NO. 72627-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LUIS ALBERTO VELA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

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# BRIEF OF RESPONDENT

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## A. ISSUES PRESENTED

1. Where evidence of prior bad acts by the defendant was necessary both to prove the reasonableness of the victim's fear as an element of a charged offense and to explain otherwise inexplicable delays in reporting and inconsistent statements by the victim, did the trial court properly exercise its discretion in admitting the evidence for those purposes and without accompanying expert testimony?

2. Where defense counsel's choice not to request an ER 404(b) limiting instruction appears to have been a legitimate tactical decision, and there is no indication that the verdict would have been different had a limiting instruction been requested, has the defendant failed to establish that his counsel's failure to request a limiting instruction constituted ineffective assistance of counsel?

## B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Luis Alberto Vela, by amended Information with assault in the second degree – domestic violence, unlawful imprisonment – domestic violence, and assault in the third degree – domestic violence, with special allegations that he committed the assault in the second degree while armed with a

deadly weapon and committed each crime against a family or household member. CP 130-31. A jury found the defendant guilty as charged, and found all the special allegations proven. CP 62-65. The trial court, finding no mitigating circumstances, imposed concurrent high-end standard range sentences of 20 months on the assault in the second degree and 16 months on the other two counts, plus the 12-month consecutive deadly weapon enhancement, for a total of 32 months in prison. CP 100-03; 1RP[1] 530-31. Vela timely appealed. CP 109.

2. SUBSTANTIVE FACTS.

a. Trial Testimony.

In early 2013, Veronica Lopez-Nunez lived in an apartment in Bothell, Washington, with her daughters, J.C. and W.C., who were 15 and 13 years old, respectively, at the time of trial in August 2014. 1RP 182-83, 242, 279. Around February 2013, Lopez-Nunez met Vela online on a social networking and dating website. 1RP 184-85. They eventually entered a romantic relationship in February or March 2013, but maintained separate residences.

[1] This brief adopts the convention used by Vela for referencing the report of proceedings, in which the 11 consecutively-paginated volumes are referred to as 1RP (September 10, 2013, October 29, 2013, June 3, 2014, June 6, 2014, August 6, 2014, August 11, 2014, August 12, 2014, August 13, 2014, August 14, 2014, August 15, 2014, and October 10, 2014), and the supplemental volume from August 12, 2014, is referred to as 2RP.

1RP 185-86. During this time, Lopez-Nunez maintained her primary job cleaning offices at Overlake Medical Center and her weekend job cleaning houses, which allowed her to support herself and her daughters financially. 1RP 184, 187.

In the beginning, Lopez-Nunez enjoyed spending time with Vela, and found him to be attentive and patient. 1RP 186. Although Vela disclosed during the first month that he was still married to the mother of his children, he said that he was about to get divorced, and he and Lopez-Nunez talked about getting married after his divorce was complete. 1RP 193-94. After about a month, however, Lopez-Nunez's relationship with Vela began to change as he began spending more and more time at her apartment and exerting more and more control over her activities and behavior. 1RP 187.

On a few occasions, Vela slept in his car in the parking lot of Lopez-Nunez's apartment building because he believed she was lying about wanting to spend time at home with her daughters. 1RP 187. He also told Lopez-Nunez to quit her side job cleaning houses on the weekends so that she could spend more time with him, which she did. 1RP 187. Eventually, Lopez-Nunez also quit her job at Overlake after Vela grew jealous about her interactions

with men during the workday and falsely claimed that a male security guard was sexually harassing her at work. 1RP 188-89.

One month into their relationship, Vela asked to borrow Lopez-Nunez's cell phone and never gave it back despite repeated requests, telling her that she did not need it. 1RP 189-90. When Lopez-Nunez's car broke down and she made an appointment to have it fixed, Vela cancelled the appointment and told her that it was unnecessary because he could drive her wherever she needed to go. 1RP 210-11.

By April of 2013, Vela was primarily living at Lopez-Nunez's apartment, without any deliberate decision to move in together, and their relationship had become physically and emotionally abusive. 1RP 187, 191-92. Vela required Lopez-Nunez to promise that she would not use a telephone without getting his permission and telling him in advance whom she was calling and what she was going to say. 1RP 203. He also made her promise not to bathe or leave the apartment without his permission, not to go to the bathroom without him, and not to talk to anyone unless he was present. 1RP 204. When Lopez-Nunez was at home in the apartment, she was not allowed to leave her bedroom without Vela's permission. 1RP 193.

