No. 98344-5

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Washington State
Supreme Court

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

V.

IVAN LEE AHQUIN

PETITION FOR REVIEW / DISCRETIONARY REVIEW

51658-6-II

Ivan L. Ahquin #391309
MCC/TRU/B-616-1
P.O. Box 888
Monroe, WA 98272

Prepared during CORONA VIRUS facility lockdown
Pro se Papers benefit of any doubt Akhtar V. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012).

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ATTACHMENT(S)

(A) Opening Brief of Appellant (Incorporated)

A. Identity

Ivan Ahquin asks this Court to accept review of the decision in Part B of this petition.

B. Decision

On March 11, 2020, the Court of Appeals issued its opinion in 51658-6-II. Ahquin is on direct appeal from his second degree rape, second degree assault with sexual motivation, first degree criminal trespass, unlawful imprisonment with sexual motivation, violation of a domestic violence court order, and unlawful possession of a controlled substance (methamphetamine) convictions. The Court of Appeals affirmed his convictions but remanded to strike discretionary LFO's and interest accrual provisions.

C. Issues Presented for Review

1. Does the courts decision in this case, that the trial court erred in admitting ER 404(b), ER 403 evidence, but that it was both an unconstitutional error and harmless beyond a doubt, conflict with other decision(s) in **State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986), State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950), State v. Saltarelli, 98 Wn.2d 358, 364, 633 P.2d 697 (1982), State v. Fisher, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009)**, and other cases?

2. Does the courts decision in this case, that the trial court did not err when it declined to treat the second degree rape and second degree assault convictions as same criminal conduct, conflict with other decision(s) in **State v. Williams, 156 Wn. App. 482, 495, 234 P.3d 1174 (2010), State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008), State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999), State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998),** and other cases, because the trial court did not determine whether the objective intent of the two crimes were different, or consider the rule of lenity?

D. Statement of the Case

Ivan Ahquin hereby adopts the statement of the case, designated in the Brief of Appellant, incorporated in **ATTACHMENT-A.**

E. Argument Why Review Should Be Granted

1. Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defend ant's character or propensity commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct.

(ii) In this case, there were several instances or prior acts evidence. Incorporating the argument(s) made by counsel in Ahquin's Opening Brief of Appellant, **ATTACHMENT-A,** Ahquin argues that the error's the Court of Appeals ruled harmless, were prejudicial and warrant reversal, when taken together, and in light of the fact that many instances of the prior acts evidence, were of **untried crimes,** and in light of Ahquin's (SAG) issue arguing that his attorney failed to seek severance, renders the Court's UNPUBLISHED OPINION in conflict with other similar cases, designated in Ahquin's Opning Brief of Appellant, **ATTACHMENT-A, (pg's 15-32).**

2. When sentencing a defendant for two or more current offenses, if the court finds that someor all of the current offenses constitute the same criminal conduct, those offenses are counted as one crime for purposes of calculating the offender score. RCW 9.94A.589(1)(a).

(ii) In declining Ahquin's argument that the trial court abused its discretion, the Court of Appeals restated what the trial court reasoned during sentencing. The court believed it was

possible that the jury did not rely on the same act for forcible compulsion as it did for second degree assault. However, as counsel stated in Ahquin's Opening Brief of Appellant, **ATTACHMENT-A (pg 34)**, "But that is not the relevant inquiry."

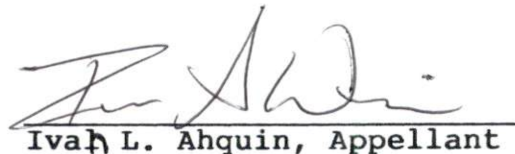
(iii) Ahquin did bear the burden of proving same criminal conduct. State v. Aldana-Garciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013), However, as the now proponent of factual contentions, and thus having the burden of proof, factual and evidentiary arguments are traditionally viewed in the light most favorable to the proponent bearing the burden of proof. Ahquin raised his same criminal conduct claim, and the court "wasn't sure". Therefore, under the rule of lenity, Ahquin met his burden of proof and the court abused its discretion when it declined to treat his crimes as same criminal conduct.

F. Conclusion

Ahquin fully incorporates his appellate counsel's arguments set forth in the Opening Brief of Appellant, included herein as **ATTACHMENT-A,** He prays for the relief of a new trial where evidence of prior acts under ER 404(b) may be

excluded from the trial, where he may be afforded the effective assistance of counsel who will seek severance of charges that otherwise infered a general sense of guilt to the jury. In the alternative, Ahquin seeks an evidentiary hearing to develope facts in support of his argument, which the Court of Appeals ruled there was insufficient record to determine if his attorney should have sought severance. At minimum, Mr. Ahquin prays for a new sentencing where he may be sentenced considering his charges as same criminal conduct.

DATED this 25th day of March, 2020.



Ivan L. Ahquin, Appellant

Additional briefing may be requested if review is accepted, Pursuant to RAP 13.7.

STATE OF WASHINGTON	)	NO. 51658-6-II
V.	)	
	)	AFFIDAVIT OF SERVICE BY MAILING
	)	
Ivan Lee Ahquin	)	

I, Ivan Lee Ahquin, do hereby certify that I have served the following documents:

Petition for Discretionary Review

Upon:

Washington COurt of Appeals
Division Two
950 Broadway, suite 300
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By placing same in the United States mail at:

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MCC/TRU/B-606-1
P.O. Box 888
Monroe, WA 98272

On this 25Th day of March, 2020.

Ivan AhQuin
Name & Number

Affidavit pursuant to 28 U.S.C. 1746. Dickerson v. Wainwright 626 F.2d 1184 (1980): Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

ATTACHMENT -A

No. 51658-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

IVAN LEE AHQUIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-00193-9
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. Assignments Of Error

1. The trial court erred where it admitted allegations of prior criminal acts committed by Ivan Ahquin in the past against the same victim in violation of ER 404(b).
2. The trial court erred in admitting improper propensity evidence under the guise of ER 404(b).
3. The trial court erred when it failed to treat the second degree rape and second degree assault convictions as the same criminal conduct in calculating Ivan Ahquin's offender score.
4. The $200.00 criminal filing fee should be stricken from Ivan Ahquin's judgment and sentence.

II. Issues Pertaining To The Assignments Of Error

1. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Ivan Ahquin's "intent" or "motive" or "state of mind" where his intent or motive or state of mind were not materially relevant in the case? (Assignments of Error 1 & 2)
2. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Ivan Ahquin's "intent" or "motive" or "state of mind" where the admitted evidence was not probative of Ahquin's intent or motive or state of mind?

(Assignments of Error 1 & 2)

3. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing the victim's "state of mind," where the evidence was only marginally probative of that issue but the prejudice was significant, and where other admitted evidence established the relevant state of mind? (Assignments of Error 1 & 2)

4. Where prior acts evidence was not admitted for a proper purpose under ER 404(b), was the admission error because it was merely propensity evidence? (Assignments of Error 1 & 2)

5. Did the trial court err when it failed to treat the second degree rape and second degree assault convictions as the same criminal conduct in calculating Ivan Ahquin's offender score because the two crimes shared the same victim, time and place, and criminal intent? (Assignment of Error 3)

6. Should the $200.00 criminal filing fee be stricken from Ivan Ahquin's judgment and sentence where the criminal filing fee statute has been amended to prohibit imposition of the fee on an indigent defendant and where Ivan Ahqin is indigent? (Assignement of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ivan Lee Ahquin with seven crimes and related aggravators all arising from a lengthy incident occurring on January 14, 2017, at alleged victim J.G.-E.'s apartment. The seven counts were:

(1) first degree rape by with domestic violence aggravator
(2) second degree assault with domestic violence and sexual motivation aggravators
(3) first degree burglary with domestic violence and sexual motivation aggravators
(4) unlawful imprisonment with domestic violence and sexual motivation aggravators
(5) violation of a domestic violence court order with domestic violence and sexual motivation aggravators
(6) felony harassment with domestic violence aggravator
(7) unlawful possession of a controlled substance

(CP 3-6)

Over objection, the trial court allowed the State to introduce testimony that Ahquin contacted J.G.-E. in violation of a no-contact order and/or assaulted J.G.-E. on three previous occasions. (CP 61-62; RP2 156-72)[1] The State found the testimony relevant to Ahquin's motive, intent or state or mind, and to J.G.-E.'s state of mind regarding the harassment charge. (RP2 131-38, 156-72) The

[1] The transcripts labeled volumes 1 through 10 will be referred to by their volume number (RP#). The transcript for the sentencing hearing will be referred to as RPS. The remaining transcript will be referred to by the date of the proceeding.

court instructed the jury to limit their consideration of the evidence for these purposes. (CP 137-39; RP6 726-27, 737-38, 745-46)

The jury returned verdicts for each of the counts and their aggravators as follows:

