Supreme Court No. 98390-9
(COA No. 78858-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE POMPILIO IRIAS SANCHEZ,

Appellant.

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

PETITION FOR REVIEW

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Jose Pompilio Irias Sanchez, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision affirming his conviction. A copy of the Court of Appeals' opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Under ER 404(b), evidence of alleged prior bad acts is inadmissible to prove the defendant's propensity to commit crimes. Although it may be admissible for other purposes, the proponent must prove by a preponderance of the evidence that the prior acts occurred, and the court must exclude the evidence if it is substantially more prejudicial than probative. Here, the jury heard allegations of years of frequent violent abuse in a trial, but the jury was supposed to be determining whether the State proved a single incident beyond a reasonable doubt. Nevertheless, the Court of Appeals affirmed. Should this Court accept review because the Court of Appeals' opinion fails to recognize that the court erred in admitting this irrelevant and inflammatory evidence? RAP 13.4(b)(1); RAP 13.4(b)(3).

2. The prosecution and its witnesses commit misconduct when they

violate pretrial rulings. Here, the trial court excluded allegations of prior sexual violence and prior violence against children, and admonished the prosecutor to prepare the key witness accordingly, but the witness testified that Mr. Irias Sanchez abused their children and sexually assaulted her. Still, the Court of Appeals affirmed. Should this Court accept review because this misconduct undermined Mr. Irias Sanchez's right to a fair trial? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Jose Irias Sanchez grew up poor in Honduras, moved to this country in 2000, and worked in the carpet-laying business for 18 years. CP 44-60 (sentencing materials). According to his friends, colleagues, and employers, he is a very hard-working and generous man. *Id.* Prior to this case, he had no criminal history apart from a single driving offense. CP 47, 62.

Mr. Irias Sanchez has two children with Liliana Salazar Hernandez. RP 452. Mr. Irias Sanchez is "an amazing father to his two girls." CP 51.

In October of 2017, Ms. Salazar called the police and stated that Mr. Irias Sanchez had held a machete to her neck and said "he wanted to finish with everything." RP 464. According to Ms. Salazar, she "struggled with him and then [she] bit on his back and then pushed him." RP 464.

She claimed she then got their daughters, who were sleeping, had them get dressed, and took them outside to their minivan. RP 464-465. She drove a few blocks and parked, then called the police. RP 465.

Based on these allegations, the State charged Mr. Irias Sanchez with second-degree assault and felony harassment, both with "domestic violence" special allegations. CP 1-2.

Pre-trial, the State moved to admit alleged prior bad acts it averred Mr. Irias Sanchez committed against Ms. Salazar. CP 5-6. Although Ms. Salazar had never before levied a similar allegation in their 13 to 14 years together, and Mr. Irias Sanchez had no criminal history except for one driving offense, Ms. Salazar now claimed that Mr. Irias Sanchez had violently abused her for years. CP 5-6, 47.

Mr. Irias Sanchez objected and moved to exclude such allegations under ER 401, 402, 403, and 404(b). CP 10-14. He noted the State could not prove by a preponderance of the evidence that the alleged incidents occurred, because they were "only uncorroborated statements made by the complaining witness." CP 12. Moreover, presenting these uncorroborated claims of domestic violence would be "highly prejudicial as it appeals directly to the jurors' emotions" and would be used for an improper propensity inference. CP 13.

The trial court excluded allegations of past sexual violence and allegations of violence against the children. RP 114-15. And it permitted Mr. Irias Sanchez to challenge Ms. Salazar's credibility by asking her about her immigration status and the potential of a "U-Visa" for alleged victims of domestic violence. RP 62. But the court admitted all of Ms. Salazar's other allegations, including a generic allegation that Mr. Irias Sanchez assaulted Ms. Salazar frequently over the years. RP 116. The court admitted these allegations "to show the reasonable fear aspects of both charges[.]" RP 113. Mr. Irias Sanchez later renewed his objection to the admission of allegations of prior assaults, but the court adhered to its ruling. RP 356-78.

The court reminded the prosecutor to prepare his witness based on the ruling, but at trial, contrary to the court's limitations, Ms. Salazar alleged Mr. Irias Sanchez hit the children. RP 457, 461. Also in violation of the ruling, she alleged Mr. Irias Sanchez sexually abused her – though the court intervened to prevent interpretation of that testimony from Spanish to English. RP 468-69.

