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Court of Appeals
Division I
State of Washington

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WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO.

93206-2

NO. 73544-6-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON.

Respondent.

v.

ABDIQAHAR ADAN.

Petitioner.

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

The Honorable Laura Inveen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Abdigahar Adan, the appellant below, asks this court to review the Court of Appeals decision referenced in section B.

B. COURT OF APPEALS DECISION

Adan requests review of the Court of Appeals decision in State v. Adan, No. 73544-6-1, filed May 2, 2016 (attached as an Appendix).

C. ISSUE PRESENTED FOR REVIEW

Petitioner was charged with second degree assault, felony harassment and unlawful imprisonment. The elements of felony harassment require proof of a threat to kill and that the victim reasonably feared the defendant would carry out the threat. The complaining witness testified at trial that petitioner verbally threatened to kill her.

The court allowed the complaining witness to testify that appellant raped her a few months before the incident that led to the charges. The complaining witness never reported the alleged rape to anyone and petitioner was never charged with rape. The complaining witness never asserted or claimed that a reason she believed appellant would carry out his verbal threat to kill her was because of the prior alleged rape but instead testified that until the incident that led to the charges she not afraid of petitioner. The court, however, admitted the complaining witness's testimony that petitioner raped her under ER 404(b) as evidence she

reasonably feared appellant would carry out his verbal threat to kill her. Where the alleged rape was not a reason the complaining witness believed petitioner would carry out his threat was the evidence irrelevant to any issue at trial and therefore improperly admitted under ER 404(b)?

D. STATEMENT OF THE CASE

Marian Mohamed moved with her family to the United States from Somalia when she was nine years old. RP 412-414. Abdigahar Adan moved to the United States from Ethiopia when he was 14 years old. RP 510. Mohamed is eight years older than Adan. RP 412-414, 510.

Mohamed and Adan lived in the same Seattle apartment complex and began dating in late 2013. RP 414-415, 448-449. In the spring of 2014 Adan and Mohamed became sexually active. Mohamed's family and their Somalia community would not have approved of her dating Adan because Adan is from a different African country and younger than Mohamed, so Mohamed and Adan kept their relationship secret. RP 416, 418. To keep their relationship hidden the two would meet secretly and have sex in Mohamed's car. RP 416-418.

On October 24, 2014 Adan and Mohamed arranged to meet for a date. RP 424-425. Adan brought with him some brandy and marijuana. RP 425, 481. Although the Somalia community frowns on women smoking and drinking alcohol, Mohamed did both. RP 444, 447.

Adan drove them to the SouthCenter Mall where the two intended to see a movie at one of the mall's theaters. They went into the theaters but could not agree on what movie to see, so they went back to the car. Mohamed said at that point Adan started to scream at her and called her unpleasant names. Adan then "removed" her from the car and drove away. RP 427.

Mohamed testified that a short time later Adan returned and apologized. Mohamed got back into the car and Adan drove to a restaurant a few blocks away. While driving to the restaurant Adan continued to yell at her. When they got to the restaurant's parking lot Adan wanted to have sex with Mohamed so he took off all his clothes and got into the back seat. RP 427-428. Mohamed was not interested in sex but instead wanted Adan to take her home. Adan, however, wanted something to eat so he drove to the IHOP restaurant in Seattle's Capital Hill neighborhood. RP 429. Mohamed did not remember what time they arrived. RP 429.

Adan, however, testified after they left the theater he and Mohamed drove around the mall's parking lot listening to music and Mohamed started drinking. RP 523-533. A few hours later Adan drove Mohamed back to her mother's apartment in Renton. When they arrived Mohamed told Adan she wanted to go back to the mall. They return to the

mall and while there they got into an argument. Adan then drove Mohamed back to Renton a second time and asked her to leave. Mohamed started crying and told Adan she still wanted to have a good time. RP 535-536. Adan drove to another parking lot, and they sat in the car and listened to music until they started arguing again. RP 537. Adan for the third time took Mohamed back to the Renton apartment. Id. Mohamed got out of the car, but before Adan left Mohamed got back into the car and told Adan she wanted to go to Seattle. RP 538.

Adan drove to the nearby park where the two often went. They decided to have sex but before they finished they started to argue again. RP 542-543. Adan then suggested they go to the IHOP restaurant because he was hungry. They arrived at the restaurant about 7:00 a.m. RP 544-545.