(1) guilty of second degree rape
(2) guilty of second degree assault with sexual motivation aggravator
(3) guilty of criminal trespass
(4) guilty of unlawful imprisonment with sexual motivation aggravator
(5) guilty of violation of a domestic violence court order
(6) not guilty of harassment
(7) guilty of unlawful possession of a controlled substance

(CP 194-216; RP10 1438-43)

The trial court denied Ahquin's sentencing request to either merge the rape and assault convictions or to treat the two offenses as the same criminal conduct. (RPS 4-18) The trial court imposed the high end of Ahquin's standard range, for a term of confinement totaling 316 months to life in prison. (RPS 33; CP 231, 234-36)

Ahquin filed a timey notice of appeal. (CP 254)

B. SUBSTANTIVE FACTS

J.G.-E. and Ivan Ahquin have known each other since they were teenagers because their families lived in the same neighborhood and frequently socialized. (RP6 713-18, 810-11) J.G.-E. is now in her 40's and has three children of her own. (RP6

705) Prior to June 2017 she lived with her 16 year-old daughter in an apartment in Lakewood. (RP6 707, 722) She was also married but separated at the time, and hoped she and her husband might eventually reconcile. (6RP 827, 833, 834)

During the spring of 2016, J.G.-E. and Ahquin ran into each other at a local casino. (RP6 718, 719) They spent the evening together, and remained in contact through social media. (RP6 719) They began dating towards the end of the summer and quickly became intimate and "inseperable." (RP6 719, 720) Ahquin lived in a trailer parked on his mother's property, but frequently spent the night at J.G.-E.'s apartment. (RP6 720-21, 722)

According to J.G.-E., they engaged in frequent sexual activity, but that it was "basic," meaning they did not use any toys or watch pornography or engage in "rough sex." (RP6 723-24) Despite having been intimate with about 10 people and being married and having three children, J.G.-E., testified that she was "not very experienced." (RP6 723-24)

Their relationship was positive at first, but J.G.-E. testified that Ahquin started becoming violent with her in mid-September. (RP6 725) She claimed Ahquin was physically and verbally abusive, but that he apologized and she decided to forgive him and

gave him another chance. (RP6 725-26)

J.G.-E. and Ahquin had an argument on October 14, 2016 that turned into a physical altercation. (RP6 727, 729) During their argument, J.G.-E.'s voice escalated and, according to J.G.-E., "he would grab my neck and squeeze so I couldn't make a sound, and I couldn't cry and I couldn't breathe ... He would say it in my ear: 'Shut the fuck up; shut the fuck up.'" (RP6 729-30) J.G.-E. testified that Ahquin pinned her on the bed and shook her head, and that she received a black eye because her head became caught between the mattress and the bedframe. (RP6 727, 779, 731) Ahquin blocked her from leaving the apartment, but eventually the police were called and Ahquin left.[2] (RP6 728, 736-37)

On December 23, 2016, J.G.-E. obtained a protection order prohibiting Ahquin from contacting her. (RP6 741; RP8 1079; Exh. P112) She nevertheless frequently initiated and allowed contact between herself and Ahquin, and several times engaged in consensual sex with Ahquin despite the protection order. (RP6 741-42, 743, 744, 754, 814-15)

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[2] Testimony describing this incident was admitted over defense objection for the limited purpose of showing Ahquin's "motive or intent as to the charge of unlawful imprisonment;" Ahquin's "state of mind or motive as to the charge of rape;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 726-27; CP 137)

On December 30, 2016, J.G.-E. returned home and found Ahquin in her apartment. (RP6 738) She did not know how Ahquin got in because she lives on the second floor of a secured building and Ahquin did not have a key. (RP6 708, 738-39) J.G.-E. testified that Ahquin immediately pushed her down and held her in a chair, and when she started talking loudly he grabbed her by the neck and strangled her.[3] (RP6 738, 739-40) When Ahquin stopped to get himself some water, J.G.-E. fled to her neighbor Ethel Cantrell's apartment and called the police.[4] (RP6 738, 740)

On January 13, 2017, Ahquin came to J.G.-E.'s apartment. (RP 746) She cannot remember if he let himself in somehow or if he knocked on the door and she let him in. (RP6 746-47) But she remembers that she was very concerned for his safety and well-being because he told her he wanted to commit suicide. (RP6 746-48) J.G.-E. testified she could not immediately leave or call the police because she did not have a telephone and was blocked in the bedroom. (RP6 748) But she was also afraid that Ahquin was

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[3] Testimony describing this incident was admitted over defense objection for the limited purpose of showing Ahquin's "motive or intent as to the charges of Assault in the Second Degree, Burglary in the First Degree, Unlawful Imprisonment, and Violation of a No-contact Order;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 737-38; CP 138)

[4] Cantrell and her daughter, Amanda Stone, confirmed that J.G.-E. came to the apartment crying and asked them to call the police because Ahquin was in her apartment and would not leave. (RP8 1061-62, 1068-69)

going to hurt himself. (RP6 747-48, 749) J.G.-E. eventually went next door to Cantrell's apartment and called the police.[5] (RP6 748)

Lakewood Police Officer Dennis Harvey responded to this call. (RP7 991, 993) He first spoke to J.G.-E., who appeared high or intoxicated, and she pleaded with the officer not to hurt Ahquin. (RP7 996-97, 999) When he attempted to contact Ahquin inside J.G.-E.'s apartment, he found that the apartment door was blocked with heavy furniture. (RP7 997) The officers were able to force the door open but Ahquin was no longer inside the apartment. (RP7 997-98) Officer Harvey noticed that a window on the back wall of the living room was open. (RP7 998)

Later that night, at about 2:00 or 3:00 AM on January 14, J.G.-E. was awakened by the sound of her dog barking. (RP6 745, 752) She went to the living room and saw Ahquin climbing through a window. (RP6 753) Because of Ahquin's earlier suicidal talk, J.G.-E. was more concerned than scared at that point. (RP6 754) So, rather than calling the police, she went back to the bedroom. (RP6 754)

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[5] Testimony describing this incident was admitted over defense objection for the limited purpose of showing "the context and circumstances leading to the events allegedly occurring on January 14th, 2017;" Ahquin's "motive or intent as to the charge of Violation of a No-contact Order;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 745-46; CP 139)

According to J.G.-E., Ahquin followed her to the bedroom and immediately began arguing with her and accusing her of having another man in the apartment. (RP6 755) Ahquin called J.G.-E. names and accused her of cheating on him. (RP6 755) J.G.-E. raised her voice to Ahquin, and Ahquin grabbed her by the neck and threw her onto the bed. (RP6 755, 761-62) Ahquin forcefully took off J.G.-E.'s clothes, and squeezed her neck hard enough to restrict her breathing and keep her from making a sound. (RP6 756, 761)

During this altercation, J.G.-E.'s telephone fell on the floor and broke, and Ahquin told her to clean it up. (RP 761, 763, 765-66) Because she was naked, she tried to grab clothing or a blanket to cover herself while she cleaned, but Ahquin kept pulling them away. (RP6 761, 763-64)

J.G.-E. needed to use the restroom. (RP 756-57, 765) So Ahquin took her arm and escorted her past the front door to the bathroom, stood in the doorway while she urinated, wiped her with a washcloth when she was done, then escorted her back to the bedroom. (RP6 757-59)

J.G.-E. was "fighting" to get away and "yelling" and "screaming," so Ahquin grabbed her by the throat again and

squeezed. (RP6 764, 775) J.G.-E. began to feel weak and started to slide to the floor. (RP6 777) According to J.G.-E., Ahquin placed his penis in her mouth. (RP6 777) She started crying and asked him not to do it. (RP6 777) Ahquin picked her up and placed her back on the bed, then briefly left the room. (RP6 777-78) J.G.-E. could hear him rummaging in the bathroom. (RP6 778)

When he returned he was holding her curling iron. (RP6 779-80) He approached J.G.-E. and lifted her legs up in the air. (RP6 780) J.G.-E. testified that she begged him not to put it inside her, but he told her she "needed to stop being a baby and [she] needed to open up to experiences and be a woman." (RP6 780) Ahquin first put the curling iron inside her vagina, which she described as painful and uncomfortable. (RP6 780-81, 782, 783)

Ahquin then removed the curling iron and inserted it into J.G.-E.'s anus. (RP6 783) J.G.-E. testified that it hurt and she begged him to stop. (RP6 785) J.G.-E. testified that Ahquin told her she should stop being a baby and should stop crying. (RP6 785) If J.G.-E. got too loud, Ahquin would grab her by the throat to make her be quiet. (RP6 786)

After a few minutes Ahquin removed the curling iron and penetrated her vagina with his penis. (RP6 784, 787, 788) J.G.-E.

testified that at one point she told Ahquin to "take me out of my misery and just kill me now[.]" (RP6 789) He responded, "Before I take you out of your misery, I'm going to get a burner from my white nephew and I'm going to make you watch me kill everybody in the building before I kill you." (RP6 789) Then Ahquin removed his penis from her vagina, placed it in her mouth, and ejaculated. (RP6 784, 786, 790)

J.G.-E. asked if she could take her dog outside to pee, and Ahquin said she could but that she better come back. (RP6 791) On her way out the front door J.G.-E. grabbed her cellular phone. She did not want to run because she was concerned he would get suspicious and leave before the police could arrive, and she did not want him to get away again. (RP6 792) So she called Cantrell and asked her to call the police.[6] (RP6 792) Then she returned to the apartment. (RP6 792)

Responding officers were aware that Ahquin had fled upon their arrival the day before. (RP5 599, 642) So when they knocked and J.G.-E. asked who was there, they responded "management." (RP5 601, 642m 645; RP6 794) A scared looking J.G.-E. opened

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[6] Cantrell confirmed that J.G.-E. called her and told her that Ahquin was in the apartment and asked her to call the police. (RP8 1070-71)

the door and was immediately ushered out by the officers. (RP5 602; 645) The officers found Ahquin in the bedroom and placed him under arrest.

