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STATE OF WASHINGTON
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NO. 98421-2

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

COURT OF APPEALS NO 36169-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

Jamaica Christina Riley,

Defendant/Appellant.

Respondent's Reply to Petitioner's Motion
for Discretionary Review

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I. IDENTITY OF THE RESPONDENT

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. DECISION OF THE COURT OF APPEALS

Appellant, Jamaica Riley, petitions this Court to review *State v. Jamaica Christina Riley*, 36169-1-III, a published decision issued on March 17, 2020, in which the Court of Appeals held that the testimony of one of the State's witnesses, Misty Black, was admissible under ER 404(b), but that the testimony of four of the defense witnesses for the purpose of impeachment of the victim by specific acts or omission was not. A copy of the Court of Appeals' published decision is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Does Appellant/Petitioner satisfy the requirement of RAP 13.4(b)(3) when the trial court properly excluded her witnesses, and the rules of evidence provided other remedies which allowed her to fully present her defense? Answer: No.

IV. STATEMENT OF THE CASE

The victim, John Pink, was in a domestic relationship, to include marriage, with the Petitioner, Jamaica Riley, for some thirteen years. RP 27-28. In July of 2016, the couple separated. RP 28. Mr. Pink left the family home, but continued to pay the rent and utility bills for the couple's property where Ms. Riley continued residing with her boyfriend. RP 29-30.

In September or 2016, Mr. Pink took steps to remove his name from the PUD account at the couple's property. RP 30. Norm Hedden was the PUD worker who went out to the property to turn the service off. RP 116. When Mr. Hedden arrived, and Ms. Riley learned that the PUD service was going to be disconnected, she called Mr. Pink, who was in the parking lot outside his place of employment. RP 32.

According to Mr. Pink, Ms. Riley told him that if he removed his name from the bill, she would "shoot me in the head." RP 30. Mr. Pink testified that Ms. Riley was screaming and very shaky, and that the call was extremely scary. RP 31. Mr. Pink knew that Ms. Riley usually meant what she said, and that she was a good shot. RP 31-32. Although Ms. Riley had

threatened Mr. Pink in the past, she had never threatened to shoot him. RP 32. Mr. Pink testified that he believed the defendant's threats and that he took her threat to mean that she would kill him. RP 31-32, 62.

After this first call with Ms. Riley, Mr. Pink informed his boss who told Mr. Pink to call the Kittitas County Sheriff's Office as he didn't want Ms. Riley coming to their workplace and potentially shooting Mr. Pink. RP 31.

Mr. Pink did call the Sheriff's Office and Deputy Zach Green responded. RP 68. As he was contacting Mr. Pink to learn the nature of the complaint, Mr. Pink's phone rang, and Mr. Pink stated "[t]hat's her again." RP 69. Mr. Pink put Ms. Riley on speaker phone, and Deputy Green was able to hear a voice that he recognized as Ms. Riley's. *Id.* Deputy Green testified that there was a lot of screaming and yelling; that Ms. Riley was very upset and belligerent, and was yelling at Mr. Pink about a number of things. *Id.* According to the deputy, during the course of the ensuing two to three minutes, Ms. Riley was screaming, cussing, and calling Mr. Pink names. RP 70. She told Mr. Pink, "[i]f you try to pick up my kids, I guarantee you will leave in an ambulance." *Id.* The deputy

testified that throughout the five to ten minutes that he interacted with Mr. Pink prior to the call, Mr. Pink's demeanor was soft-spoken and low key, as it had been in all his prior interactions with Deputy Green, and as it remained throughout the call with Ms. Riley. RP 70.

When Deputy Green spoke with Ms. Riley the next day about the call, she denied having made any threats. RP 72. When the deputy informed her that he had overheard the call, Ms. Riley told him that she didn't remember making the threat, and that Mr. Pink had been rude and degrading. RP 73. At trial, Ms. Riley testified that she had not threatened Mr. Pink in the course of their discussions on September 16th. RP 134. She also stated that she did not recall making the threat about the ambulance and that she did not believe either Mr. Pink or Deputy Green when they had testified to that information in court. RP 143-144.

Mr. Hedden, the PUD worker who was disconnecting the power, testified that in the course of performing the service call, he heard Ms. Riley speaking to someone about not paying the power bill. RP 116-117. According to Mr. Hedden, "she was cussing him pretty good." RP 116. He heard neither

a threat to kill, nor a threat to shoot anyone, although he did hear Ms. Riley telling the person she was calling that she was going to “jump on a motorcycle and drive to town and – beat – beat his ass.” RP 117. Mr. Hedden was unable to hear the person that Ms. Riley was speaking to, but testified that Ms. Riley was screaming, cussing, loud, and mad. RP 118.