Mohamed testified that while they were inside the restaurant Adan took her cell phone. RP 436. When the waiter came to their table Mohamed walked out of the restaurant. She was within walking distance of her apartment on Yesler, so she started to walk home. RP 430, 472. Before Mohamed got to her apartment Adan drove up and “physically” put her back into the car. RP 431.

On cross examination Mohamed changed her testimony. She admitted she had her phone when she was walking home from the

restaurant and that Adan kept calling her but she kept hitting the ignore button. RP 473-474. Mohamed claimed that when Adan physically put her into the car she did not run or scream for help because she did not want to wake up her neighbors because then they would then know about her secret relationship with Adan. RP 476-477.

Adan, on the other hand, testified that while at the restaurant Mohamed left the table. When she did not return he called her cell phone and then sent her text messages because Mohamed did not answer her phone. RP 546-547. Mohamed finally called Adan back and when he asked her where she was she told him she was near the park they were at earlier. Adan drove to the park but could not find her so he drove towards their apartment complex on Yesler. When he was less than a block away from the complex Adan saw Mohamed walking. RP 548.

Adan stopped and Mohamed got into the car. Mohamed left her keys to her apartment at her mother's Renton apartment so she suggested they go to the lake to wait until she could call the apartment's manager to let her inside. RP 550. While they drove to the lake Mohamed got angry at Adan over something he said about her uncle. Mohamed started punching Adan. Mohamed then bit Adan's hand. Adan pushed Mohamed's head away from his hand and her head hit the car's front passenger door. RP 551-555.

Mohamed testified that Adan started yelling at her and began banging his head. He told Mohamed that he was going to kill her and dump her body in the lake. RP 432. Adan told Mohamed that in Africa things happen to women and nobody cares. When Mohamed responded that she was glad she was in America and not Africa, Adan punched her in the mouth then grabbed her by the hair and shoved her head against the car's passenger side window. Mohamed said she believed Adan was going to kill her because he knocked her teeth out when he punched her. RP 434. Mohamed did not remember if she hit or bit Adan but she said if she did it was in self-defense. RP 436.

Adan drove to Coleman Park on Lake Washington. RP 432. Adan said that Mohamed told him that he crossed the line and she is going to get her "niggas" to take care of him. RP 556. When Adan parked the car Mohamed was on her cell phone and she told Adan he had better watch his back. RP 558. As Mohamed got out of the car Adan grabbed her phone and took out the battery. The phone's SIM card fell out as well. RP 559.

Mohamed testified that Adan parked the car in the park's parking lot, dragged her from the car and slapped her knocking her glasses off her face. Adan then pulled Mohamed towards to the lake. RP 437-438. When they got to the water Adan started washing blood off his hands. RP 435.

Adan too testified he walked down to the lake to clean the blood off his hands and as he walked back toward Mohamed he saw her talking to a woman with a dog. RP 560-561. After the woman walked away Mohamed asked Adan to help her look for her glasses, which she apparently lost. Adan found the glasses and was holding Mohamed when police arrived. RP 562-563.

Traci Jenssen was the woman with the dog. Jenssen noticed Mohamed walking towards her and Adan was walking 10 to 12 feet behind Mohamed. RP 188, 192-196. The two, however, were not walking from the lake where Mohamed testified Adan dragged her. RP 192-196. Jenssen noticed Mohamed had a bloody mouth and lip. RP 189. Mohamed mouthed to Jenssen to call 911. RP 190. As Jenssen left the park she saw Adan hug Mohamed then hold her at arm's length and scream at her. RP 191. When Jenssen got to the top of a hill, out of sight of the two, she called 911. RP 191.

Police arrived and Mohamed was taken to the hospital. Her two lower incisors were injured. RP 290, 295, 377. Mohamed told medical personnel that her teeth were injured when her boyfriend slammed her head into the car window and punched her once in the face. RP 291, 351-352, 371. Mohamed testified Adan punched her when he was driving them to Colman Park, shortly before the police arrived at 8:45 a.m.,

however, she told the medical personnel she was injured at about midnight. RP 314.

Mohamed admitted she knows self-defense and could have defended herself when Adan took her from the car to the lake but she did not want to hurt him, even though he threatened to kill her. RP 495-496. Mohamed testified that before the incident she never felt threatened by Adan because “he’s crazy about me.” RP 497.