The jury convicted Mr. Irias Sanchez as charged, and the court vacated the felony harassment conviction based on merger. CP 41-42, 89.

D. ARGUMENT

This Court should accept review because the Court of Appeals' opinion fails to recognize that the court erred in admitting the complainant's allegations under ER 404(b), as these allegations were irrelevant and highly inflammatory.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b) provides:

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

"ER 404(b) is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014) (quoting *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012)). The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person's guilt or innocence." *Wade*, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. *Id*. at 745; *Gunderson*, 181 Wn.2d at 923. 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)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776.

"The interpretation of an evidentiary rule is a question of law that [appellate courts] review de novo." *State v. Ashley*, 186 Wn.2d 32, 38, 375 P.3d 673 (2016). The court reviews a decision to admit or exclude evidence for abuse of discretion. *Id.* at 38-39. "[A] court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

The trial court erred in steps two and three of ER 404(b)'s four-pronged analysis because the alleged prior misconduct was not relevant to an element of assault. The trial court concluded "that the physical assaults and the threats, the previous threats to kill or threats of physical assault, are relevant to show the reasonable fear aspects *of both charges* here." RP 113 (emphasis added). In denying the motion to reconsider, the court reiterated that the alleged prior violence "goes directly to her reasonable fear which is an element both of the felony harassment *and of the particular prong of the second-degree assault*." RP 358. The court was wrong.

Reasonable fear is not an element of assault in the second degree. Instead, the elements of the crime as charged are: that the defendant (1) assaulted the alleged victim (2) with a deadly weapon (3) in Washington.

RCW 9A.36.021(1)(c); CP 32 ("to convict" instruction listing elements of assault). Anything else, including the common law means of committing assault by creating "reasonable apprehension," is a mere "definition." *See State v. Smith*, 159 Wn. 2d 778, 787, 154 P.3d 873 (2007); CP 29.

Thus, in *Magers*, a majority of this Court held it was improper to admit evidence of alleged prior violence to support the "reasonable fear" of an alleged assault victim. *State v. Magers*, 164 Wn.2d 174, 194-95, 189 P.3d 126 (2008) (Madsen, J., concurring); *id.* at 196 (C. Johnson, J., dissenting). In that case, the defendant was accused of holding a sword to the back of the victim's neck and threatening to cut off her head. *Id.* at 179. The State charged him with second-degree assault, and the jury was instructed that "[a]n assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." *Id.* at 183. The victim recanted before trial, and the State offered evidence of the defendant's prior violent acts towards the victim to impeach the victim's credibility as well as other incidents of fighting involving third persons to show her state of mind.

Four justices agreed with the State's position that evidence of prior incidents was relevant and admissible to impeach a recanting victim's

testimony *and* to show that her "state of mind" satisfied the "reasonable apprehension" definition of assault. *Magers*, 164 Wn.2d at 181-86 (plurality). Three dissenting justices disagreed with the plurality on both issues. *Id.* at 195-99. The concurrence agreed with the plurality that acts of violence involving the victim were relevant to her credibility. However, even though the State's theory was that the defendant committed the "reasonable apprehension" type of assault, the defendant's prior acts of violence were *not* relevant to prove the alleged victim's state of mind as an element of the crime. *Id.* at 194 (Madsen, J., concurring). The concurring justices affirmed the convictions only because the improper admission of that evidence was harmless. *Id.* at 195. But there was no question that the admission of the evidence was error. *Id.* at 194. The dissent noted, "We should continue to emphasize the constriction of any exception to ER 404(b). … [I]f there is any doubt as to its admission, the scale should be tipped in favor of the exclusion of evidence." *Id.* at 199 (C. Johnson, J., dissenting).

Here, as in *Magers*, the trial court erred in admitting alleged prior violence to prove an element of assault. RP 113, 358.

Independently, the court should have excluded the evidence because it was substantially more prejudicial than probative. Its admission

was therefore improper under ER 403 and under the fourth step of the ER 404(b) analysis. *See Gunderson*, 181 Wn.2d at 923.