Mr. Pink testified about other threats and acts of violence that Ms. Riley had committed in the course of their relationship. He stated that she would frequently get upset while they were in the car with the children, and drive at excessive speeds until he apologized. RP 32. He stated that this behavior had occurred at least a dozen times. RP 33. Mr. Pink testified that Ms. Riley would throw dinner plates and cell phones particularly at his head; that she would smack and kick him; scratch him, and in his words, was “just very aggressive.” RP 33-34. Once Ms. Riley had scratched his left forearm with four fingernails, “from the elbow all the way to the wrist.” *Id.* According to Mr. Pink, Ms. Riley had hit him too often to recall each incident. RP 50.

After the two calls, Mr. Pink obtained a protection order against Ms. Riley. RP 40. He was instructed by law

enforcement to contact them whenever Ms. Riley violated the order. RP 60, 69. Mr. Pink notified them of a call that Ms. Riley had made a few days later in which she was screaming, loud and threatening. RP 39-40. He also notified law enforcement of a communication from Ms. Riley in December of 2016, which had concerned their children and which communication was to occur only through a third party. RP 46-47, 59-60.

Mr. Pink did not contact law enforcement again until nearly a year later in November of 2017, after he encountered Ms. Riley at the Cottage Café/Inn in Cle Elum where he had gone to pick up the couple's children. According to Mr. Pink, he "was trying to pick my kids up, and she had to come up to the window and speak her piece again before she would let me have my kids – when there was the no-contact order in place." RP 39, 110-111.¹ There was no further testimony about this incident.

¹ This incident is referred to in a piecemeal fashion throughout the proceedings and involved a November 2017, transfer of the couple's children at the Cottage Café/ Inn in Cle Elum. RP 6, 13, 17-18, 39, 110-111, CP 10. It is also the incident for which Ms. Riley sought to introduce the testimony of Joseph Riley and Alyssa Turner. RP 6, 13, 17-18, 110-111, CP 10.

On cross-examination of Mr. Pink, defense counsel elicited that the custody of the couple's children was contested and had been ongoing for the past two years. RP 51. However, custody had not been at issue at the time of the initial phone calls in which Ms. Riley had threatened Mr. Pink, and the latter of which Deputy Green had heard. RP 63. Mr. Pink did not know whether a conviction of Ms. Riley would benefit his position in the custody dispute, but testified that was "not my intention." RP 51. He further testified that when he had reported Ms. Riley's actions to law enforcement, it had not been in an effort to benefit himself in the custody dispute, but rather to stay safe, and because he had been told to do so. RP 52-53, 60, 69

The State also offered the testimony of Misty Black, who had known the couple for about two years towards the end of their relationship. RP 94, 98-99. The two families had spent time together; Ms. Riley had baby-sat for Ms. Black; and Ms. Black's children had stayed the night at the Pink/Riley home. RP 101-102.

Prior to Ms. Black taking the stand, defense counsel renewed his objection to her testifying based on relevance,

arguing that the statements in her declaration were character evidence and dissimilar to the allegations in the current matter. RP 90-91. The State's response was that the observations of the witness were relevant to show an ongoing pattern of domestic violence and the victim's subjective fear of Ms. Riley. The Court indicated that it would allow Ms. Black to testify and then revisit the issue. *Id.*

Ms. Black testified that she had heard Ms. Pink "put him down for – doing something that she didn't approve of, or she would belittle him, and hit him upside the head, or – whatever she felt was necessary." RP 95-96. According to Ms. Black, Ms. Riley would yell at Mr. Pink when he wasn't doing something the way that she wanted it done. RP 96. In addition to seeing Ms. Riley hit Mr. Pink upside the head, Ms. Black also observed Ms. Riley hit Mr. Pink on the shoulder, "like shoving him". *Id.* Ms. Black had seen this behavior "a couple of handfuls of times throughout the last couple years of going over there –" *Id.* Ms. Black never saw Mr. Pink verbally or physically respond to Ms. Riley's actions other than to hang his head or apologize. RP 97. In cross-examination, defense counsel elicited that this behavior had occurred during the end

of the couple's relationship, and that Ms. Black was a friend of both Mr. Pink and his current girlfriend. RP 99, 101.

According to Ms. Riley, she and Mr. Pink had "had a fairy tale relationship." RP 126. She testified that the two of them "were the – role model couple. We were perfect. Everybody wanted exactly the relationship we had." *Id.* Ms. Riley testified that the custody of their two children was disputed and that Mr. Pink had obtained numerous protections orders against her on his behalf as well as their children. RP 126-127. She stated that during the last few years, things had "just got out of hand." RP 128. She testified to a loss of self-esteem caused by Mr. Pink's treatment of her. *Id.* However, Ms. Riley also testified that there was no violence in the marriage. RP 125. Ms. Riley testified that she had never threatened Mr. Pink, but acknowledged that she had posted on Facebook that she would ruin him financially because she was angry. RP 137, 143.

Prior to trial, the State moved to exclude the testimony of Alyssa Turner, Joseph Riley, Rebecca Pink, Tara Krier,² and

² Ms. Krier is listed in the report of proceedings as "Tara Crier" RP 7, as well as "Tara Cryer" CP 10, RP 9-10, 20, 77-78.