Prior to trial the State moved to admit evidence that during their relationship Adan once allegedly raped Mohamed. RP 26-28. Mohamed never reported the alleged assault to police, but revealed it in an interview with defense counsel. RP 27. The State argued the evidence was relevant to the felony harassment charge on the issue of whether Mohamed reasonably feared Adan was going to carry out his threat to kill her. Id.

The court found the evidence admissible to show Mohamed reasonably feared Adan would make good on his threat to kill her. The court also found any prejudice in the admission of the evidence was outweighed by its probative value. RP 133-136.

Adan argued the evidence was not relevant to show Mohamed reasonably feared Adan would carry out the threat to kill her, and its admission would prejudice Adan’s right to a fair trial. RP 35. Adan argued Mohamed did not allege there was any sexual assault or threat of a

sexual assault in connection with the events that led to the charges against him. RP 35. Moreover, there was no evidence that Adan threatened Mohamed to facilitate the alleged sexual assault or that he threatened her during the assault. RP 140-142. And, the evidence would be extremely prejudicial because the jury would perceive Adan as a rapist and that perception would taint the jury's ability to fairly assess the evidence. RP 35.

During the State's direct examination, counsel asked Mohamed if there was an incident with Adan the previous spring. RP 418. Mohamed told the jury that one evening she and Adan agreed to meet at the park where they usually met. Adan walked to the park and Mohamed drove there in her car. RP 419. While they sat in the front seat of Mohamed's car Adan told Mohamed that he was always sacrificing for her, and he disparaged her appearance. RP 419-420. According to Mohamed, Adan then picked her up, put her in the back seat, and had sex with her against her will. RP 421-422. Mohamed said she screamed but Adan had locked the car's doors and shut the windows so nobody heard her so she stopped. RP 421. When asked if Adan used "brute force" Mohamed merely responded "He started having sex with me." RP 421-422. Mohamed never reported the incident to anyone because she had children, was divorced, older than Adan, and they could not be seen together. RP 422,

450. Mohamed never testified that the alleged rape was a reason she believed Adan would carry out his threat to kill her.¹

Adan was charged with Second Degree Assault, Felony Harassment, and Unlawful Imprisonment. CP 1-7. The jury acquitted Adan of the assault charge and felony harassment charge. CP 77-78. Adan was convicted of misdemeanor harassment, which the court instructed the jury was a lesser included offense of felony harassment, and unlawful imprisonment. CP 79-80.

On appeal Adan argued the court erred in admitting Mohamed's testimony that Adan raped her months before the incident in violation of ER 404. Br. of Appellant at 17-26. The Court of Appeals disagreed. It found that the evidence Adan previously sexually assaulted Mohamed was relevant to prove that she reasonably feared Adan would kill her, and essential element of felony harassment. Slip. Op. at 9.

¹ Following Mohamed's testimony Adan moved for a mistrial. RP 506. The court denied the motion. RP 507.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE TRIAL COURT ERRED IN ADMITTING THE RAPE ALLEGATION EVIDENCE UNDER ER 404(b) WHERE THE EVIDENCE HAD NO PROBATIVE VALUE, CONTRARY TO THIS COURT'S DECISIONS AND ITS ER 404(b) JURISPRUDENCE.

Before admitting ER 404(b) evidence the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The State bears a substantial burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

However, "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." Gunderson, 181 Wn.2d at 923 (quoting State v. Saltarelli, 98 Wash.2d 358, 362, 655 P.2d 697 (1982)). Evidence that is not relevant is inadmissible. ER 402. Even relevant evidence should be excluded if its prejudicial effect outweighs its probative value. ER 403.

ER 404(b) is not a license to inject all manner of prejudicial evidence into a case. Evidence is unfairly prejudicial when it is more likely to arouse an emotional response than a rational decision by the jury, or has an undue tendency to suggest a decision on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence of other bad acts invite jurors to believe the defendant deserves to be punished for a series of immoral acts, which "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

Because this substantial prejudicial effect is inherent in ER 404(b) evidence, "uncharged offenses are admissible only if they have substantial probative value." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 847 (1995). This Court has recognized that the admission of prior allegations of sexual misconduct is particularly prejudicial. State v. Gresham, 173 Wn. 2d 405, 433, 269 P.3d 207 (2012); State v. Saltarelli, 98 Wn.2d at 363.