If Lopez-Nunez violated any of these rules, or did anything to anger Vela (such as use the computer or open the door without his permission), he would beat her, leaving bruises on her stomach and arms. 1RP 191-92. He also threatened Lopez-Nunez to ensure her compliance, including threats to beat her up, threats to kill her and dump her body in Lake Washington, threats to have someone beat up her family, threats to have her daughters taken away and Lopez-Nunez deported, and threats to take her daughters away and force them into prostitution. 1RP 192. Lopez-Nunez stayed in the relationship despite the abuse out of fear for herself and her daughters; Vela assured her that he could find her wherever she went if she tried to leave him, that he had several ways of locating her, and that if she angered him her punishment would be five times worse that whatever she had done to anger him. 1RP 195, 197.

Lopez-Nunez did not say anything about the abuse to her daughters in an attempt to shield them from what was going on, but she now spent much less time with them than she had previously. 1RP 195-96. Whereas before she had cooked regularly for J.C. and W.C., and had spent time talking and playing with them, Vela's control and demands meant that Lopez-Nunez now rarely left the

bedroom, even to cook dinner, and the girls had to knock on the bedroom door if they wanted to talk to their mother. 1RP 195-96. However, Vela was careful not to display his anger around the girls. 1RP 212. As a result, neither of the girls witnessed any of the abuse or threats. 1RP 196.

One particular incident occurred around April 30, 2013. 1RP 198. The previous night, Lopez-Nunez had used J.C.'s cell phone without Vela's knowledge to leave a message for her brother. 1RP 200. She had asked him not to call her back and to wait instead for her to call again, but the brother disregarded this and called back. 1RP 200. J.C., unaware of what was going on, reported in Vela's presence that her uncle had called and wanted to talk to Lopez-Nunez about the message she had left for him. 1RP 200. Later that night, an angry Vela ordered Lopez-Nunez to strip and stand naked in front of the bedroom window until he said otherwise. 1RP 200. He told her that if she sat down or lay down, things would "go badly" for her. 1RP 201. Vela made Lopez-Nunez stand naked at the window all night long, refusing to allow her to leave the room even to use the bathroom.[2] 1RP 201.

[2] This was the basis for the allegation of unlawful imprisonment in count two.

The next morning, after J.C. and W.C. had left for school, Vela finally told Lopez-Nunez she could sit on the bed. 1RP 198. Vela then began to beat her on her stomach and head and pull her hair, telling Lopez-Nunez that it was her fault for not listening to him despite everything he did to her, and that she was a liar for making promises to him that she did not intend to fulfill. 1RP 199, 202. Vela then went to the kitchen and returned with a steak knife. 1RP 199, 208. Putting the knife to Lopez-Nunez's vagina, Vela threatened to insert it into her vagina, saying that it wouldn't hurt him at all because she was hurting him.[3] 1RP 199. He slightly inserted the tip of the blade, but did not leave a mark. 1RP 202. Lopez-Nunez begged him not to do anything. 1RP 199. Eventually, after two or three hours of physical assaults, the incident ended, though Vela remained in the apartment and remained upset. 1RP 203.

Over the next week, Lopez-Nunez wanted to break up with Vela, but any time she indicated anything along those lines, Vela would threaten to call immigration and have her children taken away. 1RP 208. When she stated over the phone the day after the April 30th incident that she wanted to break up with him, Vela said

[3] This was the basis for the allegation of assault in the second degree in count one.

they needed to discuss it in person. 1RP 213. The next time he came over, as soon as she let him in and they went into her bedroom, Vela pulled out a gun and put it to Lopez-Nunez's head and in her mouth, stating that he could kill her and her daughters and no one would ever know. 1RP 213. Vela indicated that he was considering doing it because Lopez-Nunez was hurting him too much and was not taking his feelings into account. 1RP 213-14. Lopez-Nunez apologized and begged for his forgiveness, saying that she had been wrong to try to break up with him and really did want to be with him. 1RP 213. Afterwards, Vela instructed Lopez-Nunez to put the gun away in her apartment. 1RP 212, 214, 219.

On May 5th, Lopez-Nunez and her children got a ride to church from another parishioner with Vela's permission. 1RP 209, 238. When W.C. indicated that she needed to take a snack to school the next day because she had standardized testing, Lopez-Nunez used J.C.'s cell phone to check how much money was left in her food stamp account. 1RP 209, 211. After she and the girls returned home to Vela, they all went out to a movie, dinner, and to a store where Vela bought J.C. a dress for her upcoming school dance. 1RP 211-12.

At some point during the outing, Lopez-Nunez mentioned to Vela that they needed to stop so that she could get a snack for W.C.'s testing the next day, and Vela asked how she was going to pay for it. 1RP 209. Without thinking, Lopez-Nunez told the truth and said that she was going to use food stamps. 1RP 209. Vela then asked how she knew how much money was left on the food stamp card, and Lopez-Nunez admitted that she had used J.C.'s cell phone to check the account balance. 1RP 209. As soon as he heard that Lopez-Nunez had used a phone without permission, Vela's countenance changed, and Lopez-Nunez could tell that he was upset, though he did not reveal anything in front of her daughters. 1RP 209, 212.