Joshua Fishnik³ in the defendant's case-in-chief. According to Ms. Riley, Ms. Turner and Mr. Riley would testify about the transfer of the parties' children at the Cottage Café/Inn in November of 2017, alleging that Mr. Pink had made a false statement to law enforcement in an attempt to gain custody of his children. RP 17-18. According to counsel, Ms. Turner and Mr. Riley would dispute any allegations "that he (Mr. Pink) said that she (Ms. Riley) was yelling at him, threatening him, cursing him, and they (Ms. Turner and Mr. Reilly) were right there. And know that it did not happen." RP 6, 13, 17-18, 110-111, CP 10. Rebecca Pink, Tara Krier, and Joshua Fishnik were offered to testify that they had never seen any acts of domestic violence between the defendant, Ms. Riley, and the victim, Mr. Pink, and that the idea that Ms. Riley was abusive or assaultive was something that they never saw, and inconsistent with what they saw." RP 7, 77-79, 110-111, CP 10-11.

The State filed a motion *in limine* to preclude the testimony of these witnesses under ER 401, 403, 404, 404(b), 608, and

³ Mr. Fishnik is listed in the report of proceedings as "Joshua Fishnick" CP 11, RP 7, 20. The issue of his proffered testimony does not appear to be discussed in Petitioner's Motion for Discretionary Review, but the arguments regarding the testimony of Ms. Krier and Ms. Pink would apply equally to him.

704. The Court granted the State's motion, noting that the incident of the transfer of the parties' children at the Cottage Café/Inn was subsequent to the threatening calls at issue, dealt with collateral matters, and that the proffered testimony of Ms. Rebecca Pink, Ms. Krier, and Mr. Fishnik would only indicate an absence of observation which did not preclude the possibility that acts of domestic violence had occurred at other times. RP 12, 15, 20.

Defendant filed a motion *in limine* to preclude the testimony of Misty Black, a woman who had known Ms. Riley and Mr. Pink during the latter part of their relationship, and who, as stated *supra.*, had observed acts of domestic violence towards the victim at the hands of the defendant. RP 9, 12-13, 15-16. The State argued that Ms. Black's testimony was relevant as she had actually observed the defendant strike Mr. Pink. RP 14. The State cited *State v. Ragin*, 94 Wn.App. 407, 972 P.2d 519 (1999), and *State v. Barragan*, 102 Wn.App. 754, 9 P.3d 942 (2000), in support of its position that these acts went to the subjective fear of Mr. Pink when threatened by Ms. Riley. Ms. Riley renewed her objection prior to the testimony of Ms. Black. RP 90. The Court reserved ruling

until having heard her testimony. RP 91, 93. At the close of the State's case (which occurred immediately after Ms. Black had testified), the Court stated:⁴

And here's the other thing – we're going to be doing – and – haven't seen it, but it looks like – in his – we're going to be telling the jury that the only reason they can consider all of those – previous incidents between Mr. Pink and Ms. Riley – the only thing they can consider those for is to determine whether – Mr. Pink was – justified in his belief, in other words, whether his belief that he was going to be harmed was reasonable.

So they're not going to be use (sic) it for any other purpose. That's the whole purpose of the limiting instruction. So it doesn't make any sense to then – allow testimony to try to refute that type of testimony, because it's only being offered for that one purpose; it can't be used by them for any other purpose.

I'm going to stick to my original ruling, Mr. Moser. But you're making a good record. RP 15, 80, 110-113.

As an agreed limiting instruction, the Court gave the jury instruction number nine, which read as follows:

Evidence regarding past interactions between the defendant and Mr. Pink may only be considered by the jury in determining whether Mr. Pink was in reasonable fear that any threat would be carried out. RP 176, 187-188, CP 32.

⁴ The Court had previously indicated that it might provide a limiting instruction if it were to allow the testimony of Ms. Black. RP 80.

V. ARGUMENT

The Court of Appeals correctly concluded that the trial court did not violate Petitioner's constitutional right to present a defense when it excluded her witnesses, who, under the rules of evidence, could not have properly provided impeachment evidence. Furthermore, there were allowable alternative methods for Ms. Riley to have accomplished the same result.

Petitioner asserts that Alyssa Turner and Joseph Riley would have contradicted John Pink's testimony about the exchange of the couple's children in Cle Elum in November of 2017. According to the offer of proof at trial, those witnesses would have testified that John Pink lied when he said that Jamaica Riley "was yelling at him, threatening him, cursing him, and they were right there and know that that did not happen." RP 18.

During trial, Mr. Pink was asked about his interactions with the defendant after the September 2016, telephone calls. Testifying to the exchange of their children at the Cottage Café/Inn, John Pink stated:

“...I was trying to pick my kids up, and she had to come up to the window and speak her piece again before she would let me have my kids – when there was the no-contact order in place.” RP 39.

This was the *totality* of Mr. Pink’s testimony regarding this incident. (emphasis added). Other than saying that Ms. Riley had to “speak her piece again,” there was no reference to the defendant’s demeanor, her posture, or tone of voice, no allegation that she had yelled at him, threatened him, or cursed him.