The Court of Appeals concludes the alleged sexual assault was relevant to prove Mohamed reasonably feared Adan would carry out his threat to kill her. Merely because the element of a crime is a person's "reasonable fear" it is not a license to admit unfairly prejudicial evidence of a defendant's uncharged crimes if those crimes played no part or did not contribute to the person's fear. Here, there is no evidence the sexual assault played a factor in Mohamed's fear.

Mohamed's testimony that Adan raped her some months before the incident was not logically relevant to the issue of whether she reasonably feared Adan would carry out his verbal threat to kill her. Adan never threatened to kill Mohamed and did not use any force during the alleged rape. Mohamed never testified that because of the alleged rape, she believed Adan would or was capable of making good on the threat to kill her, nor did she testify that Adan's behavior had become more violent and aggressive following the alleged rape incident and leading up to the October 24-25 incident. There was no evidence the alleged rape was even a factor that caused Mohamed to believe Adan would carry his threat to kill her.

When the State's attorney asked Mohamed why she feared Adan would carry out his threat to kill her, Mohamed responded it was because Adan knocked out her teeth. RP 433-434. Indeed, Mohamed testified that

she never felt threatened by Adan before the incident (RP 497) despite the earlier alleged rape.²

To be relevant, evidence must tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. ER 401. There was simply no nexus between the alleged rape and Mohamed's fear that Adan would carry out his verbal threat to kill her. Without some nexus the evidence did not logically make it more probable that Mohamed reasonably feared Adan would carry out the threat. The rape allegation did not have any relevance, much less substantial, probative value. Because it lacked relevancy the evidence was inadmissible. ER 402.

The above cited cases stand for the propositions that ER 404(b) must be read in conjunction with the other rules of evidence, including ER 401, ER 402 and ER 403, that uncharged offenses are admissible only if they have substantial probative value, and allegations of prior sexual misconduct are particularly prejudicial. The conclusion the rape allegation was admissible under ER 404(b) to show Mohamed reasonably feared

² In State v. Magers, 164 Wn.2d 174, 186, 189 P. 3d 126 (2008) this Court ruled that prior acts of domestic violence are admissible under ER 404(b) to assist the jury in judging the credibility of a recanting victim. (plurality opinion); Id. at 194 (Madsen, J., concurring). However, this Court recently declined to extend Magers to cases where the complaining witness neither recants nor contradicts prior statements. Gunderson, 181 Wn.2d at 925.

Adan would carry out his threat to kill her despite the complete lack of any evidence the alleged rape was in any way related to Mohamed's fear, conflicts with this Court's decisions cited above and its ER 404(b) jurisprudence reflected in those decisions. This issue merits review under RAP 13.4(b)(1)

The court instructed the jury on self-defense consistent with Adan's testimony that Mohamed bit him and he only pushed her head away to stop her. CP 106 (instruction 15). The jury acquitted Adan of the assault charge despite Mohamed's testimony and injuries. The jury also acquitted Adan of the felony harassment charge, despite Mohamed's testimony that Adan threatened to kill her and that she believed he would carry out the threat. Thus, jurors necessarily had serious questions about Mohamed's credibility.

Despite the jury's clear misgivings about Mohamed's credibility it found Adan guilty of the lesser offense of misdemeanor harassment³ and unlawful imprisonment. Those offenses were likewise only supported by Mohamed's testimony. It is not difficult to infer the jury convicted Adan of those offenses even though it disbelieved Mohamed's testimony supporting the assault or felony harassment charges because juror's

³ The court instructed the jury on misdemeanor harassment as a lesser-included offense of felony harassment. CP 111 (instruction 20); CP 113 (instruction 22).

believed Adan was likely a rapist and was never held accountable for the crime. The jury's decision to convict Adan of the unlawful imprisonment and misdemeanor harassment charges was an emotional response to the improper rape evidence: That Adan is a bad and immoral person with a propensity for criminality.⁴ There is a reasonable probability the outcome of the trial would not have been the same without the improper ER 404(b) propensity evidence.

F. CONCLUSION

Because Adan satisfies the criteria under RAP 13.4(b)(1) he respectfully asks that this Court grant review, reverse his convictions, and remand for a new trial.

DATED this 31 day of May, 2016.

Respectfully submitted,

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⁴ This Court has warned against the admission of bad acts evidence where "its effect would be to generate heat instead of diffusing light, or . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)).

COURT OF APPEALS
20161007-2 01/02

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDIQAHAR ABDIRAHMAN ADAN,

Appellant.