"[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high." *Ashley*, 186 Wn.2d at 43 (quoting *Gunderson*, 181 Wn.2d at 925). "To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value." *Id.*

Here, the alleged prior acts of domestic violence did not have "overriding probative value." The court admitted the prior acts to support the "reasonable fear" elements of the crimes. But as explained above, "reasonable fear" is not an element of assault. And although it is an element of harassment, the prior acts had extremely low probative value on that element. The *current* allegation was that Mr. Irias Sanchez held a machete to Ms. Salazar's neck, which on its own would prove any claimed fear was entirely reasonable. Because of this fact, counsel correctly argued that "the probative value of anything that happened weeks, months, years in the past is going to be extremely outweighed by the prejudice to Mr. Irias-Sanchez by allowing the jury to hear things that were unpled, unproven, uncorroborated in any way." RP 357.

The trial court attempted to mitigate the prejudice by excluding allegations of prior sexual assaults and assaults against the children. RP 113, 363. But the court admitted all other evidence of "a history of physical violence and physical threats" over the course of many years. RP 114. The court said, "I am going to allow her to testify about the prior acts of physical assault, including the I think 2011 incident that she connects to the miscarriage of the child. I'm going to allow her to speak about further the frequency of physical assault, about threats to kill or physically assault, and to the extent a threat [to] kill was sort of a single threat encompassed her and the children, she can testify to that." RP 115.

As counsel argued, this ruling allowed what was supposed to be a trial on one incident to "become[] a referendum on their relationship[.]" RP 371.

Ashley is relevant on this prong of the analysis as well. In that case, as noted above, the trial court admitted allegations of prior domestic violence based not just on the complaining witness's statements but also on a police report from one of the prior incidents. *Ashley*, 186 Wn.2d at 41. The court admitted the evidence of prior acts for two purposes, one of which was to bolster the alleged victim's credibility. *Id.* at 47. This Court held it was error to admit the evidence for this purpose, because the State did not establish its "overriding probative value[.]" *Id.* Even though

defense counsel's general theory was that the complaining witness fabricated her story to avoid her own potential legal jeopardy, there was no evidence in the record to suggest the witness's testimony was untruthful. *Id.* "Thus, there was no need to introduce the domestic violence evidence" to rebut the defense theory. *Ashley*, 186 Wn.2d at 47.

Similarly here, the State did not establish the overriding probative value of the evidence. The evidence was ostensibly admitted to show reasonable fear, but there was no evidence in the record or a suggestion by the defense that a person with a machete held to her neck would *not* be in reasonable fear. Instead, the defense theory of the case was that the incident did not occur at all and, as in *Ashley*, that the complaining witness fabricated the incident to avoid her own potential legal jeopardy (in this case to avoid deportation). Thus, just as there "was no need to introduce the domestic violence evidence" to bolster credibility in *Ashley*, there was no need to introduce the domestic violence evidence to bolster the proof of reasonable fear here. *See* RP 356-57.

Moreover, not only did the evidence lack overriding probative value, it was also extraordinarily prejudicial. The charge was based on one alleged incident on one night, but the complaining witness was permitted to testify that Mr. Irias Sanchez had violently assaulted her frequently over many years. She asserted he regularly punched her and hit her in the head.

RP 454. She testified that he threatened to "cut [her] into pieces." RP 455. She said she suffered a miscarriage because Mr. Irias Sanchez struck her. RP 460. She said Mr. Irias Sanchez did not "allow" her to go out without him or their daughters. RP 461. In essence, she described a decade of alleged abuse at the hands of a violent, controlling monster. The testimony was substantially more prejudicial than probative.

Gunderson is instructive. There, the defendant was charged with "domestic violence felony violation of a court order for a September 2010 altercation between himself and Christina Moore, his ex-girlfriend." *Gunderson*, 181 Wn.2d at 918. The State sought to introduce evidence of the defendant's prior domestic violence against Ms. Moore to impeach her credibility in light of her testimony that the alleged altercation did not occur. *Id.* The trial court admitted the evidence, but the Supreme Court reversed. *Id.* at 919. Even though evidence of only two prior domestic violence incidents was introduced, the Court held the evidence was substantially more prejudicial than probative. *Id.* at 920, 923. The evidence had low probative value because the alleged victim's statements were internally consistent. *Id.* at 923-24. And "the prejudicial effect of prior acts in domestic violence cases" is "very high." *Id.* at 925. If a court admits alleged prior domestic violence evidence in such circumstances, "the jury may well put too great a weight on a past [incident] and use the

evidence for an improper purpose." *Id.* Thus, it was an abuse of discretion for the trial court to admit the evidence of past domestic violence. *Id.*

Here, the evidence was of equally low probative value and it was far more prejudicial than the evidence at issue in *Gunderson*. In *Gunderson* the court admitted evidence of one or two alleged prior incidents of domestic violence, but here the court admitted vague allegations of years of repeated, violent abuse. Thus, if it was error to admit the evidence of alleged prior domestic violence in *Gunderson*, it was certainly error to admit such evidence here.