Petitioner’s argument at trial seemed to be that at the time of the November incident, Mr. Pink told law enforcement something different than what he testified to, and what he had told law enforcement was a lie.

It is somewhat confusing, that in her motion for discretionary review, Petitioner’s claim seems to be that Mr. Pink’s trial testimony was a lie:

“...Riley’s rebuttal witnesses would have testified that Pink lied in his testimony about the child exchange incident...” BP 4.

“To the contrary, the testimony of Alyssa Turner would have established that Pink had lied on the stand in his testimony to the jury. RP 18, 39.

The testimony was relevant, therefore, not to establish that Pink had been dishonest at one point in the past, but to show that he was *currently* being dishonest in describing his conflicts with Riley to the jury. RP 110-11.” BP 6. (emphasis added).

Since he did not testify that Jamaica Riley yelled at, threatened, or cursed him, it is unclear as to what Ms. Turner or Mr. Riley would rebut, refute, or impeach. Mr. Pink’s testimony was not as they had represented it would be, the event had occurred some fourteen months after the threatening phone calls made by Ms. Riley and overheard by Mr. Hedden and Deputy Green, and Mr. Pink was available to be cross-examined on the exchange if there were some potential bias to be elicited.

Evidence rule 608(b) Specific Instances of Conduct states:

Specific instance of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court if probative of truthfulness or untruthfulness, be inquired into on character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The proffered testimony of Ms. Turner and Mr. Riley would have been hearsay on a collateral matter for which Mr. Pink was available for proper impeachment through cross-examination under ER 608(b).

As the Court of Appeals correctly noted, the testimony of Rebecca Pink and Tara Krier might have been relevant if they had been present during the specific incidents that Misty Black or John Pink were testifying about. There was no indication that they were, and the witnesses' testimony was offered merely to show that Ms. Riley and Mr. Pink had a non-violent relationship. The absence of evidence is not evidence of absence however, and Ms. Black and Mr. Pink were subject to cross-examination regarding those specific incidents that they testified to.

Additionally, those incidents were offered to show the reasonableness of Mr. Pink's fear when he received the two threatening phone calls from Ms. Riley, they were not offered to show her character, or that she acted in conformity therewith. As the Court of Appeals noted:

Under our state's evidence rules, Ms. Riley could have attempted to introduce evidence of her peaceful character through reputation evidence.

ER 405(a). But she did not do so. Ms. Riley was not entitled to circumvent the evidentiary prerequisites of reputation testimony by recasting peaceful character evidence as rebuttal testimony. The trial court was well within its discretion in excluding Ms. Riley's witnesses. *Opinion*, at 13 (footnotes omitted).


Petitioner does not address why ER 405(a) was not adequate to provide her with the means of achieving her goal of showing herself as an individual with a reputation of peacefulness. Petitioner also argues that the testimony of Tara Krier would have gone to the issue of whether or not John Pink had a reasonable fear of Ms. Riley RP 10, BP 8. Even the dissent acknowledges that the testimony of Ms. Krier for that purpose would have been improper. *Opinion*, at 17 (Fearing, J., dissenting).

VI. CONCLUSION

Testimony about prior bad acts of Ms. Riley were not offered to show her character but rather Mr. Pink's subjective fear in response to her threats. Under ER 608(b) and 405(a), Ms. Riley had the opportunity to cross examine both Ms. Black and Mr. Pink, and to have her reputation for peacefulness before the jury if she were able to establish that her character had been called into question, and that she had such a

reputation within the community. Ms. Riley was not denied her opportunity to present her evidence and her defense, she was however held to the rules of evidence. Therefore, Ms. Riley was not denied her constitutional right to present a defense and cannot establish under RAP 13.4(b)(3) that this Court should grant discretionary review. Petitioner's motion should be denied.

Respectfully submitted this 14th day of May, 2020.



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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on Thursday, May 14, 2020, I had mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 36169-1-III
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
JAMAICA CHRISTINA RILEY,)	
)	
Appellant.)	

PENNELL, C.J. — A fundamental tenet of a fair trial is that parties and witnesses are to be judged by what they have said or done, not by who they are. For this reason, the rules of evidence restrain the admissibility of character evidence. Specific instances of a party’s or witness’s bad conduct ordinarily cannot be introduced as evidence to prove the party or witness acted in conformity therewith. However, bad conduct evidence can be admissible for other reasons. And character evidence is sometimes permissible through reputation testimony or during cross-examination regarding specific instances of dishonest conduct.

The narrow ins and outs of the character evidence rules can pose a considerable challenge for trial judges. This is especially true in emotion-laden cases, such as ones where the involved parties are sorting through a marital dissolution or a family dispute.

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Here, the trial judge adequately marshaled the admissibility of character evidence in a criminal telephone harassment case involving divorcing spouses. We therefore affirm the judgment of conviction.