No. 73544-6-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: May 2, 2016

LEACH, J. — Abdiqahar Adan appeals his convictions of misdemeanor harassment and unlawful imprisonment. He claims that the trial court abused its discretion when it admitted ER 404(b) evidence that Adan previously sexually assaulted the same victim. Also, Adan contends insufficient evidence supports the misdemeanor harassment charge because the State failed to prove that Adan's threats to kill the victim caused her to fear bodily injury. The trial court properly admitted the evidence of the prior sexual assault to prove an essential element of the crime, the reasonableness of the victim's fear. Viewing the evidence in the light most favorable to the State, as we must, the record includes sufficient evidence for the jury to find that Adan's threat to kill caused the victim to reasonably fear bodily injury.

Background

Substantive Facts

Adan and M. began secretly dating in late 2013. M. testified that on October 24, 2015, Adan picked her up at her mother's house in Renton and drove her to the movie theater at Southcenter Mall. They walked to the movie theater but could not decide on a movie. They returned to the car. M. testified that back at the car Adan started "screaming and hollering and calling me names all over again like she [sic] was doing in the spring. How I'm still ugly. I'm still a lot of things." Then "[h]e physically picked me up and just took me out of the car and just dropped me and drove off." She waited there until Adan returned and apologized; then she got back in the car.

M. testified that Adan continued to yell at her as he drove to a restaurant a few blocks away. Then Adan decided that he wanted to have sex, took off all his clothes, and got into the backseat. M. said no. She asked Adan to take her home. Instead, Adan drove them to an IHOP restaurant in Seattle. At some point, Adan took M.'s phone from her. M. left the restaurant while Adan was eating and started walking toward her apartment nearby.

M. had been walking for five to ten minutes when she heard a car behind her. Adan pulled over, got out of the car, grabbed her, and physically put her into the car. As he drove off, he began yelling, calling her names, and banging his head against the car. M. testified that by this time she was scared.

M. testified that Adan started threatening her, saying, "I'm going to kill you. You know, nobody's going to find you. I'm going to take you to the lake. I'm going to dump your body. Nobody's going to find you," and "If you were in Africa, nobody would care." She responded, "Well, thank God I'm in America." Then Adan punched her twice in the mouth, knocking loose two of her teeth. He then grabbed her hair and banged her head against the passenger window. M. testified that she believed Adan was going to kill her.

Adan then drove to Colman Park on Lake Washington. He removed the SIM (subscriber identity module) card¹ and battery from M.'s cell phone. He told M. that he was taking the phone to keep her from calling the police. Adan grabbed her from the car and dragged her toward the lake as he continued to scream at her. He put her down by the lake and began to wash his hands in the water, still yelling at her, as she sat by the lake. She remembered seeing a woman walking a dog but did not recall interacting with her or anything that happened before an ambulance arrived.

Traci Janssen witnessed some of the events at the park. She testified that she was walking her dog when M. walked toward her with a bloody mouth. M. asked if she could use Janssen's phone or if Janssen would call 911 for her. Janssen saw Adan walking behind M. without speaking. Janssen quickly went to

¹ "[A] card that is inserted into a device (as a cell phone) and that is used to store data (as phone numbers or contact information)." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/SIM%20card> (last visited Apr. 15, 2016).

a different part of the park and called the police. Janssen could still see M. and Adan from where she stood. She saw Adan catch up to M., grab her in a hug, and then start screaming at her while holding her at arm's length. Soon, the police arrived. The jury heard Janssen's 911 call at trial.

Procedural Facts

The State charged Adan with assault in the second degree, felony harassment, and unlawful imprisonment. M. and Adan provided substantially different testimony about the incidents at trial. Adan denied and refuted all but one of M.'s allegations. Adan did not address the alleged sexual assault. The State largely relied on M.'s testimony about the charged incident, as only she and Adan witnessed what occurred.

During a pretrial defense interview and briefly in a statement to a police officer, M. stated that Adan sexually assaulted her a few months before. She never reported the incident to police and could not remember exactly when it took place. M. testified about the incident at trial. In the spring of 2014, she and Adan went to a park and sat in the front seats of her car. When it started getting late, M. told Adan that she wanted to leave. Adan got upset and started screaming at her and banging his head in the car. He said that he was always sacrificing for her and insulted her appearance. M. was scared. M. testified that Adan picked her up and put her in the backseat of the car. He took the car keys and locked all the doors and windows. Then he "forced himself" on her and started having sex with her. She screamed, but nobody heard her. After the

incident, she did not speak to Adan for a month, but she decided to get back together with him because she still loved him.

