

62329-0

LM
62329-0

NO. 62329-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY NELSON,

Appellant.

2009 AUG 20 11:41:05
COURT OF APPEALS
STATE OF WASHINGTON
FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	5
C. ARGUMENT	9
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO AMEND THE INFORMATION AND ADD COUNT IV AT THE BEGINNING OF TRIAL.....	9
2. EVIDENCE OF NELSON'S PURPORTED GANG AFFILIATION AND PRIOR ACTS OF DOMESTIC VIOLENCE WAS PROPERLY ADMITTED TO PROVE THAT THE VICTIMS' FEAR WAS REASONABLE AND TO EXPLAIN RODRIGUEZ'S RECANTATION AT TRIAL.	16
a. Christenson's and Jordan's testimony was properly admitted to prove that they reasonably feared that Nelson would carry out his threats.	19
b. The acts described in Rodriguez's petition for an anti-harassment order were admissible to prove her reasonable fear and to assist the jury in assessing her credibility.	23
3. NELSON DID NOT PRESERVE HIS SEVERANCE MOTION BECAUSE HE DID NOT RENEW IT AT OR BEFORE THE CLOSE OF THE EVIDENCE AS REQUIRED.....	27
D. CONCLUSION	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Graham,
275 F.3d 490 (6th Cir. 2001) 30

Washington State:

State v. Barragan,
102 Wn. App. 754, 9 P.3d 942 (2000) 18

State v. Binkin,
79 Wn. App. 284, 902 P.2d 673 (1995),
rev. denied, 128 Wn.2d 1015 (1996),
overruled on other grounds,
State v. Kilgore, 147 Wn.2d 288,
53 P.3d 974 (2002)..... 18

State v. Bryant,
89 Wn. App. 857, 950 P.2d 1004 (1998),
rev. denied, 137 Wn.2d 1017 (1999) 28

State v. Goglin,
45 Wn. App. 640, 727 P.2d 683 (1986) 26

State v. Grant,
83 Wn. App. 98, 920 P.2d 609 (1996) 19, 23

State v. Haner,
95 Wn.2d 858, 631 P.2d 381 (1981)..... 11

State v. Henderson,
48 Wn. App. 543, 740 P.2d 329,
rev. denied, 109 Wn.2d 1008 (1987) 28

State v. Jackson,
102 Wn.2d 689, 689 P.2d 76 (1984)..... 26

<u>State v. Kalakosky,</u> 121 Wn.2d 525, 852 P.2d 1064 (1993).....	29
<u>State v. Lane,</u> 125 Wn.2d 825, 889 P.2d 929 (1995).....	17
<u>State v. Lough,</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	18
<u>State v. Magers,</u> 164 Wn.2d 174, 189 P.3d 126 (2008).....	19, 23
<u>State v. Michielli,</u> 132 Wn.2d 229, 937 P.2d 587 (1997).....	13
<u>State v. Pelkey,</u> 109 Wn.2d 484, 745 P.2d 854 (1988).....	10, 11, 14
<u>State v. Powell,</u> 126 Wn.2d 825, 889 P.2d 929 (1995).....	18
<u>State v. Ragin,</u> 94 Wn. App. 407, 972 P.2d 519 (1999).....	18
<u>State v. Smith,</u> 92 Wn.2d 856, 651 P.2d 207 (1982).....	24
<u>State v. Tharp,</u> 96 Wn.2d 591, 637 P.2d 961 (1981).....	26
<u>State v. Ziegler,</u> 138 Wn. App. 804, 158 P.3d 647 (2007).....	11, 15

Statutes

Washington State:

RCW 9A.46.020	18
---------------------	----

Rules and Regulations

Washington State:

CrR 2.1(d)	1, 10, 11
CrR 4.3.....	2, 29, 31
CrR 4.4.....	28
CrR 8.3(b)	13
ER 403	17
ER 404(b).....	1, 4, 16, 17, 18, 19, 22, 24, 26, 27
ER 801(d)(1)(i)	24, 26

Other Authorities

5 W. LaFave, J. Israel, N. King & O. Kerr, <u>Criminal Procedure</u> (3d ed. 2007)	30
---	----

A. ISSUES PRESENTED

1. Under CrR 2.1(d), the trial court has the discretion to grant the State's motion to amend the information at any time prior to verdict if the defendant will not be prejudiced. In this case, the State learned of an additional victim prior to trial, notified defense counsel immediately, provided discovery, and gave notice on the record that the information would be amended. The trial court granted the State's motion to amend before any substantive pretrial motions had occurred. The record demonstrates that defense counsel was prepared for trial, and that Nelson suffered no prejudice. Did the trial court properly exercise its discretion in granting the State's motion to amend?