As the officers escorted Ahquin out of the apartment, J.G.-E. began crying and said, "Thank you for arresting him." (RP5 655) J.G.-E. described the incident to the officers. They noted that her voice was hoarse and scratchy and she appeared to have scratches on her jawline and red marks on her neck. (RP5 657)

The officers noted that a window was open and its screen was on the floor of the living room. (RP5 652, 659-60) The officers also found footprints on an AC unit and electric fixtures on the back of the building leading to the same window. (RP5 652) The officers found a curling iron on a dresser in the bedroom. (RP7 922) The cord had been cut and removed. (RP7 922) During a search incident to arrest, the officers also found a folding knife and a small baggie of methamphetamine in Ahquin's pockets. (RP5 603, 604, 606; RP8 1077-78))

J.G.-E. was transported to the hospital and took part in a sexual assault forensic examination. (RP6 796; RP7 953) The nurse examiner noted bruising on J.G.-E.'s arms and thigh but did not see any bruising or swelling in her neck area. (RP7 969-70,

987) The nurse also noted lacerations around J.G.-E.'s vagina and rectum, and a laceration and slight bleeding around her cervix. (RP7 973-75)

Several of Ahquin's family members testified that J.G.-E. initiated contact with Ahquin multiple times after the protection order was issued. (RP8 1118, 1122-23, 1133; RP9 1128, 1237, 1238) Several times she came to his mother's property looking for him when he was not there and refused to leave when asked. (RP8 1123-24, 1135, 1143, 1145; RP9 1228, 1237-38) Other times, Ahquin was there but hid in his trailer until she left because he did not want to have contact with her. (RP8 1125-26; RP9 1187) J.G.-E. would become angry because she thought Ahquin's family members were lying and would not let her see him. (RP8 1125; RP9 1238)

Ahquin testified on his own behalf. He testified that they frequently engaged in sexual intercourse throughout their relationship, and that they occasionally used sex toys and engaged in anal sex and light bondage activities. (RP9 1172-73) These acts were always mutually agreed to and consensual. (RP9 1173-74) Ahquin testified that J.G.-E. asked him to put his hand around her throat during intercourse, so he tried it but did not like it so he

stopped. (RP9 1174-75)

Ahquin also testified that J.G.-E. often became jealous and angry when he communicated with other women. (RP9 1175-76) She would scream and yell and accuse him of cheating on her. (RP9 1176)

He knew that J.G.-E. obtained a protection order, but they both ignored it and kept dating and sleeping together. (RP9 1183-84, 1185-86) He denied assaulting J.G.-E. on October 14 and testified that he left J.G.-E.'s apartment when asked to on December 30. (RP9 1176-77, 1182-83) He climbed out of the window on January 13 because he did not want to be arrested for being at the apartment. (RP9 1183)

On January 13, Ahquin and J.G.-E. had consensual sex twice, including vaginal, oral and anal sex. (RP9 1197, 1200) Later, J.G.-E. and Ahquin began arguing again about other women, so Ahquin decided to leave. (RP9 1199-1200)

But when Ahquin later received a text from J.G.-E. telling him she was going to kill herself by overdosing on pills, he became concerned. (RP9 1205) He went back to her apartment, but she did not answer his texts or calls. (RP9 1206) He was afraid she might be unconscious, so he climbed up to her window. (RP9

1206) He knocked on the glass, and J.G.-E. came over and let him in. (RP9 1207)

They talked and cuddled, and eventually had sex again. They used the curling iron as a sex toy. (RP9 1208, 1209-10) Later that morning, J.G.-E. left the apartment to throw away a bag of garbage. (RP9 1216) Soon after she returned, there was a knock on the door and the police were there to arrest him. (RP9 1217)

Ahquin testified that he never grabbed J.G.-E.'s neck in order to strangle her or prevent her from breathing. (RP9 1218) He denied threatening to kill her or the other people in her apartment building. (RP9 1219) He did not prevent J.G.-E. from leaving her apartment. (RP9 1219) And all sexual acts they engaged in were consensual. (RP9 1210, 1211, 1219)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED IN ADMITTING THE PRIOR BAD ACTS EVIDENCE BECAUSE IT WAS NOT RELEVANT AND THEREFORE AMOUNTED TO INADMISSIBLE PROPENSITY EVIDENCE.

1. *Absent a specific exception, propensity evidence is inadmissible.*

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to

commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Before evidence of prior crimes, wrongs, or acts can be admitted, two criteria must be met. First, the evidence must be shown to be logically relevant to a material issue before the jury. The test is "whether the evidence ... is relevant and necessary to prove an essential ingredient of the crime charged." State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982), (quoting State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952) (Goebel II.)) Second, if the evidence is relevant its probative value must be shown to outweigh its potential for prejudice.

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity with the charged crime. Otherwise "motive" and "intent" could be used as "magic passwords whose

mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. State v. Fisher, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009) (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must also be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. Fisher, 165 Wn.2d at 745. Evidence of prior acts should be excluded if "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) (Gobel I)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." Smith, 106 Wn.2d at 776.

This Court reviews the trial court's interpretation of ER

404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court's ruling admitting evidence is reviewed for abuse of discretion. Fisher, 165 Wn.2d at 745. A trial court abuses its discretion where it fails to abide by the rule's requirements. Fisher, 165 Wn.2d at 745.

The trial court in this case admitted the above-described testimony regarding two prior uncharged incidents where Ahquin allegedly contacted J.G.-E. at her apartment, they argued, and Ahquin pinned J.G.-E. down and forcefully grabbed her neck. (RP6 727-31, 738-39) The court found the October 14, 2016 incident to be probative of Ahquin's intent and motive "to both unlawfully imprison [J.G.-E.] and to force himself upon her sexually." (RP2 163-64) The court also found the incident to be probative of J.G.-E.'s reasonable fear that Ahquin would carry out his threat to kill her. (RP2 163-64; CP 137)

The court found the December 30, 2016 incident to be probative of Ahquin's motive and intent to have contact with J.G.-E., to enter her home without permission, to show he would assault and restrain her "if necessary" so he could "be with her for sexual purposes," to show his intent to "enter her home, despite not being invited," and to show his intent and motivation to be with J.G.-E.

"regardless of a court order to the contrary." (RP2 168-69) The court found the incident also to be probative of J.G.-E.'s reasonable fear that Ahquin would carry out his threat to kill her.[7] (RP2 169)

The court found that the probative value of the testimony relating these two incidents outweighed the potential prejudicial impact. (RP2 165, 169-70) The jury was given limiting instructions. For the October 14, 2016 incident, the court instructed the jury that it could consider the testimony only for the limited purposes of showing Ahquin's "motive or intent as to the charge of unlawful imprisonment;" Ahquin's "state of mind or motive as to the charge of rape;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 726-27; CP 137) For the December 30, 2016 incident, the court instructed the jury that it could consider the testimony only for the limited purposes of showing Ahquin's "motive or intent as to the charges of Assault in the Second Degree, Burglary in the First Degree, Unlawful Imprisonment, and Violation of a No-contact Order;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 737-38; CP 138)

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[7] Admission of the third incident occurring on January 13, 2017, involving contact but no assault, is not being challenged on appeal because it was also admitted for the alternative, and apparently proper, purpose of showing "context and circumstances leading to the events occurring on January 14, 2017[.]" (CP 139; RP6 745-46)

However, motive and intent were not material issues in this case and, even if they were, the admitted testimony was not necessary or relevant to establish motive, intent or state of mind during the charged incident. The testimony was improperly admitted because it did not rise beyond mere propensity evidence.