Before trial, the State asked the court for permission to introduce M.'s testimony about the sexual assault incident. Adan opposed the request, relying on ER 404(b). The trial court admitted the evidence. The court gave a limiting instruction twice—before the testimony was presented and before the jury deliberated. The instruction stated, “Before evidence of allegations of prior acts is allowed, the Court advises you and instructs you that you may consider the testimony only for the purpose of determining the witness’s state of mind on October 24th and 25th.” Adan also requested and received an instruction that allowed the jury to consider misdemeanor harassment, a lesser included offense of felony harassment.

The jury found Adan not guilty of assault in the second degree and felony harassment but found Adan guilty of misdemeanor harassment and unlawful imprisonment. Adan appeals.

Analysis

ER 404(b) Evidence

Adan contends that the trial court abused its discretion under ER 404(b) when it admitted M.’s testimony that Adan sexually assaulted her several months before the charged incident.

Interpretation of an evidentiary rule presents a question of law, which we review de novo.² When the trial court has correctly interpreted the rule, we review the trial court's decision to admit the evidence for an abuse of discretion.³ A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons.⁴ "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion."⁵

ER 404(b) prohibits admitting "[e]vidence of other crimes, wrongs, or acts" to prove a person's character and show the person acted in conformity with that character.⁶ The same evidence may be admissible for other purposes, depending on its relevance and the balancing of its probative value against unfair prejudice.⁷

To admit evidence of other wrongs, 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.⁸

The trial court must conduct this analysis on the record.⁹ In doubtful cases, the trial court should exclude the evidence.¹⁰ If the court admits the evidence, it must

² State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

³ DeVincentis, 150 Wn.2d at 17.

⁴ State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

⁵ State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

⁶ State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

⁷ Gresham, 173 Wn.2d at 420.

⁸ Vy Thang, 145 Wn.2d at 642.

⁹ State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)).

¹⁰ Vy Thang, 145 Wn.2d at 642; Smith, 106 Wn.2d at 776.

also give a limiting instruction to the jury.¹¹ If the trial court gives a limiting instruction, we presume jurors have followed that instruction, absent evidence proving the contrary.¹² Here, the trial court gave the jury an appropriate limiting instruction.

Adan challenges the trial court's decision on two grounds: (1) that the evidence of the prior sexual assault was not relevant to show M. reasonably feared Adan would carry out his threat to kill her and (2) that the evidence was unfairly prejudicial. Adan contends that the evidence was not relevant because the earlier sexual assault incident did not include any death threats or evidence that Adan used brute force or attempted to kill M. He also maintains that M. did not relate her fear of the charged threat to any consideration of the earlier incident. Thus, no evidence shows that the earlier incident affected her state of mind.

The trial court is generally the proper court to decide the relevance of evidence, and this court reviews its decision for abuse of discretion.¹³ Relevant evidence must tend "to make the existence of any fact that is of consequence to

¹¹ Foxhoven, 161 Wn.2d at 175.

¹² State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008); State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

¹³ Foxhoven, 161 Wn.2d at 176; State v. Lough, 125 Wn.2d 847, 861, 889 P.2d 487 (1995).

the determination of the action more probable or less probable.”¹⁴ Relevant prior misconduct evidence tends to prove an issue the jury must decide.¹⁵

A person is guilty of misdemeanor harassment if he or she knowingly threatens “to cause bodily injury immediately or in the future to the person threatened or to any other person,”¹⁶ which “places the person threatened in reasonable fear that the threat will be carried out.”¹⁷ The charge is elevated to a felony if the threat constituted a threat to kill.¹⁸ Whether the threat created a “reasonable fear” is an essential element of both misdemeanor and felony harassment.¹⁹ The fact finder applies an objective standard to determine if the victim’s fear that the threat will be carried out is reasonable.²⁰ This requires the jury to “consider the defendant’s conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.”²¹

Washington courts have allowed evidence of prior misconduct to show that a victim’s fear was reasonable. In State v. Johnson,²² this court held that evidence of the defendant’s prior controlling or domineering behavior toward the

¹⁴ ER 401; Foxhoven, 161 Wn.2d at 176; Lough, 125 Wn.2d at 861-62.

