

62329-0

62329-0

NO. 62329-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY NELSON,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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LILA J. SILVERSTEIN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in allowing the State to amend the information to add count four after the case was sent out for trial.

2. The trial court violated ER 404(b) and ER 403 by allowing Rachel Christenson to testify that she had previously heard Mr. Nelson threaten Lazett Rodriguez.

3. The trial court violated ER 404(b) by allowing Rachel Christenson to testify that she had previously seen Mr. Nelson push Lazett Rodriguez.

4. The trial court violated ER 404(b) and ER 403 by allowing Rachel Christenson and Jamilla Jordan to testify that Mr. Nelson wore gang colors and tattoos and flashed gang signs.

5. The trial court violated ER 404(b) and ER 403 by failing to perform an analysis under these rules to determine whether Lazett Rodriguez's petition for a protection order, and the statements therein, were admissible.

6. The trial court violated ER 404(b) and ER 403 by allowing Ms. Rodriguez to testify that Mr. Nelson had threatened to kill her in the past and that he had put his arms around her neck and said,

“Die, die,” and by admitting this statement with no analysis under ER 404(b) and ER 403.

7. The trial court violated ER 404(b) and ER 403 by allowing Ms. Rodriguez to testify that Mr. Nelson had fondled her breasts in public against her wishes, and by admitting this statement with no analysis under ER 404(b) and ER 403.

8. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor, when examining Ms. Rodriguez, to state, “you wrote in that petition that you just couldn’t leave him because he has always said that if you leave him, he will kill you,” and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

9. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor to highlight the statement in the petition for protection order alleging that Mr. Nelson once “pulled a knife, acting like he [was] going to stab” Ms. Rodriguez, and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

10. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor to state that the petition for protection order alleged that Mr. Nelson had kicked in the door of Ms. Rodriguez’s

car and broken her mirror, and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

11. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor to state that the petition for protection order indicated Mr. Nelson blocked Ms. Rodriguez's car when she tried to leave him, and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

12. The trial court violated ER 404(b) and ER 403 by failing to perform the requisite analysis under these rules and by allowing the prosecutor to read the following statement from Lazett Rodriguez's petition for protection order: "[Mr. Nelson] has gotten drunk and punched me in the back three times, left bruises."

13. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor to state, "How about when you wrote down in your statement, 'He used a butter knife and a steak knife, acting like he was going to stab me,'" and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

14. The trial court violated ER 404(b) and ER 403 by allowing the prosecutor to elicit the allegation that Mr. Nelson once told Ms. Rodriguez that if she "were to ever die, he was going to

keep [her] body, put it in a closet, and have sex with it,” and by admitting this prior act without performing the requisite analysis under ER 404(b) and ER 403.

15. The trial court abused its discretion in denying Mr. Nelson’s motion to sever count one from the other charges.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The State may not amend an information if doing so would prejudice the substantial rights of the defendant. The defendant is prejudiced if an amendment occurs on the eve of trial and adds a charge rather than merely changing an existing charge to a similar charge. Where the State amended the information to add a new count involving a new incident and a new victim after the case had already been sent out for trial, did the trial court abuse its discretion in allowing the surprise amendment? (Assignment of Error 1).

2. Evidence of acts other than the crime charged is not admissible to show a defendant’s character or propensity to commit such acts, and must be excluded unless (1) it is relevant and necessary to prove an essential ingredient of the crime charged, and (2) its probative value outweighs its potential for prejudice. In this prosecution for four counts of felony harassment, did the trial

court err in admitting many allegations of prior threats, minor violence, and gang affiliation, without performing the requisite analysis for most of the acts, and where most of the acts were either not relevant or substantially more prejudicial than probative? (Assignments of Error 2-14).

3. Although the criminal rules allow for joinder of related charges, the trial court should sever offenses if prosecution of all charges in a single trial would prejudice the defendant. Where the trial court admitted an extraordinary amount of highly inflammatory evidence as to count one, but that evidence would not have been admissible in a separate trial for counts two, three, and four, did the trial court abuse its discretion in denying Mr. Nelson's motion to sever count one from the other charges? (Assignment of Error 15).

### C. STATEMENT OF THE CASE

On March 31, 2008, the State charged Anthony Nelson with two counts of felony harassment under the threat-to-kill prong for telephone calls he had made earlier that month to his ex-girlfriend, Lazett Rodriguez, and her neighbor, Rachel Christenson. CP 1-7. The case was sent out for trial on June 10, 2008. 6/10/08 RP 2.