In sum, the court should have excluded this highly prejudicial and irrelevant evidence. This Court should accept review.

2. This Court should accept review because the Court of Appeals' opinion fails to recognize that prosecutorial and witness misconduct deprived Mr. Irias Sanchez of his right to a fair trial.

Although the trial court admitted allegations of past domestic violence as discussed above, it excluded allegations of violence against the children or sexual violence against Ms. Salazar. RP 115. The court admonished the prosecutor to explain the rulings to the witness, and the prosecutor assured the court the State would do so. RP 117-18, 457. But the witness testified that Mr. Irias Sanchez sexually assaulted her and abused the children. RP 461, 469. The court sustained an objection to the

latter and prohibited translation of the former, but the witness blatantly violated the pretrial rulings.

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). A prosecutor must comply with pretrial rulings himself, and must ensure all State's witnesses do the same. "At a minimum, trial advocates must explain to witnesses … any orders in limine entered by the court …." *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008); *accord State v. Easter*, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996) (criticizing "cavalier violation" of pretrial rulings disallowing mention of defendant's silence).

Gregory is instructive. *See State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). There, the trial court in a death penalty case granted a State's motion to exclude evidence of prison conditions for those sentenced to life without parole. *Gregory*, 158 Wn.2d at 864. But in closing argument, the prosecutor asked the jury to consider all of the amenities that would be afforded to the defendant in prison if he were sentenced to life instead of death. *Id.* He also argued there was a possibility the defendant could escape from prison. *Id.* at 864-65.

This Court held the prosecutor committed misconduct and reversed the death sentence. *Id.* at 865-67. This Court noted, "It is clear that the prosecutor's argument at the very least violates the trial court's order excluding 'any reference to the conditions that exist in prison.'" *Id.* at 865-66; *see also State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (reversing for prosecutorial misconduct where prosecutor argued facts not in evidence "in spite of a direct court order on a motion in limine to exclude" the evidence at issue).

Similarly, here, the prosecutor and witness directly violated a court order on a motion in limine excluding evidence of sexual violence and violence against children. The violations cannot be deemed harmless in light of the inherently prejudicial nature of the allegations. For this reason, too, the Court of Appeals should have reversed and remanded for a new trial. This Court should accept review.

E. CONCLUSION

Based on the foregoing, Mr. Irias Sanchez respectfully requests that this Court accept review.

DATED this 8th day of April, 2020.

Respectfully submitted,

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FILED
3/9/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent v. JOSE POMPILIO IRIAS SANCHEZ, Appellant.	)	No. 78858-2-I DIVISION ONE UNPUBLISHED OPINION FILED: March 9, 2020

HAZELRIGG, J. — Jose P. Irias Sanchez (Irias)[1] was convicted of assault in the second degree-domestic violence and felony harassment-domestic violence after a jury trial. In pretrial motions, the defense sought to exclude prior allegations of domestic violence. The trial court specifically excluded some acts while allowing testimony as to others. At trial, the key witness twice violated these pretrial rulings. In the first instance the court provided a curative instruction. In the second instance, the testimony was not interpreted from Spanish to English for the jury. Irias argues the admission of the prior bad act evidence was improper and that he was deprived of a fair trial due to the violations of the pretrial rulings by the witness.

[1] The defendant's last name is listed both with and without a hyphen in various documents contained in the record. In the majority of the letters of support submitted for his sentencing, friends and business associates refer to the defendant as Jose Irias. Further, he appears to sign documents in the record with only Irias. As this is a common naming convention in Latinx and Spanish-language dominant communities, and it appears to be how the defendant self-identifies, we will utilize that practice herein.