2. Under ER 404(b), evidence of a defendant's prior crimes or other misconduct is admissible if the evidence is relevant to a material issue at trial. In a felony harassment case, evidence of prior bad acts is admissible if relevant to prove the victim's reasonable fear that the defendant's threats would be carried out. In domestic violence cases where the victim recants, evidence of prior domestic violence is admissible to assist the jury in evaluating the recanting victim's credibility. In this case, Nelson was charged with felony harassment for threatening to kill his girlfriend and her

neighbors. Evidence of Nelson's self-proclaimed gang ties and prior violent behavior was admitted to prove the victims' reasonable fear. In addition, Nelson's prior acts of domestic violence were admitted because his girlfriend recanted at trial. Did the trial court exercise sound discretion in admitting this evidence under ER 404(b)?

3. Crimes should be joined for trial under CrR 4.3 if the crimes are of the same or similar character, or if they are based on a series of connected acts. In this case, Nelson was charged with four counts of the same crime, felony harassment, for threatening his girlfriend and her neighbors within the same two-day time frame. Were these crimes properly joined?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Anthony Nelson, was originally charged with two counts of felony harassment for threatening to kill his girlfriend, Lazett Rodriguez, and Rodriguez's neighbor, Rachel Christenson, in March 2008. CP 1-7. The State later gave notice that "additional felony harassment counts" would be filed prior to trial. Supp. CP ____ (Sub No. 12).

On June 3, 2008, when Rachel Christenson came in for her interview with the defense, the prosecutor learned that Nelson had also threatened to kill Christenson's domestic partner, Jamilla Jordan. RP (6/11/08) 5. The prosecutor notified defense counsel that an additional count may be added for trial, and asked the case detective to take Jordan's statement. RP (6/11/08) 5-6. The prosecutor gave formal notice of the amendment at the omnibus hearing on June 6, 2008. RP (6/11/08) 6-7; Supp. CP ____ (Sub No. 21).

Nelson's trial began on June 10, 2008 with a motion to exclude witnesses. RP (6/10/08). The next morning, before any other pretrial motions were discussed, the State moved to amend the information to add counts III and IV: a second count of felony harassment committed against Rachel Christenson, and a count of felony harassment committed against Jamilla Jordan. RP (6/12/08) 2. Nelson did not object to count III, but argued against the addition of count IV. RP (6/12/08) 3, 8-11. The trial court granted the State's motion to amend, finding no prejudice to Nelson. RP (6/12/08) 18-19.

Nelson then moved to sever count I, the count involving Lazett Rodriguez. RP (6/12/08) 12-20. The motion was denied

because the crimes were connected and the evidence on all four counts was intertwined. RP (6/12/08) 20-22. Nelson did not renew this motion at or before the conclusion of the evidence.

The State offered evidence of Nelson's prior bad acts under ER 404(b). More specifically, the State offered evidence that Nelson had represented himself to be a member of the Gangster Disciples (also known as "GD" or "Folks"), and evidence of Nelson's prior acts of domestic violence against Lazett Rodriguez. This evidence was offered to prove that the victims' fear that Nelson would carry out his threats was reasonable, and to assist the jury in assessing Rodriguez's credibility because she was recanting. RP (6/12/08) 30-39, 56-57, 91-93; RP (6/16/08) 101-04, 106-09, 111-21, 124-34. Christenson, Jordan, and Rodriguez all testified pretrial. RP (6/16/08) 11-31, 42-63, 73-101. After hearing this testimony, the trial court admitted the evidence offered by the State. RP ((6/16/08) 104-06, 110, 121-23.