On June 11, the State moved to amend the information to add another count involving Rachel Christenson, as well as a fourth

count alleging that Mr. Nelson also threatened to kill Ms. Christenson's partner, Jamilla Jordan, between March 22<sup>nd</sup> and 24<sup>th</sup>. 6/11/08 RP 2-4. Mr. Nelson did not oppose the amendment adding count three, because he was already aware of the possible addition. But Mr. Nelson opposed the amendment adding count four on the eve of trial, because it was a surprise charge alleging a violation against a new complainant and the State only provided discovery as to this allegation that day. 6/11/08 RP 2-3, 8-14. The trial court granted the motion to amend, reasoning that the State had only recently become aware of the facts supporting the fourth charge. 6/11/08 RP 18-19.

Mr. Nelson moved to sever count one from the other charges on the basis that the strength of the evidence varied and that evidence admissible as to count one would not be cross-admissible in a separate trial for the other counts. 6/12/08 RP 12-15. The trial court acknowledged that the cross-admissibility issue was difficult, but denied the motion. 6/12/08 RP 21-22.

During a pretrial hearing on evidentiary issues, Mr. Nelson opposed the introduction of prior acts under ER 404(b) and ER 403. 6/12/08 RP; 6/16/08 RP. Over his objection, the trial court allowed Ms. Christenson and Ms. Jordan to testify that Mr. Nelson flashed

gang signs and sported gang-affiliated clothing and tattoos, and that they had previously witnessed Mr. Nelson threaten and shove Ms. Rodriguez. 6/16/08 RP 110.

As to Ms. Rodriguez, Mr. Nelson opposed the admission of a petition for protection order and the statements therein on several grounds: (1) as inadmissible hearsay under ER 802, (2) as impermissible character evidence under ER 404(b), and (3) as substantially more prejudicial than probative under ER 403. The trial court ruled that the statements did not constitute inadmissible hearsay because they were prior inconsistent statements under ER 801(d)(1)(i). 6/16/08 RP 111-132. The court then refused to perform an admissibility analysis under ER 404(b) and ER 403, reasoning that the hearsay ruling was dispositive of the statements' admissibility. 6/16/08 RP 134. The State accordingly elicited around a dozen highly inflammatory statements from the petition during Ms. Rodriguez's testimony. 6/18/08 RP 4-34.

At trial, Ms. Christenson and Ms. Jordan testified that Mr. Nelson called them and threatened to kill them, and that they were afraid he would carry out the threats because he was in a gang and because they had previously heard him threaten Ms. Rodriguez and had seen him push her. 6/18/08 (AM) RP 3-93. Ms. Rodriguez

testified that Mr. Nelson called her and threatened to kill her, but that she was not afraid of him. To prove that Ms. Rodriguez was, in fact, afraid, the prosecution stepped through every prior act alleged in the petition for protection order. 6/18/08 (PM) RP 4-34.

Mr. Nelson was convicted as charged on all counts. CP 125-34. He timely appeals. CP 123-24.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S LATE MOTION TO AMEND THE INFORMATION TO ADD COUNT FOUR.

The State originally charged Mr. Nelson with two counts of felony harassment in an information filed March 31, 2008. CP 1-2. The case was sent out for trial on June 10, 2008, and on June 11 the State moved to amend the information to add counts three and four. 6/11/08 RP 2-4.

Mr. Nelson did not oppose the amendment adding count three, because it was an additional allegation regarding Rachel Christenson, the alleged victim on count two, and Mr. Nelson was already aware of the possible addition. But Mr. Nelson opposed the amendment adding count four on the eve of trial, because it alleged a violation against a new complainant, Jamilla Jordan, and

the State only provided discovery as to this allegation that day.

6/11/08 RP 2-3, 8-14.

The trial court allowed the amendment adding count four over Mr. Nelson's objection. 6/11/08 RP 19. Mr. Nelson challenges that ruling on appeal. This Court reviews a trial court's decision allowing amendment for abuse of discretion. State v. Ziegler, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

Article I, section 22 of our state constitution<sup>1</sup> and the Sixth Amendment to the federal constitution<sup>2</sup> provide that an accused must be informed of the charges he is to meet at trial. Const. art. I, § 22; U.S. Const. amend. VI. Consistent with these constitutional provisions, our criminal court rules allow the State to amend an information before resting its case only if the "substantial rights of the defendant are not prejudiced." CrR 2.1(d).