¹⁵ See State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (“[T]he evidence must be shown to be logically relevant to a material issue before the jury.”).

¹⁶ RCW 9A.46.020(1)(a)(i).

¹⁷ RCW 9A.46.020(1)(b).

¹⁸ RCW 9A.46.020(2)(b)(ii).

¹⁹ State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999).

²⁰ Ragin, 94 Wn. App. at 411.

²¹ Ragin, 94 Wn. App. at 411 (quoting State v. Alvarez, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994), aff’d, 128 Wn.2d 1, 904 P.2d 754 (1995)).

²² 172 Wn. App. 112, 120-21, 297 P.3d 710 (2012), aff’d in part, rev’d in part, 180 Wn.2d 295, 325 P.3d 135 (2014).

victim was relevant to prove the element of reasonable fear. In State v. Binkin,²³ this court held that the evidence of a prior threat against the same victim was relevant to prove the element of reasonable fear. In State v. Magers,²⁴ the Washington Supreme Court held that the trial court properly admitted evidence of acts causing defendant's prior arrest for domestic violence against the same victim and evidence of defendant fighting in jail to prove the element of reasonable fear.

Here, the evidence that Adan previously sexually assaulted M. was similarly relevant to prove that she reasonably feared Adan would kill her, an essential element of felony harassment.

Even if relevant, if the evidence's prejudicial effect substantially outweighs its probative value, a trial court cannot admit it.²⁵ Adan asserts that the trial court did not properly weigh the probative value against the prejudicial effect. He maintains that admitting the uncharged rape evidence simply caused the jurors to have "a strong emotional reaction of animosity toward [him] and believed he had an immoral and a criminal character."

The trial court must balance the probative value of the evidence against its potential prejudicial effect on the record.²⁶ In this case, the trial court considered both parties' arguments on the record before concluding that the evidence was

²³ 79 Wn. App. 284, 292-93, 902 P.2d 673 (1995), abrogated on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

²⁴ 164 Wn.2d 174, 183, 189 P.3d 126 (2008).

²⁵ Ragin, 94 Wn. App. at 412.

²⁶ Foxhoven, 161 Wn.2d at 175.

highly probative of whether M.'s fear was objectively reasonable and that this probative value outweighed its prejudicial effect.

Whether M.'s fear that Adan would carry out his threat was reasonable is a critical element of the crime charged.²⁷ M. testified that Adan behaved aggressively and erratically during the charged incident, but this behavior alone did not provide a context for M.'s state of mind.²⁸ Evidence that Adan previously assaulted her was highly probative of this issue, as M.'s experiences with Adan would significantly influence her perception of what Adan would or would not do.²⁹ Excluding this evidence would have hindered the trier of fact's ability to determine the reasonableness of M.'s fear that Adan would carry out his threat.³⁰ Although clearly prejudicial, the trial court did not abuse its discretion by deciding that its probative value outweighed its possible prejudicial effect.

Before the jury heard the evidence, the trial court provided the required limiting instruction. We assume the jurors followed those instructions and only used the evidence for the permitted purpose.³¹ Thus, the trial court did not abuse its discretion in admitting the evidence of the sexual assault under ER 404(b).

Insufficient Evidence for Misdemeanor Harassment

Adan next contends insufficient evidence supports his conviction for the lesser included offense of misdemeanor harassment. The State contends that

²⁷ Binkin, 79 Wn. App. at 292-93Smith.

²⁸ Ragin, 94 Wn. App. at 412.

²⁹ Binkin, 79 Wn. App. at 292-93.

³⁰ Ragin, 94 Wn. App. at 412.

³¹ Ragin, 94 Wn. App. at 413.

the "invited error doctrine" bars this challenge because Adan proposed the jury instructions for misdemeanor harassment as a lesser included offense.

The "invited error doctrine" prevents a party from appealing or gaining a windfall from its own errors.³² This doctrine would prohibit Adan from challenging the misdemeanor harassment instruction that he proposed at trial. But it does not prevent Adan from challenging the sufficiency of the evidence to support the jury's verdict. Because the "invited error doctrine" does not apply, we consider the merits of Adan's sufficiency challenge.