Nelson's jury trial took place June 17-19, 2008. At the conclusion of the trial, the jury found Nelson guilty of four counts of felony harassment as charged. RP (6/20/08); CP 99-102.

Prior to sentencing, Nelson pled guilty to one count of misdemeanor violation of a court order for contacting Rodriguez

from jail. RP (9/4/08); CP 110-22. Nelson received a standard-range sentence of 29 months on the felony harassment convictions, and a suspended sentence on the misdemeanor. CP 125-37. Nelson now appeals. CP 123-24.

2. SUBSTANTIVE FACTS

Nelson and Lazett Rodriguez have three young children together. RP (6/18/08 p.m.) 5. In early 2008, they were living together in an apartment in Auburn. RP (6/18/08 p.m.) 5-6. Their next door neighbors were Rachel Christenson and Jamilla Jordan, who also have three children. Christenson and Rodriguez were friends, and their children played together. RP (6/18/08 a.m.) 4-6.

Nelson and Rodriguez's relationship was marred by domestic violence, and Nelson moved out of the apartment in mid-March 2008. RP (6/18/08 a.m.) 9. After Nelson moved out, he began calling Christenson and Jordan and asked them to help him get back together with Rodriguez. RP (6/18/08 a.m.) 10-11, 68. But on March 22, 2008, Nelson's calls became threatening.

On that date, Nelson spoke with Christenson and accused her of coming between him and Rodriguez. He told her that he was going to "[k]ick [her] door in" and "kill [her] kids." RP (6/18/08 a.m.) 12. Nelson called Christenson several times between noon and

3:00 p.m. that day, and threatened her each time. RP (6/18/08 a.m.) 13. Eventually, Nelson said, "Bitch, you should not have got in my business. I'm going to show you how the CD does it. This is GD. You should have minded your business. Your kids are going to get it." After this call, Christenson called the police. RP (6/16/08 a.m.) 15.

Officer Sharon Orvis responded to the call and took a report from Christenson. RP (6/17/08) 28-31. Christenson and Jordan then blocked their doors with furniture because they were afraid Nelson would follow through on his threats. RP (6/18/08 a.m.) 16.

Two days later, on March 24, 2008, Nelson called Christenson and Jordan's residence again. RP (6/18/08 a.m.) 17. Jordan took the first two calls; during each call, Nelson said, "this is Folks, I'll kick in your door, you don't want to see me," and other things to that effect. He also said he would "shoot up the house." RP (6/18/08 a.m.) 69-71. Christenson answered the next calls. Nelson told her, "I'm from Folks, the CD, we get down, you're going to see it, you're going to feel it, I'll shoot up your house." RP (6/18/08 a.m.) 18-19. Christenson again called the police. RP (6/18/08) a.m.) 19.

Meanwhile, Nelson was also calling and threatening Lazett Rodriguez, even though she had just changed her phone number. Nelson told Rodriguez that he would "blow [her] brains out," and "shoot up [her] house[.]" CP 43-44. Rodriguez also called the police as a result of Nelson's threats. RP (6/18/08 p.m.) 10.

Officer Orvis responded to these 911 calls as well, and she took statements from both Christenson and Rodriguez. RP (6/17/08) 35-47. Orvis noted that Rodriguez was "very, very upset." She was shaking, crying, and "real twitchy." RP (6/17/08) 41.

The following day, on March 25, 2008, Rodriguez went to the courthouse and filed a petition for an anti-harassment order against Nelson. RP (6/18/08 p.m.) 14. In her petition, which she wrote herself and signed under penalty of perjury, Rodriguez described the history of her relationship with Nelson, including many prior incidents of domestic violence. RP (6/18/08 p.m.) 19-29. The next day, Rodriguez assisted the case detective, Randy Clark, in arresting Nelson and serving him the petition. RP (6/18/08) 62-66.