Prejudice is more likely to exist where, as here, an amendment on the eve of trial adds a new count involving a new incident and a new victim rather than merely modifying an existing count. In State v. Hakimi, for example, this Court rejected the defendant's argument that trial counsel was ineffective for failing to

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<sup>1</sup> "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ...."

<sup>2</sup> "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation ...."

challenge a late amendment, because the amendment did not add a count and in fact *reduced* the defendant's exposure:

The State's amendment in this case did not jeopardize Hakimi's ability to defend himself. The State did not allege an additional count; its amendment reduced one count. The reduced charge arose out of the same factual scenario on which the original charge had been brought.

Hakimi, 124 Wn. App. 15, 28, 98 P.3d 809 (2004).

Similarly, in State v. Brown, this Court held that the trial court properly allowed the State to amend the information on the eve of trial where "the amendment *eliminated* some charges and reduced others." Brown, 55 Wn. App. 738, 743, 780 P.2d 880 (1989) (emphasis in original). The defendant could not show prejudice because "[t]he reduced charge involved the same evidence and presented no problems for the preparation of Brown's defense." Id. at 743-44. The Court concluded, "Where the principal element of the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." Id. at 743 (quoting State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982)).

Here, in contrast to Brown and Hakimi, the amendment did not reduce the charges but added a new one. Mr. Nelson was

prejudiced by the late amendment because the new count was based on new evidence which Mr. Nelson did not have adequate time to address. Although his attorney was allowed a brief recess to interview the new complainant, he could not request a continuance because it would have delayed the trial by another two months (in light of impending absences of both attorneys), thereby prejudicing Mr. Nelson. 6/11/08 RP 8-11, 19; Cf. State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997) (defendant was prejudiced by amendment adding three counts days before trial, because he was forced to waive his speedy trial right and request a continuance to prepare for the surprise charges).

Ziegler is instructive. There, this Court approved an amendment changing a count of first degree child rape to first degree child molestation, but held the trial court abused its discretion in allowing an amendment to *add* two counts of child rape. Ziegler, 138 Wn. App. at 810-11. The latter amendment was improper even though, unlike in this case, the two new counts involved the same victim as the existing counts. Id. at 807. This Court explained:

This was not merely the amendment from one crime to a similar charge. Nor was this an amendment that changed the means of a crime already charged.

Adding two child rape charges during trial affected Ziegler's ability to prepare his defense.

Id. at 811.

The same is true here. This was not an amendment from one crime to a similar charge or one that changed the means of a crime already charged. It was an amendment adding an allegation of a separate incident against a separate victim and involving completely new discovery which was not provided to the defense until the day of trial. 6/11/08 RP 14. The late surprise amendment prejudiced the substantial rights of Mr. Nelson. Accordingly, this Court should reverse the conviction on count four.

2. THE TRIAL COURT VIOLATED ER 404(B) AND ER 403 BY ADMITTING EVIDENCE OF SEVERAL PAST ACTS THAT WERE RELEVANT ONLY TO IMPUGN MR. NELSON'S CHARACTER AND WERE SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE.

a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded unless (1) it is relevant and necessary to prove an essential ingredient of the crime charged, and (2) its probative value outweighs its potential for prejudice. "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.

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.

When the State offers evidence of prior acts, the court must “closely scrutinize” it to determine if (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

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.” Id. at 776.

A trial court’s evidentiary rulings are reviewed for abuse of discretion. State v. Pogue, 104 Wn. App. 981, 984, 17 P.3d 1272 (2001). Improper admission of evidence constitutes reversible error if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (citing State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

b. The prior acts to which Ms. Christenson and Ms. Jordan testified should have been excluded under ER 404(b) and ER 403. Rachel Christenson and Jamilla Jordan testified that they witnessed Mr. Nelson threaten and push Ms. Rodriguez, and that Mr. Nelson wore gang colors and tattoos and flashed gang signs. None of these incidents pass the two-part test for admissibility, and the trial court should have excluded them.