In considering a sufficiency of the evidence challenge, a reviewing court will reverse a conviction "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt."³³ The State may establish the elements of a crime by either direct or circumstantial evidence.³⁴ This court draws all reasonable inferences from the evidence in favor of the State and interprets it most strongly against the defendant.³⁵ A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences drawn from that evidence.³⁶ We defer to the trier of fact's

³² State v. Momah, 167 Wn.2d 140, 150-53, 217 P.3d 321 (2009); State v. Henderson, 114 Wn.2d 867, 869-71, 792 P.2d 514 (1990).

³³ State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³⁴ State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

³⁵ State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas, 119 Wn.2d at 201; Smith, 155 Wn.2d at 501.

³⁶ Salinas, 119 Wn.2d at 201.

decisions about credibility, conflicting testimony, and the persuasiveness of the evidence.³⁷

To convict a defendant of misdemeanor harassment the State must prove beyond a reasonable doubt that (1) the defendant knowingly threatened to cause bodily injury immediately or in the future to the victim or any other person and (2) the words or conduct of the defendant placed the victim in reasonable fear that the threat would be carried out.³⁸

In State v. C.G.,³⁹ the Supreme Court overturned the defendant's conviction for felony harassment because the victim testified to fearing only bodily harm, not death. The court held that the State needed to prove that the victim was "placed in reasonable fear that the threat made is the one that will be carried out."⁴⁰ But the court noted that when the evidence shows a defendant threatened to kill, the State might also charge the defendant "with threatening to inflict bodily injury, in the nature of a lesser included offense."⁴¹ Thus, a defendant may be convicted on the "misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury."⁴²

³⁷ State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), abrogated on other grounds by In re Pers. Restraint of Cross, 180 Wn.2d 664, 327 P.3d 660 (2014)..

³⁸ RCW 9A.46.020(1)(a)(i), (b).

³⁹ 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

⁴⁰ C.G., 150 Wn.2d at 610.

⁴¹ C.G., 150 Wn.2d at 611.

⁴² C.G., 150 Wn.2d at 611.

Adan relies on C.G. to argue that because M. did not reasonably fear the harm he threatened (death), the State presented insufficient evidence to convict him of misdemeanor harassment. Adan correctly notes that M. never testified that he threatened to inflict bodily injury, only that he threatened to kill her. Thus, the jury did not convict him for "the threat made." But the facts here are opposite those of C.G. In C.G., the victim testified to a lesser fear than the one required to prove the charged crime, and here M. testified to a greater fear than that required for misdemeanor harassment. A threat to kill undoubtedly includes the lesser threat to inflict bodily injury. And fear of the threat to kill would similarly include fear of bodily injury. The Supreme Court anticipated this very circumstance when it said that the State might charge a defendant who threatens to kill "with threatening to inflict bodily injury, in the nature of a lesser included offense." Thus, C.G. provides no support for Adan's argument.

The State presented sufficient evidence to support Adan's misdemeanor harassment conviction. M. testified that Adan threatened to kill her and that she believed he would carry out his threat. This testimony provided the only evidence of Adan's threat. We defer to the jury decisions about M.'s and Adan's credibility and do not review the jury's credibility decision on appeal.⁴³ A rational juror, having heard that Adan threatened to kill M., could then find that M. did not reasonably fear Adan would kill her but that, instead, he would injure her.

⁴³ State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335 (1987).

The State provided evidence of Adan causing M. physical harm and acting in a physically threatening manner. M. testified that Adan once sexually assaulted her after acting similarly erratically. She also testified that on the night of the charged incident, Adan grabbed and shoved her and she felt scared of him. Then, after threatening to kill her, Adan punched her in the face and hit her head against the car window. Finally, the 911 caller witnessed Adan holding M. by her shoulders and "screaming" at her, even after her teeth were dislodged. Considering all the evidence in the light most favorable to the State, a rational juror could find that M. reasonably feared that Adan was threatening to cause her bodily injury and that he would carry out the threat. We affirm the trial court.

Conclusion

The trial court did not abuse its discretion by admitting the ER 404(b) evidence of the prior sexual assault relevant to and probative of an essential element of the charged crime, which outweighed its prejudicial effect. And a rational trier of fact could have found Adan guilty of misdemeanor harassment

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beyond a reasonable doubt because Adan's threats to kill M. caused her to reasonably fear he would act on his threat by inflicting bodily injury. We affirm.

Leach, J.

WE CONCUR:

Speerman, J.

Cox, J.



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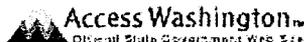
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