FACTS

Jamaica Riley and John Pink separated after 13 to 14 years together. They had two children. Shortly after the separation, Mr. Pink moved out of the family home and later contacted the utility company to remove his name from the power bill. A utility worker was dispatched to the residence, where he encountered Ms. Riley. When the worker stated the reason for his presence, Ms. Riley became upset. She then made two telephone calls to Mr. Pink. The content of those calls gave rise to the two counts of telephone harassment at issue in this case.

During the first call, Ms. Riley yelled at Mr. Pink and threatened to shoot him in the head. The utility worker was present within earshot during this call. He did not recall Ms. Riley's threat to shoot Mr. Pink, but he did overhear Ms. Riley curse and issue other threats. Both Mr. Pink and the worker described Ms. Riley as angry and loud. In describing Ms. Riley's tone of voice, Mr. Pink stated she "was screaming and very shaky, and it was extremely scary." Report of Proceedings (RP) (June 5, 2018) at 31. Mr. Pink explained he was afraid Ms. Riley would act on her threat because Ms. Riley owned two

guns and Mr. Pink knew Ms. Riley was “a very good shot,” and “usually meant what she said.” *Id.* at 31-32.

Ms. Riley’s second call came after Mr. Pink had contacted the county sheriff. A deputy was with Mr. Pink at the time of the call and listened in on Ms. Riley’s statements. During the second call, Ms. Riley stated Mr. Pink would “be lucky to leave in an ambulance” if he came to pick up their children later that day, as had been previously arranged. *Id.* at 37. The sheriff’s deputy recalled Ms. Riley stating something to the effect, “[i]f you try and pick up my kids I guarantee you will leave in an ambulance.” *Id.* at 70. Mr. Pink interpreted Ms. Riley’s statements regarding the ambulance as a legitimate threat to his safety.

The State charged Ms. Riley with two counts of telephone harassment, one count of witness tampering, and one count of violating a protection order.¹ Ms. Riley exercised her right to a jury trial.

Prior to trial, the State successfully moved to exclude four of Ms. Riley’s witnesses. Two witnesses (Alyssa Kaye Turner and Joseph Riley) were to testify Mr. Pink

¹ The conduct for the latter two counts occurred after the threats, and does not substantively relate to the issues Ms. Riley raises on appeal. Originally, the State charged Ms. Riley with two counts of felony telephone harassment. During trial, one of the felony telephone harassment counts was amended to a misdemeanor.

had made a false police report against Ms. Riley. According to the defense proffer, the testimony was relevant for impeachment. The other two witnesses (Rebecca Pink and Tara Krier) were to testify that they had not observed any marital discord between Ms. Riley and Mr. Pink. The defense claimed this testimony was relevant to challenge the notion that “Mr. Pink had a reasonable fear that Ms. Riley would carry out a threat.” Clerk’s Papers (CP) at 10.²

The defense unsuccessfully moved to exclude a State witness named Misty Black. Ms. Black was to testify she had seen Ms. Riley slap Mr. Pink in the back of the head on numerous occasions.³ According to the State, Ms. Black’s testimony was relevant to prove Mr. Pink reasonably feared Ms. Riley would carry out her telephone threats.

² The entire proffer was as follows: Rebecca Pink would testify “she has seen John Pink and Jamaica Riley interact on a number of occasions and has never seen them violent or angry with each other and that such a characterization is not consistent with the dynamic the couple had.” CP at 10. Tara Krier would testify “she has known John Pink and Jamaica Riley for more than 15 years and that based on a lack of violence of conflict, Mr. Pink would not have reasonable fear that Ms. Riley would carry out a threat.” *Id.*

³ The pretrial proffer was Ms. Black would testify she had known John Pink and Jamaica Riley ““for approximately the last two years. We would hang out as families and go camping and do other activities. Throughout that entire time I witnessed Jamaica hit or slap John numerous times in anger. I saw her smack him in the back of the head numerous times because she was upset over very minor things like ordering the wrong type of pizza. I never witnessed John become physical with Jamaica in any way. He would usually hang his head and act ashamed over these incidents.”” RP (June 5, 2018) at 9.

The defense argued Ms. Black's testimony was not relevant because testimony that Ms. Riley was abusive and had hit her husband in the head was "not relevant to a person being afraid of being shot." RP (June 6, 2018) at 91. The court disagreed.

At trial, the State's evidence was consistent with the foregoing summary and judicial rulings. In addition, Mr. Pink testified over objection about additional instances of threatening conduct by Ms. Riley. Mr. Pink claimed that on at least a dozen occasions Ms. Riley exhibited fits of rage while driving the family car. During these incidents, Ms. Riley would accelerate to over 130 miles per hour and then slam the gears of the car in order to frighten Mr. Pink and the couple's children. Mr. Pink also testified Ms. Riley often threw objects at his head such as plates, cell phones, and rocks.

According to Mr. Pink, Ms. Riley's angry outbursts were a daily occurrence. Ms. Riley was very aggressive and would frequently smack or kick Mr. Pink. One time, Mr. Pink recalled Ms. Riley scratched his left forearm with four fingernails, "from the elbow all the way to the wrist." RP (June 5, 2018) at 33-34. On another occasion, Ms. Riley kicked Mr. Pink in the ribs, knocking him out of the bed.

