it lowered the State's burden of proof he may raise it for the first time on appeal. Appellant's Brief at 22. Smith should be required to demonstrate how the use of an approved WPIC instruction specifically was a manifest error of constitutional magnitude here since he failed to object below.

In State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court directed trial courts to use the approved pattern instruction WPIC 4.01 in order to instruct the jury about the reasonable doubt standard. Prior to providing this direction to trial courts, the court noted that jury instructions "must define reasonable doubt and clearly communicate that the State carries the burden of proof." Id. at 307. In choosing not to endorse the *Castle* instruction, the court also noted: "The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. The court then directed the trial courts to use WPIC 4.01 to inform the jury of the State's burden to prove the charges beyond a reasonable doubt. Id. at 318.

Smith asserts though that the Bennett court did not address the bracketed "abiding belief" language, arguing that the "belief in the truth" phrase minimizes the State's burden. As mentioned by Smith, the Supreme Court in State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) did reference this language. Although it did not specifically address the phrase Smith finds objectionable, the court found that the abiding belief language, evaluated in the context of the whole instruction, adequately conveyed the reasonable doubt standard. Id. at 656-658-58. It

was the last sentence[7], a sentence that was added by the judge, that the court found unnecessary but not erroneous. Id. at 658. In fact, the court noted the U.S. Supreme Court had upheld the "abiding belief" language in Victor v. Nebraska, 511 U.S. 1, 14-15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Id. Moreover, two other cases have specifically addressed the argument that WPIC 4.01, with the abiding belief language included, dilutes the State's burden of proof and have held that the instruction taken as a whole does not. *See*, State v. Lane, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988) (when instruction is construed as a whole, abiding belief language in WPIC 4.01 adequately instructs jury regarding State's burden to prove each element beyond a reasonable doubt).

The instruction given here, WPIC 4.01, adequately conveyed the State's burden of proof. CP 44; WPIC 4.01. The instruction should be construed as a whole, without overemphasizing three isolated words in the instruction. The instruction has previously been upheld and did not dilute the State's burden.

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[7] The last sentence read: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." Pirtle, 127 Wash. 2d at 656.

Smith contends that the instruction was exacerbated by the prosecutor's argument, thus diluting the State's burden of proof. The first argument by the prosecutor that Smith objects to did not even use the "abiding belief" language, and Smith takes the argument out of context. In closing, the prosecutor recognized that credibility of the witnesses was a significant issue in the case and encouraged them "to assess the credibility," noting that in "our personal lives" people may deal differently with people known to lie. RP 215. The prosecutor then explained:

> This is not our personal life. This is a test, really of your ability to determine what actually happened. Which means just because any particular witness is found by you to have lied sometime doesn't mean you disregard everything they say. And that kind of makes sense, doesn't it? Just because somebody has lied in the past, doesn't mean that they're necessarily lying to you. Or, even further, just because somebody has lied to you, if you find that they have (sic) about one thing doesn't mean they lied about another thing. You need to go through the process of figuring out when they're telling the truth and what the truth actually is. Think about it this way. The truth is always there. People might try to cover it up but deflect your attention off to something else at some point but the truth is still there and you can still find out what it is.

RP 215-16. The prosecutor then discussed why and when some people might lie. RP 216.

In rebuttal the prosecutor did make one reference to the "abiding belief" language in explaining the entire reasonable doubt instruction, noting at the end of that explanation that if a juror just

doesn't know, can't decide, then that person has to discuss that with the other jurors. RP 250-51.

The prosecutor here made no statement asking the jury to declare the truth as the prosecutor did in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), cited by Smith. The prosecutor argued from the reasonable doubt instruction the "abiding belief" language. The prosecutor reminded the jury in his argument that the State carried the burden of proof. RP 223, 233, 241, 244. The prosecutor's use of the "abiding belief" language did not dilute the State's burden of proof.

4. The reference in the judgment and sentence to the fact that the jury found the defendant guilty of Assault in the Fourth Degree should be removed pursuant to State v. Turner.

Smith asserts that references in the judgment and sentence to the jury's finding him guilty of assault in the fourth degree violate double jeopardy and therefore must be removed. The State concedes under State v. Turner, that references in the amended judgment and sentence should be removed.

As noted by Smith, the State conceded at sentencing that the assault in the fourth degree conviction should be vacated. Appellant's Brief at 28. The amended judgment and sentence still references the

assault four conviction in section 2.1 and 3.2. Section 2.3 also indicates there was a second count although it doesn't specify what it was. In State v. Turner, the Washington Supreme Court advised: "a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference...". State v. Turner, 169 Wn. 2d 448, 464-65, 238 P.3d 461 (2010). The State therefore concedes that the references to the vacated count in Sections 2.1, 2.3 and 3.2 should be removed.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Smith's convictions for Felony Violation of a No Contact Order (Domestic Violence) and Assault in the Fourth Degree (Domestic Violence), but remand for correction of the judgment and sentence to remove references to the vacated fourth degree assault conviction.

Respectfully submitted this 22nd day of January, 2014.

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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TM Anderson — 1/23/14

Legal Assistant — Date