When viewed in light of the evidence as a whole, Irias fails to demonstrate that the statements were so prejudicial as to deprive him of a fair trial. We affirm.

FACTS

Jose Irias Sanchez was charged with assault in the second degree-domestic violence and felony harassment-domestic violence. The charges arose out of an incident in October 2017 when police responded to a 911 call by Liliana Salazar Hernandez (Salazar). When police arrived, they found Salazar with her two young daughters in a van a short distance away from the home they shared with Irias. Salazar reported that her children's father, Irias, had attacked her with a machete. Salazar does not speak English and could not communicate directly with responding officers, so her children and a neighbor assisted as interpreters with the police.

Salazar reported that she put her children to bed earlier that evening and then she went to bed at approximately 9:30pm. Irias had been outside drinking and came upstairs at approximately 1:00am. Salazar observed Irias go into their daughters' room and then come in to their bedroom. Irias began to argue with Salazar and then left to bathe. Salazar testified that Irias came out of the bathroom with a machete, pushed Salazar's face against a pillow and held the machete to her neck, stating he wanted to "finish everything." Salazar was ultimately able to get away, gather her daughters and drive a few blocks away to call the police.

Irias was taken into custody and charged with assault in the second degree and felony harassment both with special allegations of domestic violence. Prior to trial, the State sought to admit alleged prior bad acts involving domestic violence

within Irias and Salazar's relationship. None of the prior acts had been reported to law enforcement previously and the evidence solely consisted of Salazar's statements. The defense moved to exclude such testimony, arguing that the State could not prove them by a preponderance of the evidence. Defense counsel further argued that allowing uncorroborated claims of past domestic violence would be highly prejudicial and would be used for improper inferences as to Irias' propensity toward violence.

The trial court excluded allegations of past sexual violence and violence against the children. However, the court did permit other broader allegations of ongoing domestic violence to show the "reasonable fear aspects of both charges." The court reminded the prosecutor in the case to discuss these limitations with Salazar. At trial, however, Salazar did testify to past violence by Irias against the children and sexual violence against her. The court issued a curative instruction after the testimony about conduct toward the children. The judge was able to intervene during the testimony regarding sexual violence, preventing the testimony from being interpreted from Spanish to English for the jury.

The jury convicted Irias as charged and the court vacated the felony harassment charge based on merger. Irias now appeals, arguing the court improperly admitted evidence of prior bad acts and that the improper testimony by Salazar deprived him of his right to a fair trial.

ANALYSIS

I. Admission of 404(b) Evidence of Prior Bad Acts

We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). However, "[w]e review the trial court's interpretation of ER 404(b) de novo." State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion." Foxhaven, 161 Wn.2d at 174. The appellant bears the burden of proving an abuse of discretion occurred. State v. Ashley, 186 Wn.2d 32, 39, 375 P.3d 673 (2016).

"Generally, evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused's propensity to commit the crime charged." Fisher, 165 Wn.2d at 744. However, ER 404(b) allows prior misconduct to be admitted for other purposes, such as proof of a victim's state of mind. Id.

> To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (internal citations omitted). The party seeking to introduce the evidence has the burden of establishing the three steps and that the misconduct actually occurred. Ashley, 186

Wn.2d at 39. The court must conduct this inquiry on the record and provide a limiting instruction if the court admits the evidence. Id.

Here, the State brought a pretrial motion to admit certain ER 404(b) evidence and Irias opposed. The court heard argument on this and other matters while addressing motions in limine of the parties prior to seating a jury. Irias argues that the trial court erred in admitting the prior bad act evidence of previous domestic violence because the state failed to prove that the prior incidents had occurred, the evidence was not relevant to an element of assault, and the risk of prejudice from the evidence substantially outweighed its potential probative value.

Irias argues that the court was only provided with statements by the victim without any corroborating evidence and that this was insufficient to support the court's finding that the prior acts did occur. However, the defense cites no authority to support their claim that the court's finding in this regard was improper absent such corroboration. We review the court's determination as to whether the prior misconduct was proven by a preponderance of the evidence for abuse of discretion. Id. at 40.