As to pushing and shoving, Ms. Christenson testified that she had twice witnessed Mr. Nelson “behave aggressively” toward

Lazett Rodriguez. 6/18/08 (AM) RP 27. "The first time they were playing at first and it became – she became enraged because he was hurting her, and then he just started yelling and shoved her."

6/18/08 (AM) RP 28. Ms. Christenson further explained:

It was the time we were drinking in his home. I think he had gotten sick. He was saying he just didn't want to drink anymore, he didn't feel good. All of the kids were around playing. He became upset with Lazett because she was like well, we're all drinking, we're all having fun, start playing, sit down. And when he got up to walk to the bathroom I remember hearing her say ouch, don't push me.

6/18/08 (AM) RP 31.

"The second time was after he was no longer staying there. He was trying to retrieve his washer and dryer that he had bought for her and her kids, and he started shoving her because she wouldn't let him in the house. And then when he got past her he pushed her again." 6/18/08 (AM) RP 28.

These incidents should have been excluded because neither is relevant to the question of whether Mr. Nelson's telephone calls on March 22 and 24 placed the witnesses in reasonable fear that a threat to kill would be carried out, which was the State's proffered purpose. Pushing and shoving is a far cry from murder. As the defense attorney pointed out, these acts were simply introduced for

the impermissible purpose of impugning Mr. Nelson's character. Accordingly, their admission was an abuse of discretion.

The trial court also admitted extensive testimony about Mr. Nelson's alleged gang membership. Ms. Christenson testified that Mr. Nelson had previously told her and Ms. Jordan that he was in the "Folks" gang, otherwise known as "Gangster Disciples." 6/18/08 (AM) RP 21-22. She continued, "He walked around with a black bandana which is a representation of that gang. He's threw up gang signs." 6/18/08 (AM) RP 22. "I saw tattoos on him, one on his stomach. ... I don't really remember the exact tattoo, but I remember my partner saying to me that is a gang tattoo." 6/18/08 (AM) RP 22.

Ms. Jordan testified that she had seen Mr. Nelson with a black bandana and had heard Lazett Rodriguez describe Mr. Nelson as a gang member. 6/18/08 (AM) RP 73-74. She further testified that Ms. Rodriguez once lifted up Mr. Nelson's shirt to reveal a "GD" tattoo on his stomach. 6/18/08 (AM) RP 75.

The gang evidence should have been excluded because it is not relevant to the question of whether the witnesses were placed in reasonable fear that a threat to kill would be carried out. There was no evidence that Mr. Nelson committed violent acts on behalf

of his gang, but only that he sported gang-affiliated clothing and tattoos. Furthermore, even if the evidence were relevant to prove an element of the crime, it is substantially more prejudicial than probative. The jury's passion was likely inflamed by the mere mention of gangs, and the introduction of such evidence is a classic example of a situation in which "the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." Smith, 106 Wn.2d at 774. The gang evidence should have been excluded as irrelevant and more prejudicial than probative.

Ms. Christenson also testified about alleged threats Mr. Nelson had previously directed toward Ms. Rodriguez. Ms. Christenson testified that she once heard Mr. Nelson tell Ms. Rodriguez "I'll beat you, I'll beat your ass" and other "things of that nature." 6/18/08 (AM) RP 28. She also said that Ms. Rodriguez had told her that Mr. Nelson once said "something to the effect if I stabbed you and just watched you die, something to that effect." 6/18/08 (AM) RP 29.

These statements should have been excluded as impermissible propensity evidence. They show only that Mr. Nelson allegedly threatened harm in the past, and therefore he probably committed the threats of which he was accused in this

case. They certainly do not go to the reasonable fear element, because Mr. Nelson did not carry out these alleged prior threats.

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) is instructive. There, the trial court admitted evidence of prior acts to rebut a defense, but this Court reversed because the way the evidence would rebut the defense was by showing a propensity to act in conformity with prior behavior. Id. at 982. Pogue involved a prosecution for possession of cocaine. Id. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. This Court pointed out that “[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.” Id. at 985.

Similarly here, the only logical relevance of Mr. Nelson’s alleged prior threats is based on a propensity argument: Because he allegedly threatened Ms. Rodriguez in the past, it is more likely that he threatened the three complainants in this case on March 22 and 24. As in Pogue, the admission of the prior acts violated ER 404(b).