2. *The testimony was not admissible to establish Ahquin's intent or state of mind.*

The trial court admitted the testimony of Ahquin's prior contacts and assaults against J.G.-E., believing it was relevant to show his intent relating to assault, burglary, unlawful imprisonment, and violation of a no-contact order, and his intent or state of mind relating to rape. (CP 137, 138; RP2 164-65, 168-69)

However, a trial court may not admit prior acts evidence to prove the defendant's intent or state of mind unless his mental state at the time of the alleged offense is relevant, and unless the prior acts shed light on his state of mind at the time of the charged offense. State v. Acosta, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). To admit evidence of prior acts to prove intent, some logical theory – other than propensity – must connect the prior acts to intent, which must be an element of the charged offense. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). "The

evidence should not be admitted to show intent ... if intent is of no consequence to the outcome of the action." Saltarelli, 98 Wn.2d at 363.

Unlawful imprisonment contains no statutory intent requirement, but occurs when a person knowingly restrains another person. RCW 9A.40.040(1). Thus, intent is not an element of unlawful imprisonment. *See* State v. Billups, 62 Wn. App. 122, 134, 813 P.2d 149 (1991) (Scholfield, J. (dissenting)). Likewise, the essential elements of domestic violence violation of a no contact order are (1) willful contact with another, (2) prohibition of such contact by a valid court order, and (3) the defendant's knowledge of the no contact order. State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001); RCW 26.50.110. Intent is not an element of the crime of violating a no-contact order. Thus, Ahquin's intent in committing either of these crimes was not an issue, and the prior incidents were unnecessary and irrelevant for this particular purpose.

Likewise, Ahquin's intent in committing rape was also not an issue in this case. The criminal intent and state of mind that is "necessary to be shown in the crime of rape is shown by the doing of the acts constituting the offense." State v. Smith, 3 Wn.2d 543,

553, 101 P.2d 298 (1940). That is, the State need prove only the act of intercourse and manifest—i.e., made known to the perpetrator—lack of consent. The requisite culpable mental state is the intent to have intercourse without consent, which the State proves by proving the fact of forcible intercourse. State v. Geer, 13 Wn. App. 71, 75, 533 P.2d 389 (1975); Smith, 3 Wn.2d at 553.

For example, in Saltarelli, *supra.*, the defendant was convicted of second degree rape. At his trial, he did not deny having intercourse with the victim, but maintained that she consented. The Court found that evidence of a prior attempted rape of another woman several years prior was improperly admitted to show his intent. Saltarelli, 98 Wn.2d at 366.

The Court found no issue of intent in Saltarelli's case because the defendant admitted having intercourse with the victim and the only issue was whether the victim consented.

> "Where the charge is of *rape,* the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application."

Saltarelli, 98 Wn.2d at 366 (quoting 2 J. WIGMORE, EVIDENCE § 357, at 334 (Chadbourn rev. ed. 1979) (emphasis in original)). Similarly

here, Ahquin admitted engaging in sexual acts with J.G.-E., and the only issue was whether those acts were consensual. Ahquin's intent or state of mind was not at issue, and the evidence of the prior incidents were not relevant for the purposes of proving the rape charge. The State merely needed to show intercourse, which Ahquin did not contest, and lack of consent, which was proved by other evidence indicating use of force.

Finally, to convict Ahquin of burglary, the jury was instructed that it must find that he entered or remained unlawfully in J.G.-E.'s apartment "with intent to commit a crime against a person or property therein." (CP 164) And to convict Ahquin of assault, the jury had to find that he assaulted J.G.-E. "with intent to commit rape." (CP 145) Accordingly, Ahquin's intent was relevant to an issue at trial for these charges. However, the October 14 and December 30 incidents were not relevant or probative of Ahquin's intent on January 14. The circumstances of the prior assaults shed no new light on the question of whether Ahquin intended to commit a crime in J.G.-E.'s apartment on January 14, or on whether Ahquin assaulted J.G.-E. on January 14 because he intended to commit a rape. The only way these prior incidents proved intent was through an improper propensity inference.

For example, this Court reversed a conviction because the trial court committed a similar error in State v. Holmes, 43 Wn. App. 397, 717 P.2d 766 (1986). The defendant in that case was charged with burglary and the trial court admitted evidence of the defendant's two prior convictions for theft. The State argued, and the trial court agreed, that the evidence was relevant to prove intent. 43 Wn. App. at 398. This Court held the admission of the prior acts violated ER 404(b):

> Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

Holmes, 43 Wn. App. at 400.

In Wade, *supra.*, this Court similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. 98 Wn. App. at 332. The court noted that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged

offense." 98 Wn. App. at 334 (emphasis in original). Such a non-propensity theory rarely exists:

> When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

98 Wn. App. at 335.

Similarly here, the only logical relevance of the prior acts is based on a propensity argument: Because Ahquin entered J.G.-E's apartment without permission and assaulted her in in the past, it is likely that he entered without permission and assaulted her again on January 14. As in Holmes and Wade, this is improper and the admission of the other acts violated ER 404(b).

3. *The testimony was not admissible to establish Ahquin's motive.*

The trial court admitted the testimony of Ahquin's prior contacts and assaults against J.G.-E., believing it was relevant to show his motive relating to rape, assault, burglary, unlawful imprisonment, and violation of a no-contact order. (CP 137, 138;

RP2 164-65, 168-69) But the fact of the prior incidents does not tend to prove Ahquin's motive for committing the charged crimes.

Motive is not the same as *mens rea*. *Mens rea* describes the purposefulness with which an act is committed. See BLACK'S LAW DICTIONARY p. 985 (6th rev. ed. 1992) ("defining mens rea as "a guilty or wrongful purpose"). Motive on the other hand is "[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." Saltarelli, 98 Wn.2d at 365 (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); and BLACK'S LAW DICTIONARY, p. 1164 (4th rev. ed. 1968)).

For example, in State v. Hieb, 39 Wn. App. 273, 693 P.2d 145 (1984),[8] Division 1 held that in a prosecution for the murder of a child, evidence that the defendant had injured the child on other occasions was inadmissible to show motive. The court explained:

> It is difficult to ascertain how the prior assaults on [the child] could be a motive or inducement for Hieb's later assault on [the child]. There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to Hieb's motive for the last assault. The evidence was not admissible on this basis.

Hieb, 39 Wn. App. at 282-83.

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[8] Reversed on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986).

Similarly, in Saltarelli, the Court found that evidence of a prior attempted rape of another woman several years prior was improperly admitted to show the defendant's motive for the current charge of second degree rape. 98 Wn.2d at 365. The Court first noted that "[i]t is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later." 98 Wn.2d at 365. But even if there was some marginal relevance, the Court found that its probative value would be slight because "[t]he only issue was whether the victim consented to intercourse with defendant; in the present case, defendant's motive was irrelevant to this issue." 98 Wn.2d at 365.

Likewise, the reason or motivation for why Ahquin committed the current acts is irrelevant. But even if Ahquin's motive is marginally relevant, it is unclear how the alleged prior acts induced or tempted Ahquin to commit the acts giving rise to the charges here. Instead, the only relevance of the prior acts is to suggest that because he acted in this manner before he must have done so again, i.e., that he has a propensity to assault or rape or unlawfully contact J.G.-E. But that is not a proper use of prior acts evidence. ER 404(b). Thus, the evidence was not relevant to show Ahquin's motive and was improperly admitted for this purpose. See

Saltarelli, 98 Wn.2d at 365.

4. *The testimony was not relevant or probative of J.G.-E's state of mind.*

Finally, the court found the testimony relevant to show J.G.-E.'s state of mind as to the charge of harassment. To prove that charge, the State had to show that J.G.-E. was placed in reasonable fear by the threat to kill her. RCW 9A.46.020(1)(b), .020(2)(b). Although the testimony relating the prior incidents may have had some relevance to this issue, the relevance was minimal and unnecessary. J.G.-E. described several assaultive and threatening acts over the course of the charged incident. She also described Ahquin's threat in detail and testified that she took his threat seriously. (RP6 789) Whatever marginal relevance the prior conduct may have had on J.G.-E.'s state of mind was far outweighed by the prejudicial impact and should not have been admitted.

5. *The error in admitting the other acts evidence requires reversal.*

The erroneous admission of ER 404(b) evidence, requires reversal if the error, "within reasonable probability, materially affected the outcome." State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was

harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); Acosta, 123 Wn. App. at 438.

It is well recognized that evidence of a defendant's prior criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Calegar, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the charged crime. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

Furthermore, the potential for prejudice is even higher where the prior act is for an offense that is nearly identical to a current charge. *See* State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to "the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a

general guide, those convictions which are for the same crime should be admitted sparingly[.]" Newton, 109 Wn.2d at 77 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967)).

It is also well recognized that evidence of prior instances of domestic violence are highly prejudicial. Accordingly, "[t]o guard against this heightened prejudicial effect, [court's should] confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value[.]" State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

The detailed testimony about the prior irrelevant assaults, committed in a similar way to the current charge, was at best minimally probative. But they were highly prejudicial. The admission of the prior acts therefore violated not only ER 404(b), but also ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative.