When they finally returned home that evening, Vela told Lopez-Nunez to take their purchases up to the apartment, and that he would be up in a few minutes. 1RP 212. Worried about what Vela's reaction to her use of the phone would be once they were behind closed doors, Lopez-Nunez gathered all the scissors and knives out of the kitchen and hid them in the laundry hamper in one of the girls' bedrooms. 1RP 212-13. She also moved the gun from her bedroom closet to a closet in the hallway, so that if Vela asked for it, she would have an opportunity to tell one of the girls to call

the police. 1RP 212, 218. Finally, fearing a repeat of the April 30th incident, Lopez-Nunez warned J.C. that Vela was "a bit upset" and asked her to knock on Lopez-Nunez's bedroom door the next morning before going to school. 1RP 218. Lopez-Nunez told J.C. what coded phrase she would use if she needed J.C. to call the police. 1RP 218-19.

When Vela entered the apartment a few minutes after Lopez-Nunez, he told her to go to her bedroom, and once they were inside he told her, "Give me what I told you to put away the other time." 1RP 219. Lopez-Nunez told him that she would need to go into the hallway because the gun wasn't in the bedroom. 1RP 219-20. She left the bedroom and instructed J.C., who was standing in the hallway, to call the police right away. 1RP 219.

Fearing that the result of not bringing Vela the gun would be just as bad as obeying him, Lopez-Nunez returned to Vela and put the gun, which was in a plastic grocery sack, on the bedside table. 1RP 220, 222. Vela, who was already drinking a bottle of beer, railed that Lopez-Nunez still wasn't listening despite his warnings, that he couldn't take it any longer, and that she had provoked all the bad things that were going to happen to her. 1RP 220. As he

did so, he poured his beer on her head and began to beat her on the head with the bottle, causing pain and dizziness.[4] 1RP 220-21.

Shortly thereafter, W.C. knocked on the bedroom door and asked her mother to open it, but did not mention that police officers had arrived. 1RP 222. At Vela's insistence, Lopez-Nunez did not open it but merely asked W.C. what she wanted. 1RP 222. W.C. again asked them to open the door, and Vela again told Lopez-Nunez not to. 1RP 222. At that point, an officer identified himself as the police and told them to open the door. 1RP 222. Lopez-Nunez then did so; as she got up from the bed and walked to the door, she heard the rustling of the plastic bag containing the gun, but did not see what Vela did with it. 1RP 222.

Officers drew Lopez-Nunez away from the bedroom and spoke to her briefly. 1RP 222. After learning that Vela had a gun in the bedroom, the officers returned to the bedroom doorway and ordered Vela to come out with his hands visible. 1RP 316. He did so, and was searched and handcuffed. 1RP 317. No gun was found on him or in the bedroom; however, officers soon located a gun and ammunition in a plastic grocery bag on the lawn below

[4] This was the basis for the charge of assault in the third degree, in count three.

Lopez-Nunez's bedroom window, which Lopez-Nunez identified as Vela's.[5] 1RP 318-19.

While speaking with Lopez-Nunez, officers observed that she was visibly distressed and upset, and had redness and swelling on her face and neck, bruises on her upper left arm, and a scratch or scar on her lower left arm.[6] 1RP 324-25, 351. Additionally, her hair was partially wet and there appeared to be hair missing from a portion of her scalp near her forehead. 1RP 352, 352.

Although L.C. and W.C. had not witnessed any abuse or threats by Vela, they testified that after Vela began spending a lot of time at their apartment, their mother was isolated from them, and was almost always in the bedroom with Vela. 1RP 245, 282. Even when not in the bedroom, their mother was always accompanied by Vela at all times, even to the bathroom. 1RP 283, 295. Their mother no longer drove them to school, and rarely cooked or cleaned, frequently leaving the girls to find dinner for themselves. 1RP 246-47, 283-84, 307. Their mother had quit her job at the hospital after Vela started spending more time at the apartment,

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[5] Prior to trial, the gun was discovered to not be in working order due to a malfunctioning slide. 1RP 321-23.

[6] Lopez-Nunez testified that these injuries were caused by Vela. 1RP 192.

though she later started working again.[7] 1RP 248. After a certain point in the relationship, Vela had almost exclusive use of their mother's cell phone. 1RP 307. When the girls saw injuries on their mother's arms, such as bruises or scrapes, Lopez-Nunez said that she had gotten them at work. 1RP 249, 301.