Both parties cite to Ashley, in which a court admitted evidence of the defendant's prior domestic violence against the victim under ER 404(b). Id. at 40. The court was provided with the victim's testimony describing instances of domestic violence by Ashley between 2000 and 2008, along with a police report from 2004. Id. at 40-41. Ashley did not present any evidence to refute the allegations and the court ultimately determined the state had proven the prior abuse had occurred by a preponderance of the evidence. Id.

Here, the trial court was provided with Salazar's statements to police in the course of the investigation of the present case in which she mentioned the prior incidents, her petition for a protection order which discussed previous abuse, the audio of the protection order hearing that included testimony from Salazar about prior violence, and the audio of the prosecutor's interview with her for purposes of preparing the instant case. Additionally, the record contains a pretrial exhibit wherein Irias verbally acknowledges that violence existed in the relationship.

On review, we must determine whether the trial court's findings are supported by evidence that was submitted in the record; specifically that the State demonstrated by a preponderance of the evidence that prior acts of domestic violence occurred. Here, that standard is met with the evidence described above. This is further bolstered by the fact that Irias provided statements indicating some abuse had occurred and provided no evidence refuting the victim's claims of prior abuse.

Next, we address Irias's argument that the prior misconduct was not relevant to the charged crimes. "Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). The two charges in this case were assault in the second degree and felony harassment. The relevant subsection under which Irias was charged with assault states "[a] person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon." The jury instruction defining assault in this case stated:

> [a]n assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

The jury instruction for the felony harassment charge was as follows:

> [a] person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.

Here, the trial court allowed testimony regarding prior domestic violence by Irias against Salazar "to show the reasonable fear aspect of both charges." Prior acts of domestic violence would have some relevance to both counts submitted to the jury.

The defense cites to Magers for the proposition that it is improper for a court to admit alleged prior violence to support the reasonable fear of an alleged victim, but that opinion is a plurality and the facts are distinguishable. See 164 Wn.2d 174. Magers involved a recanting victim along with an admission of a separate prior bad act which did not involve the victim. Id. at 178-79. Here, Salazar did not recant and all of the prior bad acts at issue directly involved her. The trial court did not abuse its discretion in determining that the prior acts of domestic violence were relevant to both charges as they tend to increase the probability that Salazar was reasonably fearful as to both counts.

Irias also asserts that the trial court abused its discretion in reaching its determination as to which prior acts were substantially more prejudicial than probative. The trial court in this case was very specific as to what it determined

would be admissible and inadmissible on this prong of the ER 404(b) analysis. The trial court weighed the evidence and determined that any references to abusing the children would not be allowed in, nor would anything about sexual violence or coercion. The court determined that it would allow testimony as to domestic violence by Irias against Salazar generally, an assault incident by Irias that caused Salazar to miscarry, and Salazar's claim that Irias would assault her if she did not do what he wanted.

Irias argues that the evidence was not particularly probative since anyone would be fearful if a machete was brandished at them. However, when this argument was considered during the ER 404(b) argument, the court noted that the evidence of the history of physical violence and physical threats "is sufficiently probative of reasonable fear" and was allowed in. This was despite the reasonable conclusion that the specific act with the machete underlying the assault in the second degree charge would result in fear for most people. The trial court did not abuse its discretion in the analysis and ruling to admit the specific prior bad acts.

Irias argues that Ashley is instructive here, but it does not advance his position. 186 Wn.2d 32. In Ashley, the court admitted the victim's testimony regarding prior domestic violence. Id. at 38. The court admitted it for two purposes; to assess the victim's credibility and to determine the element of consent as to the unlawful imprisonment charge. Id. The Supreme Court rejected the claim that the evidence was properly allowed in for credibility purposes, but did find it proper to prove the element regarding consent. Id. at 43-44. The court held that, "[i]t is unquestionably reasonable for the trial court to conclude that a domestic violence

victim would continue to fear her tormentor, even years after the last incident of abuse." Id. at 45.

The court in Ashley expressly found that the prior abuse was relevant to an element of the criminal allegation before the court. Id. The court went on to explain that despite the defense's general theory that the victim had "made up her story to avoid getting in trouble, there was no evidence in the record to suggest that [the victim's] testimony was untruthful." Id. at 47. This led to the court's determination that there was no need to introduce the domestic violence evidence to defend or bolster the victim's credibility. Id. Since the evidence was properly admitted to prove an element of the crime, its admission for credibility purposes as well was determined to be harmless error.