Other cases are in accord. In State v. Holmes, the court reversed the defendant's burglary conviction because the trial court had improperly admitted evidence of the defendant's two prior convictions for theft. 43 Wn. App. 397, 717 P.2d 766 (1986). The State argued, and the trial court agreed, that the evidence was relevant to prove intent. Id. at 398. The Court of Appeals 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, 98 Wn. App. 328, the Court of Appeals 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. Id. at 332. The court reminded the prosecution 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." Wade, 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.

Id. at 335.

In State v. Sargent, this Court reversed a murder conviction because the trial court admitted evidence that the defendant had assaulted the victim eight months prior to the killing. 40 Wn. App. 340, 351-52, 698 P.2d 598 (1985). The opinion explained, “We can discern no relationship between proof of Sargent’s intent the night of the murder and an argument with his wife 8 months earlier.” Id. at 352. Similarly here, there is no relationship between proof of Mr. Nelson’s harassment of Ms. Christenson and Ms. Jordan in March of 2008 and his alleged threats against his partner in the past.

The conviction was reversed in State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) for similar reasons. There, the court held that evidence of two prior sexual assaults should not have been

admitted, even though they were very similar to the charged crime and both occurred within the previous year. Id. at 189. The court noted that although the State alleged three proper purposes for the evidence, “the evidence demonstrates little more than a general propensity to commit indecent liberties, precisely the purpose forbidden under ER 404(b).” Id. at 191.

As in all of these cases, evidence of Mr. Nelson’s alleged prior threats demonstrates little more than a general propensity to commit harassment, precisely the purpose forbidden under ER 404(b). The admission of these acts therefore constitutes an abuse of discretion.

In sum, the trial court erred in admitting testimony of Ms. Christenson and Ms. Jordan about Mr. Nelson’s alleged prior threats, pushing and shoving, and gang affiliation. These incidents were not relevant and necessary to prove an element of harassment, and in any event were more prejudicial than probative.

The only incident that was properly admitted was Ms. Christenson’s testimony about the bruises Ms. Rodriguez attributed to Mr. Nelson. 6/18/08 (AM) RP 28-29. All of the other acts discussed above should have been excluded.

c. The prior acts to which Ms. Rodriguez testified, and which were also admitted as part of exhibit 9, should have been excluded under ER 404(b) and ER 403. The trial court erred in refusing to perform any analysis under these rules on the basis that it had already performed a hearsay analysis. The trial court allowed the State to elicit testimony from Lazett Rodriguez regarding many alleged prior acts of Mr. Nelson. Ms. Rodriguez initially made the allegations in a petition for a protection order, and the State moved to admit the order in addition to questioning Ms. Rodriguez about the statements on the witness stand. Mr. Nelson opposed admission of the statements on several grounds: (1) as inadmissible hearsay under ER 802, (2) as impermissible character evidence under ER 404(b), and (3) as substantially more prejudicial than probative under ER 403.

The trial court evaluated *only* the hearsay claim – determining that the petition fell within the exception for prior inconsistent statements under ER 801(d)(1)(i) and State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982). The court then declined to perform any ER 404(b) or ER 403 analysis, erroneously concluding that if the evidence was not excludable as hearsay,

there was no reason to evaluate whether it must be excluded as character evidence:

Thach [126 Wn. App. 297, 310-11, 106 P.3d 782 (2005)] says I should do a 404(b) analysis, which at the end of the 404(b) analysis would get me to the 403 issue.

But it's already coming in. And the first thing I need to find, in a 404(b), is find by a preponderance of the evidence that the prior misconduct actually occurred.

That's difficult for me to get when she says – a number of issues – when she denies it on the stand. Certainly the ones she admits I could find by a preponderance of the evidence.

But I guess what I'm saying is, because I've already done the Smith factors on the prior inconsistent statement, I think that's just where I'm going to stop. So, it comes in as substantive evidence.

6/16/08 RP 134. The court disregarded Mr. Nelson's argument that it must perform a separate analysis under ER 403 and ER 404.

6/16/08 RP 130.

Because the court did not perform any ER 404(b) or ER 403 analysis, it necessarily abused its discretion in admitting the statements from the petition for a protection order. See State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005). In Thach, as in this case, the State moved to admit the complainant's written statements regarding the accused's prior acts, and examined the

witness as to the statements. Thach, 126 Wn. App. at 305. As in this case, the trial court ruled – and the Court of Appeals affirmed – that the statements were admissible under ER 801(d)(1)(i) and Smith. Id. at 307-08. But this Court held that the trial court abused its discretion in failing to evaluate the statements under ER 404(b). Id. at 310-11. Similarly here, the court’s refusal to perform an analysis of admissibility under ER 404(b) and ER 403 constitutes an abuse of discretion.