Ms. Riley took the stand and testified in her own defense. Ms. Riley discussed the two phone calls between herself and Mr. Pink. She agreed the calls were heated, but denied making any threats. Ms. Riley also denied ever hitting Mr. Pink or engaging in

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other violent acts. According to Ms. Riley, her marriage to Mr. Pink was “a fairy tale relationship.” RP (June 6, 2018) at 126.

After the close of evidence, the court instructed the jury on telephone harassment, including the requirement that the State prove Ms. Riley had issued a true threat.⁴ The threat instruction stated as follows:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 30.

The jury convicted Ms. Riley on two counts of telephone harassment and one count of violating a protection order. It acquitted her of witness tampering. The court sentenced Ms. Riley to 10 months’ confinement and \$700 in legal financial obligations, including a \$200 criminal filing fee.

Ms. Riley appeals.

⁴ The misdemeanor telephone harassment count required proof of threat to injure. The felony count required proof of a threat to kill.

ANALYSIS

Admission of other act evidence

ER 404(b) governs the admissibility of other act evidence. The rule prohibits admission of extraneous “crimes, wrongs, or acts” for the purposes of proving bad character. But not all other act evidence is prohibited. In particular, other act evidence is admissible in a criminal case if relevant to proving an essential component of the State’s case. *State v. Foxhaven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Before admitting other act evidence under ER 404(b), the trial court is required to conduct the following four-step inquiry on the record:

- (1) find by a preponderance of the evidence that the misconduct occurred,
- (2) identify the purpose for which the evidence is sought to be introduced,
- (3) determine whether the evidence is relevant to prove an element of the crime charged, and
- (4) weigh the probative value against the prejudicial effect.

State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If, despite the requirement for an explicit record, the trial court fails to document its ER 404(b) analysis, we may review its decision de novo. *See State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) (reviewing trial court’s ruling de novo where trial court did not conduct four-part analysis on the record); *State v. Trickler*, 106 Wn. App. 727, 733, 25 P.3d 445 (2001) (same); *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (same).

The thrust of Ms. Riley's argument is that the trial court should have restricted the scope of the State's other act evidence, aimed at explaining why Mr. Pink reasonably feared Ms. Riley would carry out her telephone threats.⁵ Ms. Riley does not dispute the State was entitled to elicit evidence on the issue of Mr. Pink's reasonable fear of harm.⁶ Her argument is the State's other act evidence was too dissimilar to the charged conduct to give rise to a reasonable fear of harm.

Ms. Riley's arguments implicate the third and fourth components of the ER 404(b) analysis: relevance and undue prejudice. There is no serious dispute that the court had sufficient evidence the prior acts occurred, based on the testimony from John Pink and

⁵ Ms. Riley also points out the trial court overruled an objection to Mr. Pink's testimony regarding the facts leading up to the couple's separation. Although the trial court likely should have struck this testimony, Ms. Riley fails to explain why this testimony deprived her of a fair trial, particularly in light of the uncontested fact that Ms. Riley and Mr. Pink had a contentious divorce. We therefore need not address the issue further. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

⁶ The crime of telephone harassment requires proof of a true threat. *State v. Tellez*, 141 Wn. App. 479, 483, 170 P.3d 75 (2007). The jury was therefore required to find that a reasonable person *in Ms. Riley's position* would have foreseen the words uttered to Mr. Pink would be interpreted as a serious expression of an intent to cause harm. Unlike the crime of generic harassment, the State is not also required to prove Ms. Riley's words placed Mr. Pink "in reasonable fear that the threat would be carried out." RCW 9A.46.020(1)(b). The distinction between what would be reasonably understood by the defendant, as opposed to the victim, is subtle and has not been addressed either at trial or on appeal. We operate under the parties' apparent assumption that proof of whether Mr. Pink had a reasonable fear of harm was relevant to whether Ms. Riley reasonably would have foreseen him to have a fear of harm.

Misty Black. And the noncharacter purpose of the State's evidence (proof of reasonableness of threatened harm) was made explicit on the record.

We agree with the State that the third and fourth components of the ER 404(b) test are met in this case. The breadth of admissible other act evidence depends on what the State is seeking to prove. For example, when other act evidence is proffered to prove identity through modus operandi, “a high degree of similarity” is required so “as to mark [the prior act] as the handiwork of the accused.” *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974)). It is only when a prior act and a charged crime share distinct or unusual characteristics that the prior act is relevant to proving identity. *Id.* at 777-78. But other act evidence proffered to prove reasonableness of threatened harm is different. In order to explain why the defendant's words constituted a true threat, which would reasonably be interpreted as a serious threat of harm, the State must be able to place the defendant's statement in “context.” *State v. Ragin*, 94 Wn. App. 407, 412, 972 P.2d 519 (1999). “The jury [is] entitled to know what [the victim] knew at the time” the defendant issued the threat to decide whether it constituted a true threat. *Id.* The issue of similarity is not part of the analysis.