Furthermore, it is normally improper to admit evidence of prior instances of domestic violence for the sole purpose of bolstering a victim's credibility. See State v. Ashley, 186 Wn.2d 32, 47, 375 P.3d 673 (2016); Gunderson, 181 Wn.2d at 924-25. But that is exactly what this evidence likely did in this case; it inappropriately bolstered J.G.-E.'s credibility in a case that rested

entirely on the jury's determination of whether J.G.-E. or Ahquin was more credible.

And this prejudice was compounded when the prosecutor impliedly made a propensity argument to the jury. The prosecutor began his closing arguments by saying to the jury: "I told you two weeks ago, you are going to hear a case about *escalation*, power and control." (RP10 1366-67, emphasis added) He said J.G.-E. was in a "cycle of violence." (RP10 1377)

The prosecutor also talked about how J.G.-E. gave Ahquin a "second chance" and "third chance" and "fourth chance" and still wanted to be friends, then asked the jury:

> Can you not maintain some level of communication and contact *without having to be sexually assaulted every single time*? Can't you just remain friends? Not to Mr. Ahquin. Mr. Ahquin was not going to take that laying down.

(RP10 1377, emphasis added) The prosecutor also stated:

> there was one thing that was *a constant* in her life and in her relationship with Mr. Ahquin, and that's when she got too loud, he was going to quiet her down, and he did that by choking her *repeatedly*, strangling her.

(RP10 1381, emphasis added)

In other words, the prosecutor used these prior incidents to argue that Ahquin had a pattern of using violence towards J.G.-E.

The prosecutor did not limit his use of these prior incidents to establish Ahquin's intent or motive or state of mind on January 14.

The trial court erred when it allowed the State to present detailed testimony about the prior irrelevant assaults. The prejudice from this error could not be cured by the limiting instruction, and Ahquin's convictions must be reversed.

B. AHQUIN'S RAPE AND ASSAULT CONVICTIONS WERE THE SAME CRIMINAL CONDUCT.

The jury convicted Ahquin of second degree assault with sexual motivation (RCW 9A.36.021, RCW 9.94A.030(48)) and second degree rape (RCW 9A.44.050). (CP 195, 198, 200) The jury had been instructed that to convict Ahquin of second degree rape they must find that Ahquin engaged in sexual intercourse with J.G.-E. "by forcible compulsion." (CP 150) The jury had been instructed that to convict Ahquin of second degree assault they must find that he assaulted J.G.-E. either (1) "with intent to commit Rape" or (2) "by strangulation." (CP 145) To support its finding that the assault was committed "with a sexual motivation," the jury was required to find that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." (CP 192)

At sentencing, Ahquin asked the court to either merge the rape and assault convictions, or to treat them as the same criminal conduct in calculating his offender score. (RPS 4-5, 8-12, 16-17) The trial court declined, because it was not certain that the jury relied on strangulation as the forcible compulsion used to commit the rape. (RPS 17-18) While this may be accurate for the purposes of analyzing merger in this case,[9] the court erred when it applied this reasoning to find that the rape and assault offenses were not the same criminal conduct.

When sentencing a defendant for two or more current offenses, if the court finds that some or all of the current offenses constitute the same criminal conduct, those offenses are counted as one crime for purposes of calculating the offender score. RCW 9.94A.589(1)(a). "'Same criminal conduct' means that multiple crimes require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). "Intent in this context means the defendant's objective criminal purpose in committing the crime." State v.

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[9] For example, in State v. Williams, 156 Wn. App. 482, 495, 234 P.3d 1174 (2010), the assault and rape convictions merged because there was evidence of only one single assault that could have caused the injury necessary to elevate the crime of rape as charged in that case.

Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008).

The relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) (citations omitted). In addition, the court considers whether one crime furthered the other. State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998).

A trial court's determination of what constitutes "same criminal conduct" for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The trial court here abused its discretion because it did not make the proper inquiry as required by the sentencing statute and case law. The trial court declined to treat the crimes as same criminal conduct because it was not sure what instance of force the jury relied upon to find forcible compulsion for the rape. (RPS 17-18) The court believed it was possible the jury did not rely on the same act for forcible compulsion as it did for second degree assault. (RPS 17-18) But that is not the relevant inquiry.

Instead, the trial court should have considered whether the second degree assault furthered the rape and whether Ahquin's

objective intent in committing the second degree assault and the rape was the same. If it had the court would have undoubtedly concluded that the two offenses were the same criminal conduct.

The State alleged and asserted repeatedly that Ahquin entered the apartment with the goal of raping J.G.-E., and that every act thereafter, including the assault, was done in furtherance of that goal. This is demonstrated in the charging document, where the state alleged a sexual motivation aggravator for the assault, burglary, unlawful imprisonment and protection order violation charges. (RP 3-6) It is demonstrated in the jury instructions, which asked the jury to find that the assault, burglary, unlawful imprisonment and protection order violation offenses were sexually motivated. (CP 181-92) It is also demonstrated by the prosecutor's closing statements, where he told the jury that: "His motivations and his intent for entering that home was sexual. It was sexual motivation, 100 percent sexual motivation." (RP10 1378) And the prosecutor argued that the jury should find Ahquin guilty of assault because, when J.G.-E. was screaming and begging him to stop, "Ahquin tried to stop that screaming, to try to get his way by putting enough pressure on her neck so that she couldn't breathe." (RP10 1382) And the jury clearly agreed by convicting Ahquin of second

degree assault with a sexual motivation finding. (RP10 1439; CP 198, 200)

The State's theory, and the evidence presented at trial, clearly demonstrate that the assault furthered the rape and that Ahquin's objective intent in committing the second degree assault and the rape were the same. Any force or strangulation used upon J.G.-E. that night was done in furtherance of and with the intent of committing a rape.

All three requirements for same criminal conduct are met in this case. The victim of both offenses was J.G.-E. The offenses occurred at the same time and at the same place. And the offenses involved the same objective intent: to force J.G.-E. to have sexual intercourse. The two offenses encompass the same criminal conduct, and should have been treated as such for the purpose of calculating Ahquin's offender score.

C. THE $200.00 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM AHQUIN'S JUDGMENT AND SENTENCE.

At sentencing, the trial court considered Ahquin's financial circumstances and found that he was indigent and did not have the ability to repay discretionary legal financial obligations (LFOs). (RPS 27, 33; CP 31) The trial court waived the DNA database fee,

but imposed the mandatory $500.00 crime victim assessment fee and $200.00 criminal filing fee. (CP 32) The trial court also found that Ahquin did not have the financial resources to pay for his appeal and signed an Order of Indigency. (CP 220-22, 223-24)

However, the legislature recently amended the criminal filing fee statute, RCW 36.18.020. Pursuant to the amendment, the $200.00 fee may not be imposed on an individual who is indigent under RCW 10.101.010(3) (a) through (c). Laws of 2018, ch. 269, § 17.

Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level. The record demonstrates Ahquin is indigent under RCW 10.101.010(3)(c), because his annual income does not exceed 125 percent of the poverty level. At sentencing, Ahquin had no source of income and no savings. (CP 221-22) He will be incarcerated for 316 months to life. (CP 234-36) There is no question that he is indigent.

Recently, in <u>State v. Ramirez</u>, 2018 WL 4499761 at *8 (Sept. 20, 2018) the State Supreme Court found that these amendments

applied prospectively to Ramirez's case because it was still on appeal and his judgment was not yet final. The Court remanded his case for the trial court to amend the judgment and sentence to strike the criminal filing fee and other improperly imposed LFOs. Similarly, Ahquin's case is on appeal and his judgment is not yet final. His case should be remanded to the trial court to amend the judgement and sentence to strike the $200.00 criminal filing fee.

V. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court must reverse Ahquin's convictions. Alternatively, because the rape and assault convictions are the same criminal conduct, Ahquin's case must be remanded for resentencing and to strike the criminal filing fee.

DATED: October 1, 2018

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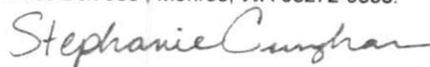
CERTIFICATE OF MAILING

I certify that on 10/01/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ivan L. Ahquin, DOC# 391309, Monroe Correctional Complex, Twin Rivers Unit – B603, Post Office Box 888 , Monroe, WA 98272-0888.



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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. IVAN LEE AHQUIN, Appellant.	No. 51658-6-II UNPUBLISHED OPINION

LEE, A.C.J. — Ivan L. Ahquin appeals his convictions for second degree rape, second degree assault with sexual motivation, first degree criminal trespass, unlawful imprisonment with sexual motivation, violation of a domestic violence court order, and unlawful possession of a controlled substance (methamphetamine). Ahquin argues that (1) the trial court erred in admitting evidence of prior bad acts under ER 404(b), (2) his rape and assault convictions should have been treated as same criminal conduct when calculating his offender score, and (3) certain legal financial obligations (LFOs) that are inconsistent with the 2018 legislative amendments should be stricken from his judgement and sentence. In a Statement of Additional Grounds (SAG)[1], Ahquin claims that (1) the trial court erred by excluding the victim's mental health history, (2) he received ineffective assistance of counsel, (3) cumulative error requires reversal, (4) his sentence was clearly excessive, and (5) the trial court erred in calculating his offender score. We affirm

[1] RAP 10.10.