Both Christenson and Jordan took Nelson's threatening phone calls very seriously, in large part because Nelson had told them that he was a member of the Gangster Disciples. RP (6/18/08 a.m.) 29-30, 76. Christenson and Jordan had also seen

Nelson displaying a black bandanna, a symbol of this gang, and Christenson had seen him flash gang signs. RP (6/18/08) 24-25, 73. They had also seen a "GD" tattoo on Nelson's stomach. RP (6/18/08 a.m.) 75. Christenson was very familiar with the Gangster Disciples' rituals and reputation, because her children's father was a member. RP (6/18/08) 23. In addition, Christenson and Jordan had witnessed several incidents of domestic violence between Nelson and Rodriguez prior to the threatening phone calls. RP (6/18/08) 27-28, 90-93. Christenson took Nelson's threats seriously due to these incidents as well, although Jordan, for some reason, thought Nelson's behavior toward Rodriguez was "funny." RP (6/18/08 a.m.) 30, 90-93.

By the time of trial, Rodriguez was recanting and minimizing Nelson's threatening behavior. She claimed that she "would never be scared" of Nelson. RP (6/18/08 p.m.) 15. Accordingly, the prosecutor confronted her with her descriptions of domestic violence in her petition for the anti-harassment order. RP (6/18/08 p.m.) 19-31. Although Rodriguez acknowledged that she had written the petition and signed it under penalty of perjury, she claimed she had done so because the staff at the apartment building had threatened that her housing would be in jeopardy if

she did not pursue a protective order. RP (6/16/08 p.m.) 29. She said she thought that Nelson's threats were "funny." RP (6/18/08 p.m.) 18.

The facts of this case will be discussed in more detail below as necessary for argument.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO AMEND THE INFORMATION AND ADD COUNT IV AT THE BEGINNING OF TRIAL.**

Nelson first argues that the trial court should not have granted the State's motion to amend the information by adding count IV, felony harassment committed against Jamilla Jordan, at the beginning of trial. Nelson contends that the trial court should have disallowed the amendment because it was untimely and resulted in prejudice to his right to a fair trial. Appellant's Brief, at 8-12. This claim should be rejected. The State gave notice of the new charge, and provided the discovery on which it was based, as soon as the information came to light. The amendment took place before any substantive pretrial motions occurred. Moreover, the record demonstrates that defense counsel was prepared for trial and provided a competent defense to all of the charges. Also,

although Jamilla Jordan testified that Nelson threatened her and her family, Jordan also offered testimony that was favorable to Nelson. The trial court exercised its discretion appropriately in allowing the amendment, and this Court should affirm.

The trial court may allow the State to amend the information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d). This rule is interpreted in light of a defendant's constitutional right to be informed of the charges in order to prepare an adequate defense. State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1988). Accordingly, motions to amend the information should be liberally granted prior to trial, but should be more stringently scrutinized as the trial progresses.

As the court explained in Pelkey, new information giving rise to additional charges frequently comes to light after the initial information has been filed:

During the investigatory period between the arrest of the criminal defendant and the trial, the State frequently discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.

Pelkey, 109 Wn.2d at 490. On the other hand, mid-trial amendments are far more likely to result in prejudice to the defendant's right to a fair trial:

The constitutionality of amending an information after trial has already begun presents a different question. All of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.

Id. Therefore, the court held that the information "may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same crime or a lesser included offense." Id. at 491.

However, before the State has rested its case and "the *Pelkey* rule does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d)." State v. Ziegler, 138 Wn. App. 804, 809, 158 P.3d 647 (2007). Moreover, the trial court's decision to allow an amendment of the information is reviewed for manifest abuse of discretion. Id. at 808 (citing State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

Under these standards, the amendment at issue in this case, which took place prior to any substantive pretrial motions and before voir dire, was proper.

Nelson was originally charged on March 31, 2008 with two counts of felony harassment: one count each against Lazett Rodriguez and Rachel Christenson. CP 1-7. When the case was set for trial, the State gave notice on May 5, 2008 in its omnibus application that "additional felony harassment counts" would be filed against Nelson. Supp. CP ____ (Sub No. 12).

Then, as the trial prosecutor explained to the trial court in arguing the motion to amend, the State later learned that Nelson also had threatened Jamilla Jordan. The prosecutor learned of this when Jordan accompanied Rachel Christenson to her defense interview on June 3, 2008. RP (6/11/08) 5. The trial prosecutor immediately notified defense counsel of this development, asked the case detective to take a statement from Jordan, and gave formal notice on the record at the omnibus hearing on June 6, 2008 that an additional count of felony harassment against Jordan would be filed at the beginning of trial. RP (6/11/08) 6-7; Supp. CP ____ (Sub No. 21). The prosecutor provided defense counsel with Jordan's statement on June 10, 2008. RP (6/11/08) 7.