Here, the crux of the parties' dispute was whether Ms. Riley's telephone statements could reasonably be interpreted as true threats of harm. During closing argument, the defense likened Ms. Riley's words to the taunts of a high school football team: "'We're gonna maul the other team, we're gonna kill 'em, we're gonna murder 'em.'" RP (June 6, 2018) at 208. Ms. Riley characterized Mr. Pink as not really concerned by Ms. Riley's statements and that he would simply call the police "pretty much at the drop of a hat . . . whether he's concerned or not, whether he's worried or not. Whether he's in fear or not." *Id.* at 213. In light of the parties' competing theories, the State was entitled to present the jury information regarding what Mr. Pink knew at the time of Ms. Riley's calls that gave rise to a reasonable fear of harm. Ms. Riley's criticism of the quality of the State's proof went to the weight of the State's case and provided fodder for argument, but it did not bar admission of the evidence.

Exclusion of defense witnesses

Ms. Riley claims she was deprived of her right to present a defense when the court excluded two sets of witnesses. The first set of witnesses (Alyssa Kaye Turner and Joseph Riley) were proffered to impeach Mr. Pink's credibility through testimony that Mr. Pink engaged in misconduct by making a false report against Ms. Riley to police. The second set of witnesses (Rebecca Pink and Tara Krier) would have testified Ms. Riley and Mr.

Pink did not have a violent relationship, thereby challenging the State's other act evidence under ER 404(b). We find no error in the trial court's orders, as Ms. Riley failed to show the proffered testimony would be admissible under the rules of evidence.

Impeachment through specific instances of misconduct

ER 608(b) addresses the circumstances under which a witness may be impeached through specific instances of misconduct. The rule provides that, except as allowed by ER 609 (impeachment by evidence of criminal conviction), extrinsic evidence of prior instances of misconduct may not be introduced to support or impeach a witness's testimony. In this context, "extrinsic evidence" means evidence "adduced by means other than cross examination of the witness." BLACK'S LAW DICTIONARY 700 (11th ed. 2019).

Here, Ms. Riley sought to impeach Mr. Pink's credibility by introducing witness testimony that Mr. Pink had engaged in specific instances of dishonest behavior. Under ER 608(b), Ms. Riley was welcome to cross-examine Mr. Pink regarding his character for truthfulness by referencing specific instances of misconduct. However, if Mr. Pink denied the misconduct, Ms. Riley would have been required to take Mr. Pink at his answer.

United States v. Herzberg, 558 F.2d 1219, 1223 (5th Cir. 1977) (Under Federal Rule of Evidence 608(b), "[t]he cross-examining attorney must take the witness' answer.").

Ms. Riley was not allowed to impeach Mr. Pink through witness testimony. The trial court's ruling excluding Ms. Riley's evidence was therefore appropriate.

Rebuttal of State's ER 404(b) evidence

Ms. Riley argues that because the trial court allowed the State to introduce evidence under ER 404(b) regarding prior acts of aggression by Ms. Riley against Mr. Pink, she should have been allowed to present rebuttal testimony from witnesses who would state they had never seen such conduct. This argument misses the mark. Had Ms. Riley's witnesses been present during a specific instance when Mr. Pink had been assaulted or threatened, their testimony would have been admissible as direct rebuttal. Alternatively, the testimony might have qualified as rebuttal evidence if the witnesses had been together with Ms. Riley and Mr. Pink with sufficient regularity that they likely would have been present during any alleged acts of violence. But Ms. Riley made no such claims. Instead, she argued her witnesses were generally familiar with the interactions between Ms. Riley and Mr. Pink and they had never observed any violent conduct. This was not rebuttal testimony and was not admissible as such.

The fact that Ms. Riley's witnesses could not directly rebut the State's claims regarding prior acts of aggression did not strip the defense of options. ER 404(a)(1) provided Ms. Riley an avenue for introducing evidence of a pertinent character trait, such

peacefulness. Under our state's evidence rules, Ms. Riley could have attempted to introduce evidence of her peaceful character through reputation evidence. ER 405(a).⁷ But she did not do so.⁸ Ms. Riley was not entitled to circumvent the evidentiary prerequisites of reputation testimony by recasting peaceful character evidence as rebuttal testimony. The trial court was well within its discretion in excluding Ms. Riley's witnesses.

Legal financial obligations

As a final argument, Ms. Riley seeks relief under Washington's reformed legal financial obligation laws, claiming the \$200 criminal filing fee imposed against her

⁷ Unlike the federal rules of evidence, Washington's evidence rules do not permit character evidence to be proved by opinion testimony. *State v. Kelly*, 102 Wn.2d 188, 194-95, 685 P.2d 564 (1984); FED. R. EVID. 405. The state rules therefore limit the manner in which a litigant can present evidence relevant to the jury's assessment of guilt or innocence. Such limitation appears unnecessary and perhaps even unwise. Nevertheless, it is not this court's role to rewrite the evidence rules. Although an accused person has a constitutional right to present a defense, the scope of that right does not include introduction of otherwise inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010).