Ahquin's convictions, but we remand for the trial court to strike the criminal filing fee and interest provision from Ahquin's judgment and sentence.

FACTS

A. INCIDENT

In 2016, Ahquin and J.G.-E.[2] were involved in a dating relationship. On January 14, 2017, Ahquin broke into J.G.-E.'s apartment, strangled her, and then raped her both vaginally and anally with a curling iron. Afterward, J.G.-E. pretended to take her dog on a walk, but instead contacted her neighbor, who then called 911.

Ahquin was arrested inside of J.G.-E.'s apartment. At the time of the arrest, law enforcement removed a folding knife and a bag of methamphetamine from Ahquin's pants pocket. The State charged Ahquin with first degree rape, second degree assault with sexual motivation, first degree burglary with sexual motivation, unlawful imprisonment with sexual motivation, felony domestic violence court order violation, felony harassment, and unlawful possession of a controlled substance.[3]

B. PRE-TRIAL MOTIONS

Prior to trial, Ahquin filed a motion in limine asking the trial court to "[a]dmit evidence of [J.G.-E.]'s prior mental health treatment, diagnosis, and prescription medication compliance." Clerk's Papers (CP) at 62. J.G.-E. was diagnosed with post-traumatic stress disorder and major

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[2] We use the sexual assault victim's initials to protect her privacy.

[3] All of the charges, except the unlawful possession of a controlled substance charge, included a domestic violence allegation. The jury returned special verdicts finding none of the charges Ahquin was found guilty of were acts of domestic violence.

depressive disorder "with psychotic features" in October 2015. 4 Verbatim Report of Proceedings (VRP) at 531.

Although Ahquin conceded that there was no evidence that J.G.-E. was delusional or psychotic when the incident occurred on January 14, 2017, Ahquin argued that the evidence was relevant to show consent because J.G.-E. "comes to court with a lot of mental baggage," she was "not of right mind," and J.G.-E.'s behavior was "not indicative of a person who is mentally stable." 4 VRP at 536, 553, 534. The trial court denied Ahquin's motion.

The State also filed a pretrial motion, asking the trial court to admit evidence of prior acts of domestic violence Ahquin committed against J.G.-E. in the months leading up to the January 14, 2017 incident. Specifically, the State sought to introduce testimony regarding an October 14, 2016 incident in which J.G.-E. reported that Ahquin had strangled her for approximately five seconds and forced her to put her mouth on his penis. The State also asked the trial court to admit evidence regarding a December 30, 2016 incident in which Ahquin broke into her apartment, pinned her down, and covered her mouth.[4]

The trial court found that evidence related to the October 14 incident was "strongly probative of [Ahquin]'s intent and motive on January 14, 2017 . . . ." 2 VRP at 164. It also found that the evidence was relevant to prove that J.G.-E. reasonably feared that Ahquin's threats would be carried out on January 14, 2017. The court concluded that the probative value of the evidence

[4] The State also moved to allow evidence of domestic violence incidents between Ahquin and J.G.-E. that occurred on September 11, 2016, October 21, 2016, December 21, 2016, December 23, 2016, and January 13, 2017. The trial court admitted evidence regarding the January 13, 2017 incident. Ahquin does not challenge the admission of evidence related to the January 13, 2017 domestic violence incident on appeal.

substantially outweighed the risk of unfair prejudice and was admissible with a limiting instruction to the jury. The court's limiting instruction stated,

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the October 14th, 2016 alleged incident. This evidence may be considered by you only to the extent you find it relevant to the following issues:
>
> 1. The defendant's motive or intent as to the charge of unlawful imprisonment,
> 2. The defendant's state of mind or motive as to the charge of rape, and;
> 3. The alleged victim's state of mind as to the charge of harassment.
>
> You may not consider the evidence for any other purpose. The evidence about the defendant's alleged actions on October 14, 2016 has not been admitted, and cannot be considered, to prove the character of the defendant in order to show that he acted in conformity therewith. This evidence cannot be considered by you to prove propensity, proclivity, predisposition or inclination to commit rape or assault or unlawful imprisonment or harassment or burglary or violation of a no contact order.
>
> Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP at 137.

The trial court also ruled that the evidence that Ahquin broke into J.G.-E.'s apartment on December 30 was probative to his first degree burglary charge and his motive and intent to unlawfully restrain J.G.-E. and to contact J.G.-E. despite the no contact order prohibiting him from doing so. The court found that this evidence was probative as to J.G.-E.'s reasonable fear on January 14. The court further found that the probative value of this evidence outweighed the risk of unfair prejudice, but that a limiting instruction to the jury was necessary. The court's limiting instruction stated,

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the December 30, 2016 alleged incident. This evidence

> may be considered by you only to the extent you find it relevant to the following issues:
>
> 1. The defendant's motive or intent as to the charges of: assault in the second degree, burglary in the first degree, unlawful imprisonment and violation of a no contact order, and;
> 2. The alleged victim's state of mind as to the charge of harassment.
>
> You may not consider the evidence for any other purpose. The evidence about the defendant's alleged actions on December 30, 2016 has not been admitted, and cannot be considered, to prove the character of the defendant in order to show that he acted in conformity therewith. This evidence cannot be considered by you to prove propensity, proclivity, predisposition or inclination to commit rape or assault or burglary or unlawful imprisonment or harassment or violation of a no contact order.
>
> Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP at 138.

C. TRIAL

At trial, J.G.-E. testified that she began dating Ahquin in July 2016. On October 14, 2016, Ahquin strangled J.G.-E., violently shook her neck, and gave her a black eye. When her voice escalated, Ahquin grabbed her neck and would squeeze while telling her to "shut up." 6 VRP at 730. Ahquin also strangled her, "forced intimacy," and held her down. 6 VRP at 730-31.

Ahquin was served with a no-contact order on December 23, 2016, which prohibited him from contacting J.G.-E. On December 30, 2016, when she returned to her apartment, she found Ahquin inside. Ahquin "immediately . . . started in on [J.G.-E.] physically by pushing [her] into the chair and grabbing [her] neck," strangling her and yelling at her. 6 VRP at 738.

In the early morning hours of January 14, 2017, J.G.-E. awoke and saw Ahquin climbing though her apartment window. J.G.-E. raised her voice, and Ahquin grabbed her throat and

restricted her breathing. Ahquin then threw her onto her bed and forcefully took her clothes off. At one point, J.G.-E. said that she needed to use the restroom. Ahquin walked her to the bathroom and squeezed her throat while she sat on the toilet. Ahquin would not let J.G.-E. wipe herself; instead, Ahquin wiped J.G.-E. while keeping one hand around her neck.

When the two returned to the bedroom, a glass fell from the bedpost. Ahquin forced J.G.-E. to clean up the broken glass. As J.G.-E. cleaned up the broken glass, her legs started to get weak from being strangled and losing her strength from fighting and trying to get the defendant off her. Ahquin pulled J.G.-E.'s head back and inserted his penis in her mouth. Ahquin then picked up J.G.-E., threw her on the bed, and told her to stay there before he left the room.

Ahquin returned from the bathroom with a curling iron and penetrated her both vaginally and anally with the curling iron. Ahquin continued to strangle J.G.-E. "off and on" so that she "would shut up" during this time. 6 VRP at 784. When Ahquin was finished penetrating J.G.-E. with the curling iron, he vaginally penetrated her with his penis.

Afterward, J.G.-E. asked to take her dog outside. Ahquin permitted her to leave but told her she had to come back. Once outside, J.G.-E. asked her neighbor to call the police and then returned to the apartment.

Law enforcement officers responded to the neighbor's 911 call and arrested Ahquin inside J.G.-E.'s apartment. The officers conducted a search incident to arrest and found a folding knife and methamphetamine in Ahquin's pants pocket.

Following Ahquin's arrest, J.G.-E. consented to a sexual assault examination. At trial, the sexual assault nurse examiner testified that she observed bruising to J.G.-E.'s left upper arm, left forearm, right upper arm, and right forearm. She also documented scratches to J.G.-E.'s right hand

and right upper thigh and tenderness to J.G.-E.'s hip, head, back, and both sides of her neck. The nurse further documented a two-centimeter scratch under J.G.-E.'s jaw on the left side. Finally, the nurse noted a one-centimeter tear and to J.G.-E.'s cervix, with some slight bleeding in that area. The nurse testified that, "there would have had to have been something with an edge to be able to cause a laceration or a tear" to the cervix. 7 VRP at 975-76. The nurse also documented three small lacerations to J.G.-E.'s rectum.

Ahquin testified as follows: On January 13, J.G.-E. picked him up at his trailer and they went to her apartment. He had consensual sex with J.G.-E., and then they began to argue. After J.G.-E. calmed down, he left and went to a friend's house. Later, he received a text from J.G.-E. threatening to commit suicide. He returned to J.G.-E.'s apartment and entered by climbing up an outside wall to the window. He knocked on the window, and J.G.-E. let him in.