L.C. testified that on May 5th, Vela seemed quieter than usual during their outing. 1RP 250. She confirmed that her mother had entered the apartment several minutes before Vela, and that her mother had asked her to call 911 shortly after Vela had entered the apartment. 1RP 251. L.C. testified that her mother seemed scared when she asked L.C. to call 911, and that at no point in the evening had Lopez-Nunez appeared angry. 1RP 255. W.C. testified that she went to her room after her mother entered the apartment and started talking to L.C., and wasn't aware of anything amiss until police arrived. 1RP 286.

Vela testified in his own defense and denied ever having assaulted, threatened, or controlled Lopez-Nunez. 1RP 361-62, 382-83. He claimed that he had wanted to end the relationship multiple times in order to return to his wife and daughter but had been persuaded to stay by threats and acts of self-harm by Lopez-

[7] Vela testified that after Lopez-Nunez quit her job at the hospital she and he worked at a different cleaning job together. 1RP 378.

Nunez. 1RP 376-79. Vela acknowledged most of the verifiable aspects of Lopez-Nunez's testimony, but offered an explanation for each one that left him blameless. 1RP 371-93. He testified that his relationship with Lopez-Nunez was purely sexual and not at all emotional on his part, denied ever making plans with her to get married, and claimed that he had only started living there nearly full time, despite the problems it was causing in his own family, because Lopez-Nunez wanted him to live with her. 1RP 371, 399-400. He stated that was a mutual decision by himself and Lopez-Nunez to spend all their time in Lopez-Nunez's bedroom, and that he had only accompanied her to the bathroom two or three times, and always at her invitation. 1RP 372, 380, 397. Similarly, Vela testified that he kept Lopez-Nunez's cell phone only because they had a mutual agreement to keep each other's phones. 1RP 393.

Vela admitted sleeping in his car in the parking lot outside Lopez-Nunez's apartment several times in the beginning of their relationship, rather than going home to his own bed, but claimed that he had slept in his car out of respect for Lopez-Nunez's daughters. 1RP 372, 396. Vela admitted going to Lopez-Nunez's workplace at Overlake to talk to someone, but claimed that Lopez-

Nunez had asked him to. 1RP 374. He also acknowledged that after she quit her job, he and Lopez-Nunez worked together at a different cleaning job and commuted to and from work together. 1RP 400.

Vela stated that the scratch or scar officers photographed on Lopez-Nunez's arm was from an incident in which she had cut herself with a broken glass after Vela tried to break up with her. 1RP 376. He denied and then admitted causing the bruises on her upper arm on April 30th, and claimed that they had been the result of grabbing her to prevent her from cutting herself with a knife after he attempted again to break up with her. 1RP 381, 395-96. He admitted that Lopez-Nunez's hair had been pulled during the incident, but claimed that she had done it herself out of anger. 1RP 381.

Vela explained Lopez-Nunez's hiding of all the knives in a laundry basket by claiming that he had required Lopez-Nunez to hide them all (but had not watched where she put them) as a condition of him staying in the relationship after the April 30th incident. 1RP 382. He also acknowledged that, despite his asserted concerns that she would harm herself, he left his gun

(which as far as he knew was operable) and ammunition in her apartment. 1RP 389, 394.

Vela asserted that the May 5th incident had been the result of another attempt to break up with Lopez-Nunez. 1RP 384-86. He testified that he had told her at the movie theater and again in the parking lot of the apartment that he was leaving, and had only gone up to the apartment afterwards to pack his four or five changes of clothes and retrieve his gun. 1RP 388-89. According to Vela, when he entered the bedroom Lopez-Nunez was sitting on the bed drinking a bottle of beer. 1RP 387-88. While he packed his clothes, he asked her to retrieve his gun from wherever she'd put it, and once she came back with the gun and put it on the bed he attempted to take the beer away from her. 1RP 390. In the struggle over the beer, Vela explained, Lopez-Nunez had spilled it on her head and had struck herself in the face with her own hand. 1RP 390, 413. Vela testified that afterward, Lopez-Nunez had said something along the lines that if she couldn't have Vela, no one could, and that at that point Vela had thrown the gun out the window to prevent Lopez-Nunez from grabbing it. 1RP 392.

Vela acknowledged on cross-examination that he had no reason to stay in the apartment once Lopez-Nunez brought him the

gun, and that there was no need to throw the gun out the window because any danger that Lopez-Nunez would harm anyone with it was gone once he had it in his hand. 1RP 410. He then agreed that the gun had not been thrown out the window until the police announced their presence outside the bedroom, but denied that the only reason he threw it was because he didn't want the police to find it.[8] 1RP 411.

b. Trial Court's Ruling On The Admissibility Of ER 404(b) Evidence.