⁸ This is not a rare case where character evidence is "an essential element of a charge, claim, or defense," and therefore may be proved by specific instances of conduct. ER 405(b). *See Kelly*, 102 Wn.2d at 196-97 ("In criminal cases, character is rarely an essential element of the charge, claim or defense."). The prior acts of violence between Ms. Riley and Mr. Pink were relevant to proving a noncharacter element of the offense: whether Ms. Riley's words would be reasonably interpreted as a threat. Character or a character trait was not, itself, an essential element of proof.

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should be struck pursuant to RCW 36.18.020(2)(h) and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The State concedes relief is appropriate based on Ms. Riley's indigence under RCW 10.101.010(3)(a). We therefore grant Ms. Riley's request and order the \$200 filing fee struck from the judgment and sentence.


CONCLUSION

The judgment of conviction is affirmed. This matter is remanded with instructions to strike the \$200 criminal filing fee from Ms. Riley's judgment and sentence. Appellate costs shall not be imposed.



Pennell, C.J.

I CONCUR:



Siddoway, J.

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FEARING, J. (dissenting) — As a general rule, the State may not introduce evidence of an accused's earlier bad acts. ER 404(b). In turn, although the accused may introduce evidence of a good character, the accused generally may not introduce evidence of the absence of earlier bad acts. In Jamaica Riley's prosecution, however, the State presented evidence of earlier abusive and assaultive conduct of Riley in order to prove John Pink's fear of Riley. Riley could not, however, rebut such evidence with testimony of the absence of such behavior.

The State submitted testimony from Misty Black that she saw Jamaica Riley slap John Pink numerous times. Black also testified that John Pink did not retaliate in turn.

John Pink averred that Jamaica Riley daily engaged in angry outbursts. Pink testified that, in addition to Riley smacking him, Riley, on other occasions, scratched his arm and kicked him in the ribs. Pink testified that Riley threw plates, cellphones, and rocks at him. He testified that sometimes, when Riley drove the car with him and the children as passengers, Riley accelerated to 130 miles per hour and slammed the gears of the car to frighten him and the children. Despite this extensive evidence of earlier bad

conduct of Jamaica Riley toward John Pink, the trial court precluded Jamaica Riley from presenting testimony from Rebecca Pink that she had seen the husband and wife interact and never observed either of them violent or angry with the other. The court precluded testimony from Tara Krier that she knew the couple for fifteen years, she never saw a violent act between the two, and John Pink would not have had a reasonable fear that Riley would consummate a threat.

So the State presented extensive and demoralizing evidence painting Jamaica Riley as a circadian violent person, but Riley could not present third-party witness testimony to state that the witness never saw Riley become violent toward John Pink. Taint fair.

Jamaica Riley, during her testimony, denied any of the alleged violent acts attributed to her by John Pink and other State witnesses. The jury, of course, would have questioned the credibility of Riley because of her being the accused. Riley deserved the opportunity to have other witnesses, who observed the interaction between the parties, to testify to observations since the jury could consider the other witnesses credible.

Admittedly, Jamaica Riley's tendered witnesses did not plan to testify to Riley's character or reputation for engaging in violent acts or for not engaging in abusive behavior. They intended to testify to the lack of earlier bad acts, and Riley could have engaged in many acts of violence out of the sight of the witnesses. But the State

presented a theory that Jamaica Riley extensively and routinely engaged in violence. When John Pink testified to daily angry outbursts, Riley should have gained the right to call to testify someone who spent significant time with the couple, but saw no violent acts. At least the trial court should have inquired as to the amount of time that the witnesses spent with the couple before precluding the testimony. The majority analyzes the appeal as simply one involving the admissibility of prior bad act evidence or the lack of earlier wrongful conduct. The majority fails to analyze the appeal as one demanding an opportunity for an accused to rehabilitate her character because of the attacks meted by the State to that character.

Tara Krier's and Misty Black's testimony would not have been admissible if the State had not presented testimony of conduct of Jamaica Riley other than the conduct that formed the criminal charges. But the two witnesses' testimony became admissible when the State opened the door and presented testimony of a long and tortured history of violence. Tara Krier should not have been able to testify as to whether John Pink would or would not have a reasonable fear, but should have been able to testify as to her observations, which observations counter the State's testimony.

Washington courts allow the State to present rebuttal evidence as to character and the prior bad acts of the accused when the accused places his or her character in issue.

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State v. Young, 158 Wn. App. 707, 719, 243 P.3d 172 (2010); *State v. Brush*, 32 Wn. App. 445, 450, 648 P.2d 897 (1982). The stated rule must apply in favor of the accused also. *Barker v. Commonwealth*, 209 Ky. 817, 273 S.W. 503, 504-05 (1925).

I would reverse the convictions for telephone harassment and remand for a new trial.



Fearing, J.

KITTITAS COUNTY PROSECUTOR'S OFFICE

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