In granting the State's motion to amend on June 11, 2008, the trial court noted that the information regarding Jamilla Jordan had "just recently come to light," and further found that Nelson had not shown prejudice because there would be ample time prior to jury selection for the defense to interview Jordan and prepare for trial. RP (6/11/08) 18-19; RP (6/12/08) 12.

Under these circumstances, Nelson cannot show that the trial court abused its discretion in allowing the State to amend the information to add count IV. This is not a case where the State "possessed all of the information necessary to file all of the charges when it filed the initial information," thus "strongly suggest[ing] that the prosecutor's delay in adding the extra charges was done to harass" Nelson. See State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).¹ To the contrary, this is a case where the State "discover[ed] new data that makes it necessary to alter some aspect of the information," and where the State gave notice of the

¹ Nelson's trial counsel relied on Michielli and CrR 8.3(b) in arguing that the amendment adding count IV should not be allowed due to alleged governmental mismanagement. RP (6/11/08) 8-10. Nelson has not framed his claim in this manner on appeal, and the State agrees that a CrR 8.3(b) analysis is inapplicable in these circumstances.

amendment and the basis for it as soon as the new information came to light. See Pelkey, 109 Wn.2d at 490.

Moreover, the trial court was correct in ruling that Nelson's right to a fair trial would not be prejudiced. Jordan was interviewed by the defense prior to jury selection, and she testified during pretrials, thus providing the defense with a complete preview of her anticipated trial testimony. RP (6/16/08) 42-71. The record contains no evidence that the defense was unable to conduct an adequate investigation or to prepare for trial. In fact, on cross-examination during Jordan's trial testimony, defense counsel elicited from Jordan that she and Lazett Rodriguez thought some of Nelson's prior threatening behavior was "funny," and they did not take it seriously. RP (6/18/08 a.m.) 90-93. In short, the record demonstrates that defense counsel was prepared to meet all of the charges at trial, and that he elicited testimony favorable to Nelson as a result of Jordan's testimony. Thus, the record belies Nelson's claims of prejudice, and this Court should affirm.

Nonetheless, Nelson claims that the amendment was untimely and that prejudice resulted, relying primarily on Division Two's analysis in Ziegler. Appellant's Brief, at 11-12. Ziegler is readily distinguishable. In Ziegler, the defendant was charged with

first-degree rape of a child and first-degree child molestation, with each count alleged to have been committed against a different child victim. Ziegler, 138 Wn. App. at 806. *After both children testified during the State's case-in-chief*, the State moved to amend the information to reduce count one from child rape to child molestation, but also to add two counts of first-degree child rape as to the second victim. Id. at 807. On appeal, the court upheld the amendment from child rape to child molestation, but quite properly found that adding two counts of first-degree child rape after both victims had already testified violated the defendant's constitutional right to have notice of the charges against him and to adequately prepare his defense. Id. at 810-11.

In this case, by contrast, the prosecutor notified defense counsel prior to trial that he intended to amend the information as soon as he learned that Jamilla Jordan was also a victim. The information was then amended as the first order of business after a motion to exclude witnesses, before any other substantive pretrial issues were even discussed. Moreover, as discussed above, the record shows that defense counsel was prepared to meet all of the charges at trial. Ziegler is inapposite, and Nelson's reliance is misplaced.

Lastly, Nelson argues that he was prejudiced because his attorney could not have requested a continuance due to his and the prosecutor's vacation schedules. Appellant's Brief, at 11. This argument is both speculative and beside the point, as Nelson's trial counsel was prepared for trial and presented a competent defense in any event.

In sum, the trial court exercised its discretion appropriately in allowing the State to amend the information to add count IV. Nelson cannot meet his burden of demonstrating prejudice to his right to a fair trial, and this Court should affirm.