Once inside, he again had consensual sex with J.G.-E and they used the curling iron as part of the sex and he believed it was a sex toy. They engaged in various sex acts and they were all consensual. At one point, he asked J.G.-E. if he could use the curling iron anally and when she said no he stopped. Afterward, J.G.-E. took her dog out and then took out a box of garbage. A few minutes later, the police arrived and he was arrested. He was aware that he was violating the no contact order on multiple occasions.

The jury found Ahquin guilty of the lesser included charge of second degree rape, second degree assault with sexual motivation, the lesser included charge of first degree criminal trespass, unlawful imprisonment with sexual motivation, violation of a no contact order, and unlawful possession of a controlled substance.

At sentencing, Ahquin argued that his convictions for rape and assault encompassed same criminal conduct. The trial court stated that it was uncertain whether the jury relied on strangulation as the forcible compulsion used to commit the rape. Thus, the trial court denied the motion for a finding of same criminal conduct because there was "no question there are different elements here and therefore different intentions that are required and that were proven." VRP (March 16, 2018) at 18.

Based on Ahquin's offender score, the trial court sentenced Ahquin to a standard range sentence of 316 months to life. The trial court also found that Ahquin was indigent for the purposes of nonmandatory legal financial obligations and imposed only the $500 crime victim assessment and $200 criminal filing fee. Ahquin's judgment and sentence also included an interest provision that imposed interest on all financial obligations in the judgment and sentence.

Ahquin appeals.

ANALYSIS

A. ADMISSIBILITY OF EVIDENCE—ER 404(b)

Ahquin argues that the trial court erred in admitting prior bad acts evidence because it was not relevant, was inadmissible propensity evidence, and not admitted for a proper purpose under ER 404(b). Here, the trial court only improperly admitted evidence of prior acts for the purpose of proving the violation of the no contact order charge, and the trial court's error was harmless. Therefore, we affirm Ahquin's convictions.

1. Legal Principles

We review the trial court's interpretation of ER 404(b) de novo and review a trial court's ruling admitting evidence for abuse of discretion. *State v. Arredondo,* 188 Wn.2d 244, 256, 394 P.3d 348 (2017).

> 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.

ER 404(b). To determine if evidence of other crimes or acts is admissible under ER 404(b), the trial court must undertake the following analysis on the record: (1) find that the misconduct occurred by a preponderance of the evidence; (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 charged offense; and (4) weigh the probative value against the prejudicial effect. *Arredondo*, 188 Wn.2d at 256-57.

Evidence of other crimes, wrongs, or acts is inadmissible to prove a defendant's character or propensity to commit crimes, but may be admissible for purposes of identifying the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, "[b]ecause 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 487 (1995).

"[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act." *Powell*, 126 Wn.2d at 259. Evidence of previous

quarrels, ill-feelings, and prior threats may all be admissible to prove motive, if proving motive is relevant to the case at issue. *Id.* at 260. Evidence of prior assaults or a hostile relationship between the defendant and victim may be admissible to show motive. *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011).

Intent is distinct from motive and relates to the state of mind with which the act is done or omitted. *Powell*, 126 Wn.2d at 261. However, "prior misconduct evidence is only necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent." *Id.* at 262.

Evidence of prior bad acts is also relevant and admissible for the purpose of establishing a victim's state of mind when the victim's fear is an issue in the case. *State v. Magers*, 164 Wn.2d 174, 182, 189 P.3d 126 (2008). For charges of harassment, prior acts of violence or threats between the defendant and the victim are relevant for proving the victim had a reasonable fear of harm. *Id.*

2. October 14, 2016 Incident

The trial court admitted the evidence regarding the October 14, 2016 incident, in which Ahquin had strangled J.G.-E. for approximately five seconds and forced her to put her mouth on his penis, finding that it was relevant to Ahquin's motive or intent as to the charge of unlawful imprisonment, relevant to Ahquin's state of mind or motive as to the charge of rape, and relevant to J.G.-E.'s state of mind as to the charge of harassment. Ahquin argues that the trial court erred by admitting the evidence for all three of these purposes.

a. Unlawful imprisonment

Ahquin argues that prior bad acts were not relevant to the charge of unlawful imprisonment because motive and intent are not elements of unlawful imprisonment. But motive and intent do

not need to be necessary elements of the crime in order to be relevant to proving the charge. *See Powell*, 126 Wn.2d at 260-62.

Here, the evidence of the prior assault establishes there was a hostile, controlling relationship between Ahquin and J.G.-E. Because Ahquin claimed that he did not prevent J.G.-E. from leaving the apartment and claimed that all the acts that occurred during the January 14 incident were consensual, the prior assault where Ahquin strangled J.G.-E., held her down, and forced her to put her mouth on his penis would be relevant to proving Ahquin's motive or intent as to why Ahquin would have confined J.G.-E. Therefore, the evidence had substantial probative value to proving the unlawful imprisonment charge. Accordingly, the trial court did not abuse its discretion in admitting the evidence of the October 14 incident.

b. Rape

The trial court also did not abuse its discretion by finding that the October 14 incident was relevant to Ahquin's state of mind or motive as to the charge of rape.[5] Again, Ahquin argues that the prior incident was irrelevant because the State did not need to prove state of mind or motive to establish the charge of rape. However, because Ahquin asserted that the acts that occurred on January 14 were consensual, evidence that tends to prove his state of mind or motivation would be relevant and have substantial probative value.

Ahquin contends that the prior incident does not show a motivation or inducement to commit additional acts of violence, assault or rape. But motive does not need to be as simple as

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[5] Ahquin also argues that the prior incidents were not relevant to proving intent regarding rape. However, the trial court did not admit evidence of either incident for the purpose of proving Ahquin's intent regarding the rape charge.

the prior act is the reason the charged act occurred. Rather, motive can be more complex, such as a relationship in which a person's actions are driven by the desire to hurt or control another person. *See Baker*, 162 Wn. App. at 474 (evidence of prior assaults on same victim months apart admissible to show motive); *Powell*, 126 Wn.2d at 259-60 (motive includes any force, reason, or impulse that moves a person to act). Thus, the trial court did not abuse its discretion by admitting evidence of the October 14 incident as relevant to proving Ahquin's motive for committing rape.

c. Harassment

Finally, the trial court did not abuse its discretion by finding that the October 14 incident was relevant to prove J.G.-E.'s state of mind as to the charge of harassment. The trial court instructed the jury that Ahquin's conduct had to place J.G.-E. "in reasonable fear that the threat to kill would be carried out." CP at 181. Because the State was required to prove that J.G.-E. was placed in reasonable fear, prior incidents between Ahquin and J.G.-E. that made J.G.-E.'s reasonably fearful of Ahquin on January 14 would be relevant and have substantial probative value.

3. December 30 Incident

The trial court admitted the evidence of the December 30 incident, in which Ahquin strangled J.G.-E. during an argument, for the purpose of proving Ahquin's motive or intent as to the charges of second degree assault, first degree burglary, unlawful imprisonment, and violation of the no contact order. Ahquin argues that the trial court erred because motive and intent was unnecessary to prove any of these charges.

Here, Ahquin testified that J.G.-E. gave him permission to enter the apartment through the window. And Ahquin asserted that all the events on January 14 were consensual. Therefore, the

trial court did not abuse its discretion by admitting the evidence of the December 30 incident as relevant to prove Ahquin's motive or intent as to the charges of second degree assault, first degree burglary, or unlawful imprisonment.

However, the trial court abused its discretion by admitting the evidence of the December 30 incident with regard to the violation of the no contact order charge. Ahquin knew about the no contact order and that he entered J.G.-E.'s apartment with full knowledge that the no contact order prohibited him from being there. Therefore, intent and motive were not relevant to proving the charge of the violation of the no contact order in this case and had little probative value to proving the violation of no contact order charge.

The trial court also admitted the evidence of the December 30 incident with regard to J.G.-E.'s state of mind as to the harassment charge. Like the October 14 incident, J.G.-E. was strangled and assaulted during the December 30 incident. Therefore, the prior assault would be relevant to proving that J.G.-E.'s fear of Ahquin's threats on January 14 was reasonable.

4. Harmless Error

Ahquin further argues the trial court's error in admitting the evidence of Ahquin's prior bad acts was not harmless. We disagree and hold that the improper admission of the December 30 incident to prove the violation of the no contact order was harmless.

Because the evidentiary error is not constitutional, we apply the nonconstitutional harmless error standard. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). "This requires us to decide whether 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Id.* (internal quotation marks omitted) (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)).