The admissibility of Lopez-Nunez's testimony regarding violence, threats, and controlling behaviors by Vela outside of the charged incidents was litigated during pre-trial motions. 1RP 97-115; CP 122-26. The State asserted that the prior abuse was admissible both to prove the elements of assault in the second degree (that Vela committed assault against Lopez-Nunez with the knife by creating in her a reasonable and imminent fear of bodily injury) and to explain why Lopez-Nunez made inconsistent statements regarding the cause of her bruises and why she stayed with Vela without reporting the April 30th incident until after the May 5th incident. CP 123-26.

[8] On redirect, he reverted to his assertion that the gun was thrown out the window before the police arrived. 1RP 414.

Vela conceded that evidence of prior domestic violence may be admissible when the victim's reasonable fear is an element of the crime and when it is necessary to explain why the victim delayed reporting the abuse or made inconsistent statements. CP 25. However, he argued, the allegations of prior abuse were not admissible in his case because the assault charges were based on a completed unlawful touching rather than a reasonable apprehension of unlawful touching, because Lopez-Nunez did not recant her allegations or delay reporting the May 5th incident, and because the State was not offering expert testimony on the dynamics of a domestic violence relationship.[9] CP 26-27; 1RP 102-04. Vela also challenged whether the State had proven by a preponderance of the evidence that the prior bad acts had occurred, highlighting Lopez-Nunez's inconsistent statements regarding the source of her bruises. 1RP 105, 107.

The trial court ruled that the State's offer of proof was sufficient and that the proposed testimony by Lopez-Nunez regarding prior abuse by Vela against her was admissible to explain the delay in reporting and assist the jury in evaluating her

[9] However, when the trial court observed that "I don't think there's case law, though, that requires that . . . the evidence [of prior domestic violence] be rejected just because there's no expert to testify about the dynamics of domestic violence," Vela conceded, "That's correct." 1RP 105.

credibility. 1RP 109-15. However, the trial court excluded proposed testimony by Lopez-Nunez that Vela had once told her that he had sexually mutilated a prior girlfriend, on the grounds that the probative value was substantially outweighed by the danger of unfair prejudice. RP 98, 113-15. The trial court did not directly address the State's contention that the prior abuse of Lopez-Nunez was also admissible to prove the elements of assault. 1RP 103, 109-15.

Defense counsel had noted in his trial brief that he would be requesting a limiting instruction if the trial court admitted any of the prior bad acts under ER 404(b). CP 27. However, after the trial court made its ruling admitting most of the proposed ER 404(b) evidence, defense counsel did not request a limiting instruction and did not propose one. 1RP 97-115; CP 52-61.

## C. ARGUMENT

### 1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF VELA'S PRIOR BAD ACTS UNDER ER 404(b).

Vela contends that the trial court erred in admitting Lopez-Nunez's testimony about his actions prior to the April 30th incident because no proper purpose for admission existed and because it was not accompanied by expert testimony regarding the dynamics

of domestic violence relationships. These claims should be rejected. The prior bad acts were necessary both to prove both that the elements of second degree assault were met during the April 30th incident, and to explain why Lopez-Nunez made inconsistent statements about the source of her injuries and failed to promptly report the April 30th incident. There is no requirement that evidence of such prior bad acts be accompanied by expert testimony when admitted for these purposes. The trial court therefore properly exercised its discretion in admitting the evidence under ER 404(b).

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, such evidence may be admissible for other purposes. ER 404(b); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is related to that purpose, and (4) determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. Kilgore, 147 Wn.2d 288,

292, 5 P.3d 974 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion, and may be upheld on any grounds supported by the record. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); see In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

a. The Prior Bad Acts Were Admissible To Prove The Elements Of Assault In The Second Degree.

Where the victim's reasonable fear that the defendant will injure her or carry out a threat against her is an element of the charged offense, evidence of prior bad acts by the defendant is admissible to prove that the victim's fear was reasonable so long as the probative value of the prior acts is not substantially outweighed by the danger of unfair prejudice. State v. Magers, 164 Wn.2d 174, 182-83, 189 P.3d 126 (2008) (prior bad acts admissible to prove assault where definition includes creation of reasonable apprehension and imminent fear of bodily injury); State v. Ragin, 94

Wn. App. 407, 411-12, 972 P.2d 519 (1999) (prior bad acts admissible to prove element of felony harassment that victim reasonably feared the threat would be carried out) (cited with approval in Magers, 164 Wn.2d at 182).