If the court had evaluated each statement’s admissibility under ER 404(b) and ER 403, it would have excluded the evidence. Instead, the prosecutor was allowed to elicit many highly prejudicial descriptions of prior acts showing Mr. Nelson’s poor character and propensity to harass. For example, in response to the prosecutor’s questions, Ms. Rodriguez testified that Mr. Nelson had threatened to kill her in the past and that he had put his arms around her neck and said, “Die, die.” 6/18/08 (PM) RP 18. She also stated that Mr. Nelson had fondled her breasts in public against her wishes. 6/18/08 (PM) RP 19.

When examining Ms. Rodriguez, the prosecutor stated, “you wrote in that petition that you just couldn’t leave him because he has always said that if you leave him, he will kill you.” 6/18/08 (PM)

RP 21. He also highlighted the statement in the petition for protection order alleging that Mr. Nelson once “pulled a knife, acting like he [was] going to stab” Ms. Rodriguez. 6/18/08 (PM) RP 22. He pointed out that the petition alleged that Mr. Nelson had kicked in the door of Ms. Rodriguez’s car and broken her mirror. 6/18/08 (PM) RP 24. He read the portion of the petition that indicated Mr. Nelson blocked Ms. Rodriguez’s car when she tried to leave him. 6/18/08 (PM) RP 24-25. The prosecutor then read the statement, “[Mr. Nelson] has gotten drunk and punched me in the back three times, left bruises.” 6/18/08 (PM) RP 26. He went on, “How about when you wrote down in your statement, ‘He used a butter knife and a steak knife, acting like he was going to stab me.’” 6/18/08 (PM) RP 28.

Finally, the prosecutor elicited the allegation that Mr. Nelson once told Ms. Rodriguez that if she “were to ever die, he was going to keep [her] body, put it in a closet, and have sex with it.” 6/18/08 (PM) RP 28. The petition for a protection order, with all of these statements, was then admitted as an exhibit over Mr. Nelson’s objection. 6/18/08 (PM) RP 28.

These statements are inadmissible for the same reasons discussed above regarding the statements elicited from Ms.

Christenson and Ms. Jordan. For example, the prior threats are improper propensity evidence, because they do not support an element of the crime (in fact, they tend to show Mr. Nelson's threats are *not* carried out), and instead show only that Mr. Nelson is the type of person who threatens and harasses people – precisely the purpose forbidden by ER 404(b).

The statement about putting Ms. Rodriguez's dead body in a closet and having sex with it is extraordinarily inflammatory and should have been excluded under ER 403. It is prejudicial for obvious reasons. And it has no probative value because Mr. Nelson did not say he would kill Ms. Rodriguez and have sex with her dead body; he said that if and when she died, he would keep her body in a closet. 6/18/08 (PM) RP 28. The statement should have been excluded because it was "likely to stimulate an emotional response rather than a rational decision." Powell, 126 Wn.2d at 264.

Other acts like unwanted public fondling are simply irrelevant to any element of felony harassment.

In sum, the trial court erred in admitting evidence of many alleged prior acts without performing the requisite analysis under ER 404(b) and ER 403. Thach, 126 Wn. App. at 310-11.

Furthermore, most of the evidence was not relevant to prove an element of the crime, and was substantially more prejudicial than probative. The evidence of Mr. Nelson's prior acts should have been excluded.

d. The errors were not harmless. Improper admission of evidence constitutes reversible error if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Thomas, 35 Wn. App. at 609. It is reasonably probable that the outcome of Mr. Nelson's trial would have been materially affected had the evidence in question not been admitted.

Rachel Christenson testified that the reason she feared Mr. Nelson would carry out the threats was his gang affiliation and the fact that he had hit his children's mother in front of the children. 6/18/08 (AM) RP 34. Furthermore, the jury's passions were undoubtedly inflamed by anti-gang bias, especially in light of Ms. Christenson's testimony that "there are several different gangs" in the neighborhood along with "shootings in our backyards, people running through, stabbing in the apartment behind ours." 6/18/08 (AM) RP 57. Ms. Jordan even testified that the reason she thought

Mr. Nelson would procure a weapon was “because he said he was in a gang.” 6/18/08 (AM) RP 76.