Here, the only evidentiary error that occurred was the trial court's decision to admit the evidence of the December 30 incident as relevant to Ahquin's motive and intent for the charge of violation of a no contact order. In this case, the evidence regarding both incidents would have been otherwise admissible and it was harmless as to the violation of the no contact order charge. And Ahquin admitted that he was aware of the no contact order and was aware that he was violating it. Therefore, there is no reasonable probability that the outcome would have been different if the trial court had not admitted the evidence of the December 30 incident for the purpose of the charge of violating the no contact order.

B. "SAME CRIMINAL CONDUCT"

Ahquin argues that the trial court erred when it declined to treat his convictions for second degree rape and second degree assault as one crime because they encompassed the same criminal conduct. We disagree.

We review the trial court's calculation of an offender score de novo. *State v. Bergstrom,* 162 Wn.2d 87, 92, 169 P.3d 816 (2007). A defendant's offender score is comprised of his or her criminal history and other current offenses. RCW 9.94A.589(1)(a). The trial court presumes that two or more current offenses are counted separately. RCW 9.94A.589(1)(a). However, if the trial court finds that "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). All three elements must be met for the crimes to constitute the same criminal conduct. *State v. Lessley,* 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The defendant bears the

burden of proving same criminal conduct. *State v. Aldana Garciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). A trial court's determination of what constitutes "same criminal conduct" for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Haddock,* 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Here, the trial court determined that Ahquin failed to meet his burden to prove that the second degree rape and second degree assault convictions were the same criminal conduct because based on the statutory elements of the crimes, the two offenses had different intents. The trial court may rely on the statutory elements of the convicted offenses to determine whether the defendant had the same criminal intent. *State v. Chenoweth*, 185 Wn.2d 218, 221-23, 370 P.3d 6 (2016). Therefore, the trial court did not abuse its discretion by determining that Ahquin failed to meet his burden to prove his second degree rape and second degree assault convictions were the same criminal conduct. Accordingly, we affirm the trial court's calculation of Ahquin's offender score.

We affirm the trial court's finding that Ahquin's offenses were not the same criminal conduct.

C. LFOs

Ahquin also argues that the trial court erred by imposing the $200 criminal filing fee. The State concedes that both the criminal filing fee *and* the interest provision are improper under the 2018 legislative amendments to the LFO statutes and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). We accept the State's concession and remand to strike the improper LFOs—the criminal filing fee and the interest accrual provision on nonrestitution LFOs—from Ahquin's judgment and sentence.

D. STATEMENT OF ADDITIONAL GROUNDS

Ahquin raises five additional issues in his SAG: (1) the trial court denied his right to present a defense when it suppressed J.G.-E.'s mental health records, (2) he received ineffective assistance of counsel, (3) the cumulative error doctrine requires reversal, (4) his sentence was clearly excessive, and (5) a challenge to his offender score. We hold that Ahquin's SAG claims fail.

1. Suppression and Exclusion of J.G.-E.'s Mental Health Record

Ahquin claims that the trial court abused its discretion when it suppressed and excluded J.G.-E.'s mental health records. He argues that "[t]o say that her questionable mental state was not probative or relevant" to his defense was an abuse of discretion. SAG at 7. We disagree.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402.

When determining whether evidence of prior mental health is relevant and admissible the trial court must consider "'1) the nature of the psychological problems; 2) whether the witness suffered from the condition at the time of the events to which the witness will testify; [and] 3) the temporal recency or remoteness of the condition.'" *Arredondo*, 188 Wn.2d at 267 (alteration in original) (quoting *United States v. Love*, 329 F.3d 981, 984 (8th Cir. 2003)). When the proposed mental health testimony is unrelated to a witness's ability to perceive, remember, or relate events, it is not relevant. *Id.* at 267-69. We review the trial court's decision to exclude evidence for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

Here, the trial court determined that J.G.-E.'s mental health history of PTSD had no relation to J.G.-E.'s ability to perceive, remember, or relate the incident in question. Ahquin conceded that

J.G.-E was not suffering from delusions or psychosis at the time of the incident in question. Therefore, J.G.-E.'s mental health history was irrelevant to Ahquin's defense or to cross-examination. *Arredondo*, 188 Wn.2d at 267-68. Thus, the trial court did not abuse its discretion in determining that J.G.-E.'s mental health history was irrelevant.[6] Accordingly, Ahquin's claim fails.

2. Ineffective Assistance of Counsel

Ahquin claims that he received ineffective assistance of counsel because his counsel failed to move to sever his rape charge from the other charged offenses. He contends that he suffered prejudice as a result and that no legitimate trial strategy could account for this failure. We decline to address Ahquin's claim because the record is insufficient for review.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). An ineffective assistance of counsel claim is a mixed question of fact and law that this court reviews de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail in an ineffective assistance of counsel claim, the defendant must show: (1) counsel's performance was deficient and (2) this deficient performance resulted in prejudice to the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the defendant fails either part of this two-part test, the defendant's ineffective assistance of counsel claim fails. *Grier*, 171 Wn.2d at 32-33.

[6] Ahquin further argues that the trial court's error resulted in denying him his right to present a defense. Because we hold that the trial court did not abuse its discretion in excluding irrelevant evidence, we do not address this claim.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 33. We engage in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 10 P.3d. 80 (2004)). The record before this court must be sufficient for this court to determine what counsel's reasons for the decision were in order to evaluate whether counsel's reasons were legitimate. *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018). If counsel's reasons for the challenged action are outside the record on appeal, the defendant must bring a separate collateral challenge. *Id*.

Here, there is nothing in the record to show why Ahquin's defense counsel decided to not move to sever the rape charge from the other charges. *See id*. Therefore, we cannot evaluate whether Ahquin's counsel acted with a trial strategy or tactic. And we cannot evaluate the legitimacy of any trial tactic that Ahquin's counsel may have pursued. Accordingly, the record is insufficient to review the claim of ineffective assistance of counsel and he must bring a collateral challenge. *See id*.

3. Cumulative Error Doctrine

Ahquin claims that he is entitled to a new trial because the issues presented on appeal by his counsel and through Ahquin's SAG amount to a violation of the cumulative error doctrine. We disagree.

"Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *State v. Emery*, 174 Wn.2d 741,

766, 278 P.3d 653 (2012). Here, there was only one error—the admission of the December 30 incident as relevant to the violation of the no contact order. The cumulative error doctrine only applies when there is more than one error. Therefore, the cumulative error doctrine does not apply here.

4. “Clearly Excessive” Sentence

Ahquin claims that his sentence was clearly excessive. He asks the court to consider the factors that “this was a consenting sexual relationship between two people that, through the use of drugs and unconve[n]tional sex, went awry.” SAG at 10. However, because Ahquin received a standard range sentence, he cannot appeal it.

Here, Ahquin received a standard range sentence. Generally, a standard range sentence cannot be appealed. RCW 9.94A.585(1). However, a defendant may appeal the procedure by which the standard range sentence is imposed, including the trial court’s failure to impose an exceptional, mitigated sentence. *See State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). Because Ahquin received a standard range sentence and his assertion that the sentence is clearly excessive is unrelated to the procedure by which the standard range sentence was imposed, he cannot appeal his sentence.

5. Offender Score

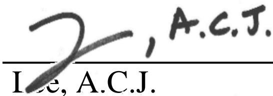
Finally, Ahquin claims that he “would like to raise an issue separate and distinct from his appellate counsel[’]s assignment of error” regarding same criminal conduct. SAG at 10. However, Ahquin’s claim is not sufficient to inform us of the nature and occurrence of the alleged error. *See* RAP 10.10(c) (“the appellate court will not consider a defendant’s statement of additional grounds

for review if it does not inform the court of the nature and occurrence of alleged errors.”). Therefore, we decline to consider Ahquin’s final claim.

CONCLUSION

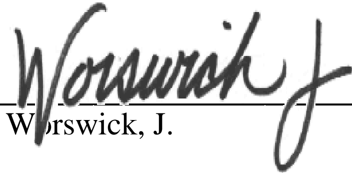
We hold that the trial court only improperly admitted evidence of prior acts for the purpose of proving the charge of violation of the no contact order, but the error was harmless. We also accept the State’s concession and hold that the trial court improperly imposed the criminal filing fee and interest provision. We find no other error. Accordingly, we affirm Ahquin’s convictions, but we remand for the trial court to strike the criminal filing fee and interest provision from Ahquin’s judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

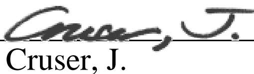


Lee, A.C.J.

We concur:



Worswick, J.



Cruser, J.

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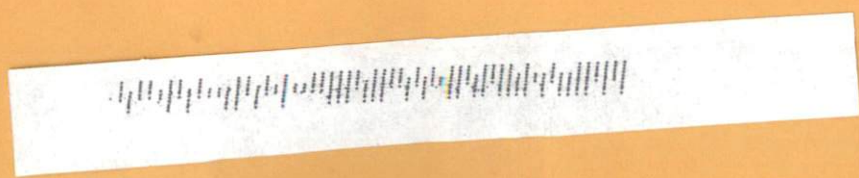

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