Vela appears to concede that his prior bad acts would be admissible if the existence of Lopez-Nunez's reasonable fear were relevant to the charges in this case. Brief of Appellant at 16. He merely argues that her reasonable fear was not relevant in this case because, in Vela's view, the assault charges were both based on a completed unlawful touching. Brief of Appellant at 16-17. However, the record establishes that the charge of assault in the second degree resulting from the April 30th knife incident required the jury to evaluate Lopez-Nunez's reasonable fear.

The jury was instructed that "[a] person commits the crime of assault in the second degree when he or she intentionally assaults another with a deadly weapon." CP 77. The jury was given the following definition of assault:

> An assault is an intentional touching striking or cutting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and **which in fact creates in another a reasonable apprehension and imminent fear of bodily injury** even though the actor did not actually intend to inflict bodily injury.

CP 79 (emphasis added).

Lopez-Nunez's testimony indicated that Vela had held the knife to her vagina during the April 30th incident and threatened to rape her with it, but was ambiguous as to how much the knife had actually touched her; although she stated that Vela had put the very tip of it "in" her vagina, she indicated that it did not leave a mark. 1RP 199, 202. As the prosecutor told the trial court in pre-trial motions, the State's theory was that Vela had assaulted Lopez-Nunez with the knife by intentionally placing her in reasonable apprehension and imminent fear of bodily injury. 1RP 99, 120. The prosecutor addressed only that prong of the assault definition during closing argument, and did not try to argue that Vela had assaulted Lopez-Nunez through a completed touching or cutting. 1RP 474-75.

The prior abuse by Vela was therefore directly relevant, and indeed critical, to the jury's determination of whether Lopez-Nunez reasonably and imminently feared bodily injury when Vela held the knife to her vagina and threatened to rape her with it, and the trial court properly exercised its discretion in admitting testimony about the prior abuse. See Magers, 164 Wn.2d at 182-83.

b. The Prior Bad Acts Were Admissible To Explain The Victim's Inconsistent Statements And Delay In Reporting.

Where the victim of a domestic violence offense has behaved in a way that would otherwise be inexplicable to the jury, such as by recanting, giving inconsistent statements, or delaying reporting the offense, evidence of prior bad acts by the defendant has overriding probative value and is admissible. Gunderson, 181 Wn.2d at 924 n.2, 925; State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270 (2011). Here, Lopez-Nunez made inconsistent statements about the source of her bruises, telling her daughters that they were from work but testifying at trial that they were inflicted by Vela. 1RP 192, 249, 301. She also delayed reporting the April 30th incident, and continued to live with Vela until the May 5th incident without telling anyone about the abuse. 1RP 196-98, 208, 328. Without knowledge of the prior domestic violence in the

relationship, those actions by Lopez-Nunez would have appeared inexplicable to the jurors, leaving them to inaccurately interpret the inconsistencies and delays as evidence of Lopez-Nunez's untruthfulness. For that reason, the prior bad acts had an overriding probative value far outweighing any danger of unfair prejudice,[10] and thus were admissible under ER 404(b). See Gunderson, 181 Wn.2d at 924 n.2, 925; Baker, 162 Wn. App. at 475.

Vela's argument to the contrary turns on his assertions that (1) Lopez-Nunez's testimony was not inconsistent with her prior statements and (2) prior bad acts are not admissible to explain a delay in reporting until after the defendant "makes an issue of" the delay. Brief of Appellant at 15-16. Vela supports the first assertion only with a citation to defense counsel's pre-trial argument in the trial court; as noted above, the record establishes that Lopez-Nunez's statements to police and trial testimony were in fact inconsistent with her prior statements to her daughters regarding the source of her injuries. Brief of Appellant at 16; 1RP 192, 249, 301.

[10] The danger of unfair prejudice in this case was lower than in many others, such as Gunderson, because here the ER 404(b) evidence consisted only of additional allegations by the victim, rather than convictions conclusively establishing that prior abuse had occurred. Cf. Gunderson, 181 Wn.2d at 926.

Vela's second assertion is based on State v. Fisher, in which the supreme court held, in response to a challenge by the defendant, that the trial court did not err in ruling that the defendant's prior physical abuse of a child sexual abuse victim "was admissible conditioned upon the defense making an issue of [the victim's] delayed reporting." 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Because Vela did not raise this argument in the trial court, this Court should not allow him to assert it for the first time on appeal.[11] CP 24-27; 1RP 101-10; Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994) (objection in the trial court on different grounds than those argued on appeal is not sufficient to preserve the alleged error); Gunderson, 181 Wn.2d at 926 (erroneous admission of 404(b) evidence is non-constitutional error); RAP 2.5 (only manifest constitutional errors may be raised for first time on appeal).