Ashley is not helpful for Irias. In his case, Salazar's credibility was the main focus for the defense. Their main defense theory was that Salazar had fabricated the incident in order to obtain immigration benefits. Though the court here did not admit the prior bad acts expressly for purposes of credibility analysis, given the theory of the case and the need for the State to prove the reasonable fear by Salazar, the court's determination that past violence, excluding the more inflammatory allegations such as sexual violence and abuse of children, does not constitute an abuse of discretion. Though the defense claims that anyone would be fearful of a machete and the bad act evidence was therefore unnecessary, this argument is not persuasive.

In Magers, our Supreme Court explained that when a defendant enters a not guilty plea, it puts the burden on the State to prove every element of the crime

beyond a reasonable doubt. 164 Wn.2d at 183. The court there concluded it was proper to admit the defendant's prior bad acts to prove the victim's reasonable fear of bodily injury. Id. The same is true here. The trial court engaged in the proper analysis on the record and considered arguments of counsel before admitting certain prior bad act evidence and excluding others. We find no abuse of discretion as to the ruling on admissibility of ER 404(b) evidence.

II. Statements by Witness in Violation of Pre-Trial Evidence Rulings

Irias argues he was deprived of a fair trial due to a violation of the court's pretrial rulings excluding certain prior bad act evidence. Though the briefing frames the argument as prosecutorial or witness misconduct, Irias appears to actually focus his argument on the violation of the pretrial ruling regarding limitation of the ER 404(b). The standard of review for the trial court's cure of irregularities, such as improper testimony, is abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Irias argues that in two instances Salazar provided testimony that violated the court's order as to the ER 404(b) evidence that was addressed during motions in limine. The first piece of testimony was when Salazar testified that Irias struck their children at times. Defense counsel objected and moved to strike and the court instructed the jury to disregard the improper testimony.

The second instance was when Salazar testified about instances of sexual coercion. However, since Salazar's testimony was conveyed to the jury via a Spanish-to-English interpreter, the court actually realized she used the term "sexual relations" during her Spanish-language testimony and stopped the interpreter before that information could be presented to the jury in English.

Outside of the presence of the jury, the court had the interpreter provide the full statement in English and then instructed the prosecutor to have further discussion with Salazar about the pretrial rulings. When the jury returned, they were asked if anyone understood Spanish. One juror said they knew a little Spanish and the court instructed the jury that that there is an "art of interpretation and translation" so the jurors should "tune out" the Spanish to the extent they understood any words. Irias did not move for a mistrial, but now argues that the two instances of testimony in violation of the pretrial rulings deprived him of a fair trial.

"To determine the prejudicial effect of an irregular occurrence during trial, we examine the occurrence's seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it." State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998). Here, the seriousness of the occurrence is significant since the court made very specific findings as to which prior bad acts were substantially more probative than prejudicial and the improper testimony was directly in violation of the court's order excluding it. Id. at 46. However, we would note the first instance of improper testimony was much more serious than that of the untranslated testimony due to the ability for the jury to comprehend the content of the improper statement. The testimony was not cumulative since no other evidence of abuse of the children or sexual coercion was offered. However, a trial court is provided with wide discretion to cure trial irregularities for improper witness statements. Post, 118 Wn.2d at 620.

Here, the error as to the Spanish-language portion of testimony about sexual misconduct was sufficiently cured since the jury was never provided with

the English interpretation of the statement and no juror indicated they were fluent in Spanish when asked by the court. The comment regarding abuse toward the children was stricken by the court and the court then again provided a curative instruction. We presume the jury followed the court's instruction. Thompson, 90 Wn. App. at 47. Irias has not provided evidence that the instructions of the court to disregard the testimony were not followed.

Ultimately, we must ask whether the two improper statements, when viewed against the background of all the evidence, were so prejudicial that Irias was denied a fair trial. Id. This is not the case. One statement was not conveyed to the jury in a language they could easily understand and the other comment regarding violence toward the children, though clearly improper and interpreted into English, was followed by a curative instruction. Further, given that the defense was focused on challenging credibility of Salazar's testimony regarding the allegation as whole, and the theory that the possibility of obtaining immigration benefits incentivized her to fabricate this event, the problematic testimony did not prejudice Irias such that he was denied a fair trial.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78858-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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