As to Ms. Rodriguez, exhibit 9 and the testimony regarding the statements therein was highly inflammatory, and it is reasonably probable that the emotional nature of the evidence affected the jury’s decision-making. Indeed, the prosecutor stressed that evidence in his closing argument. 6/19/08 RP 35, 44-45. Because the admission of prior-act evidence prejudiced Mr. Nelson, his convictions should be reversed, and his case remanded for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. NELSON’S MOTION TO SEVER COUNT ONE FROM THE OTHER CHARGES.

If this Court disagrees that the statements from Lazett Rodriguez’s petition for a protection order should have been excluded, then the trial court abused its discretion in denying Mr. Nelson’s motion to sever the count regarding Ms. Rodriguez from the counts involving Ms. Christenson and Ms. Jordan.

a. Joinder must not be used in such a way as to prejudice a defendant. The criminal rule on joinder provides, in relevant part:

Two or more offenses may be joined in one charging document, with each offense stated in a separate

count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CrR 4.3(a). But “even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant.” State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). Indeed, “joinder is inherently prejudicial.” State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1987). Thus, a court must grant a motion to sever counts if it “determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offenses.” CrR 4.4(b).<sup>3</sup>

To determine whether to sever charges to avoid prejudice to a defendant, a court considers (1) the strength of the State’s evidence on each count, (2) the clarity of defenses as to each count, (3) instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges if not

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<sup>3</sup> CrR 4.4(b) provides, in full: “The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.”

joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009); State v. Hernandez, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990). “Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant’s guilt for another crime or to infer a general criminal disposition.” Sutherby, 165 Wn.2d at 883.

b. The joinder of count 1 with the remaining counts – and the denial of the motion to sever – prejudiced Mr. Nelson. Here, the trial court abused its discretion in denying the motion to sever the domestic violence count involving Lazett Rodriguez from the other counts involving the neighbors .

First, the State’s evidence in support of count one was weaker than for the others, because Ms. Rodriguez testified that she did not fear Mr. Nelson, whereas the neighbors testified that they were afraid the threats would be carried out. Second, the defense as to count one was different than the defense on the other counts. As to counts two, three and four, the primary defense was that Mr. Nelson did not make the threats, although there was also argument on the reasonable fear element. 6/19/08 RP 51-52.

However, as to count one, Mr. Nelson acknowledged that he made

the threat but argued that Ms. Rodriguez did not fear that the threat would be carried out. 6/19/08 RP 53-54.

Third, although instruction 16 informed the jury that it was to consider each count separately, “the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found.” Ramirez, 46 Wn. App. at 228. This is especially so when one considers the fourth question, cross-admissibility of evidence. If – contrary to Mr. Nelson’s argument above – this Court determines that Exhibit 9 and the statements therein were properly admitted to support count one, then there can be no question that joining count one with the other counts was impermissibly prejudicial. As discussed above, the multiple statements elicited through Ms. Rodriguez were highly inflammatory. They were admitted to show *Ms. Rodriguez’s* fear, but could not have been admitted to show the fear of the other alleged victims, because they were not events those victims heard about or witnessed. Thus, the admission of Exhibit 9 and its attendant oral testimony renders the denial of the motion to sever an abuse of discretion, and a new trial should be granted. Ramirez, 46 Wn. App. at 228

E. CONCLUSION

For the reasons set forth above, Mr. Nelson respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 18<sup>th</sup> day of June, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,                    )  
  )  
  Respondent,                    )  
  )  
  v.                                    )  
  )  
ANTHONY NELSON,                        )  
  )  
  Appellant.                        )

NO. 62329-0-I

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COURT OF APPEALS DIVISION  
STATE OF WASHINGTON  
2009 JUN 19 PM 4:50

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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    APPELLATE UNIT    ( )    HAND DELIVERY  
    KING COUNTY COURTHOUSE                               ( )    \_\_\_\_\_

[X] ANTHONY NELSON    (X)    U.S. MAIL  
    316197   ( )    HAND DELIVERY  
    MONROE CORRECTIONAL COMPLEX-WSRU               ( )    \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF JUNE, 2009.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710