Furthermore, Fisher did not hold, as Vela would have this Court do, that prior bad acts are never admissible to explain delayed reporting until after the defense makes an issue of the delay. 165 Wn.2d at 746. Because the State generally must

[11] Vela objected to admission for the purpose of explaining delay in reporting only on the basis that Lopez-Nunez did not delay reporting the May 5th incident. CP 26.

preemptively elicit testimony disclosing the delay on direct examination to avoid the appearance of trying to hide unhelpful facts, such a rule would allow defense to lie in wait and make an issue of the delay only in closing argument, when it is too late for the State to present evidence of the prior abuse to explain the delay.

Furthermore, when a defendant's theory of the case is that the victim fabricated the allegations, his failure to explicitly make an issue of the delayed reporting does not remove the risk that the jurors will inaccurately interpret the delay as supporting the defendant's theory if they are unaware of the prior abuse. For that reason, when evidence of prior abuse is necessary to explain otherwise inexplicable delays in reporting or inconsistent statements, its probative value outweighs the danger of unfair prejudice from the outset. Cf. Gunderson, 181 Wn.2d at 925.

Consistent with that reasoning, existing caselaw strongly suggests that there is no requirement that evidence of prior abuse be excluded until after the defendant makes an issue of the otherwise inexplicable inconsistency or delay. Id. (setting out rule without any suggestion that prior abuse is admissible only after defense explicitly challenges the victim's credibility); Magers, 164

Wn.2d at 180, 184-86 (upholding admission of prior bad acts to explain recantation without specifying whether they were introduced on direct or re-direct examination of victim); Baker, 162 Wn. App at 475 (upholding admission of prior bad acts to explain delay in reporting without any suggestion that timing of admission was significant).

Because Lopez-Nunez's testimony regarding prior abuse by Vela was necessary to explain her otherwise inexplicable inconsistent statements and delay in reporting, and because the law does not require the court to delay admitting such evidence until the defendant has explicitly focused on the inconsistent statements and delay, the trial court properly exercised its discretion in admitting the testimony in the State's case-in-chief under ER 404(b).

c. Any Error In Identifying An Improper Basis For Admission Was Harmless.

The admission of ER 404(b) evidence for an improper purpose is harmless if the evidence was also admitted for a proper purpose. See State v. Powell, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995) (trial court's decision to admit prior misconduct under ER 404(b) will be upheld if one of the bases is justified). Thus,

even if this Court were to hold that one of the purposes for admission described above was improper, any error in admitting the evidence of prior abuse for that purpose would be harmless in light of the other, proper basis for admission.

d. Expert Testimony On The Dynamics Of Domestic Violence Relationships Is Not A Prerequisite To The Proper Admission Of ER 404(b) Evidence For The Purposes Identified Above.

Where evidence of prior domestic violence is admissible to prove the victim's reasonable fear as an element of the charge or explain otherwise inexplicable inconsistencies or delays by the victim, Washington courts have never imposed a requirement that such evidence be accompanied by expert testimony on the dynamics of domestic violence relationships. See Gunderson, 181 Wn.2d at 925 (discussing requirements for admission of prior domestic violence for purposes of evaluating victim's credibility, with no suggestion that expert testimony is needed); Magers, 164 Wn.2d at 182-86. The three dissenting justices in Magers advocated for such a requirement, but a majority of the court implicitly rejected that proposition by upholding the admission of evidence of prior domestic violence, without accompanying expert testimony, to explain the victim's inconsistent statements. Magers,

164 Wn.2d at 185-86, 195 (Madsen, J., concurring), 197-98 (C. Johnson, J., dissenting).

Significantly, Vela conceded before the trial court that no case requires the exclusion of otherwise admissible evidence of prior domestic violence for lack of accompanying expert testimony. 1RP 105. He should not now be permitted to argue that the trial court was required to exclude the ER 404(b) evidence for lack of expert testimony. See In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial).

Furthermore, in this case the prior bad acts were admissible to prove the elements of one of the assault charges as discussed in section C.1.a. above, and there is nothing about the logical connection between prior violence by the defendant and the victim's reasonable fear of future violence that is specific to domestic violence relationships or requires expert testimony to explain. See, e.g., Ragin, 94 Wn. App. at 411-12 (upholding admission of defendant's prior bad acts to prove reasonableness of victim's fear in non-DV felony harassment case in which there was

no accompanying expert testimony) (discussed with approval in Magers, 164 Wn.2d at 183).

Vela's argument largely ignores that basis for the admission of the prior bad acts, and focuses instead on his contention that domestic violence is "beyond the common knowledge of the average lay person," and that therefore expert testimony to explain the dynamics of domestic violence is necessary in order for the relevance of prior domestic violence in assessing a victim's credibility to be clear to the jury. Brief of Appellant at 25-28. Vela's reliance on a dissenting opinion and cases discussing the average juror's knowledge of domestic violence issues in the 1980s is misplaced.

Although there was a time when "[t]he general public [was] unaware of the extent and seriousness of the problem of domestic violence," State v. Ciskie, 110 Wn.2d 263, 272-73, 751 P.2d 1165 (1988), today domestic violence is a national topic of conversation and prominent cases of domestic violence by public figures become the topic of discussion and analysis in both the news and entertainment media. See, e.g., PBS NewsHour, "NFL Domestic Violence Case Sparks Conversation on the Silence That Surrounds Abuse" (PBS television broadcast September 9, 2014), available at

http://www.pbs.org/newshour/bb/nfl-domestic-violence-case-sparks-conversation-silence-surrounds-abuse. It cannot reasonably be said that without expert testimony, the average juror today is unable to understand that prior violence by a defendant might cause a domestic violence victim to delay reporting or make inconsistent statements.

Because Vela's request to establish, for the first time, a requirement that all ER 404(b) evidence in a domestic violence case be accompanied by expert testimony is without support in logic or existing caselaw, this Court should reject it and affirm his convictions.

### 2. VELA HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION.

Vela contends that his trial counsel was constitutionally ineffective in failing to request a limiting instruction regarding the evidence of prior bad acts admitted under ER 404(b). This claim should be rejected, as Vela has failed to establish that his counsel's choice to not request a limiting instruction both constituted deficient performance and prejudiced him.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;

Wash. Const. art I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim of ineffective assistance of counsel fails if either prong of that test is not met. Strickland, 466 U.S. at 673.

a. Vela Has Failed To Show That His Trial Counsel's Performance Was Deficient.

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective, and the defendant bears the burden of showing that the representation was deficient. Grier, 171 Wn.2d at 35. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that

the defendant received ineffective assistance of counsel." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

When trial defense counsel does not request a limiting instruction, Washington courts presume that counsel was making a legitimate tactical decision to avoid drawing additional attention to unfavorable evidence. State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). Thus, absent concrete evidence to rebut that presumption, the failure to request a limiting instruction cannot support a claim of ineffective assistance of counsel. See id.

Here, Vela's trial counsel was clearly aware of the possible usefulness of a limiting instruction for the ER 404(b) evidence, because he mentioned it in his trial brief. CP 26. There is nothing in the record to suggest that counsel's later choice to not request or propose a limiting instruction was anything other than a legitimate tactical decision to avoid drawing additional attention to the allegations of prior abuse. Indeed, there was good reason for such a decision, as a limiting instruction would have risked suggesting to the jury that the allegations of prior abuse were particularly credible or particularly damaging to the defense, whereas Vela's theory of the case was that Lopez-Nunez had fabricated both the prior and current abuse allegations. Vela has therefore failed to meet his

burden to show that his trial counsel's performance was deficient. See Humphries, 181 Wn.2d at 720; State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009).

b. Vela Has Failed To Show That He Was Prejudiced By His Trial Counsel's Allegedly Deficient Performance.

In order to show that he was prejudiced by allegedly deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229. Absent evidence in the record that the jury used evidence of prior bad acts for an improper purpose, a defendant cannot establish that the failure to request a limiting instruction prejudiced him. State v. Humphries, 170 Wn. App. 777, 798, 285 P.3d 917 (2012), aff'd in part, rev'd in part on other grounds, 181 Wn.2d 708, 336 P.3d 1121 (2014).

Here, Vela points to nothing in the record suggesting that the jury used the ER 404(b) evidence for an improper purpose. Furthermore, the evidence of prior violence in this case consisted only of additional uncorroborated allegations by the victim, rather

than objective proof of prior bad acts, such as a conviction. Vela's argument posits that the jurors would have been disinclined to believe Lopez-Nunez's testimony regarding the charged offenses (and thus would have acquitted Vela) if they had been warned to use the ER 404(b) evidence only for its proper purposes. However, if the jury had been inclined to acquit Vela under those circumstances, there is no reason that making unfettered use of the ER 404(b) evidence would have led to a different result, since there was no more reason to believe Lopez-Nunez's allegations of past violence than to believe her allegations regarding the charged offenses. Vela has thus failed to establish a reasonable probability that the jury's verdict would have been different had his trial counsel requested a limiting instruction. See Humphries, 170 Wn. App. at 798.

Because Vela has failed to show that his trial counsel's performance was both deficient and prejudicial, his claim of ineffective assistance of counsel fails.

## D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Vela's convictions.

DATED this 7th day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Luis Alberto Vela, Cause No. 72627-7, 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.

Dated this 7 day of October, 2015.

Name:
Done in Seattle, Washington