2. EVIDENCE OF NELSON'S PURPORTED GANG AFFILIATION AND PRIOR ACTS OF DOMESTIC VIOLENCE WAS PROPERLY ADMITTED TO PROVE THAT THE VICTIMS' FEAR WAS REASONABLE AND TO EXPLAIN RODRIGUEZ'S RECANTATION AT TRIAL.

Nelson next claims that the trial court erred in admitting evidence of his prior bad acts under ER 404(b), and that these errors deprived him of a fair trial. More specifically, Nelson claims that the trial court erred in admitting the following: 1) testimony from Rachel Christenson and Jamilla Jordan that Nelson claimed to be a gang member, and that they had witnessed Nelson's violent behavior towards Lazett Rodriguez on prior occasions; and 2)

descriptions of prior acts of domestic violence as contained in Rodriguez's petition for an anti-harassment order. In addition, Nelson argues that the trial court erred in failing to perform a CrR 404(b) analysis on the record with respect to the acts described in Rodriguez's petition. Appellant's Brief, at 2-28. These claims should be rejected. Christenson's and Jordan's testimony was admissible to prove that their fear that Nelson would carry out his threats was reasonable. The acts described in Rodriguez's petition were admissible for the same reason with respect to Rodriguez's fear, and for the additional purpose of aiding the jury in evaluating the context for, and the credibility of, Rodriguez's recanting testimony at trial. The trial court exercised its discretion properly in making these evidentiary rulings, and this Court should affirm.

Evidence of a defendant's other crimes or misconduct is admissible if it is relevant to a material issue at trial other than the defendant's propensity for criminal behavior, and if its probative value is not substantially outweighed by the potential for unfair prejudice. ER 404(b); ER 403; State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Prior to admitting such evidence, the trial court should identify the purpose for which it is offered, determine whether it is relevant to prove an element of the crime charged, and

weigh the probative value against the potential for prejudice. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The decision whether to admit evidence under ER 404(b) rests within the sound discretion of the trial court, and will not be reversed on appeal absent an abuse of that discretion. State v. Powell, 126 Wn.2d 825, 831, 889 P.2d 929 (1995).

A person is guilty of harassment if he or she knowingly threatens to cause bodily injury to the victim immediately or in the future, and the victim is placed in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i). Harassment is a felony if the defendant makes a threat to kill. RCW 9A.46.020(2)(b). Accordingly, in addition to the reasons for admissibility explicitly enumerated in ER 404(b), Washington courts allow evidence of a defendant's prior bad acts to be admitted in felony harassment cases when such evidence is relevant to show that the victim's fear was reasonable. State v. Binkin, 79 Wn. App. 284, 286, 902 P.2d 673 (1995), rev. denied, 128 Wn.2d 1015 (1996), overruled on other grounds, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002); State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999); State v. Barragan, 102 Wn. App. 754, 758-60, 9 P.3d 942 (2000).

Additionally, in domestic violence cases where the victim recants or minimizes the degree of violence involved, evidence of the defendant's history of domestic violence with the same victim is admissible because it is relevant in assessing the victim's credibility. State v. Grant, 83 Wn. App. 98, 105-08, 920 P.2d 609 (1996); State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008).

Based on these standards, the trial court's evidentiary rulings were correct. Those rulings will be discussed in turn.

- a. Christenson's and Jordan's testimony was properly admitted to prove that they reasonably feared that Nelson would carry out his threats.

As noted above, evidence of a defendant's prior bad acts may be admitted under ER 404(b) in felony harassment cases to prove that the victim's fear was reasonable. See Binkin, Ragin, and Barragan, *supra*. Accordingly, the trial court was within its discretion in ruling that Christenson's and Jordan's personal experiences with Nelson's claims of gang membership and his violent behavior towards Rodriguez were admissible for this purpose.

Christenson and Jordan both testified at the pretrial CrR 404(b) hearing that Nelson identified himself as the member of a

gang, specifically the Gangster Disciples, or "Folks." Christenson described how Nelson displayed a black bandanna, had a gang-related tattoo on his stomach, and flashed a gang sign that she knew to be a symbol of the Gangster Disciples. RP (6/16/08) 27-29. Christenson was very familiar with this particular gang and its rituals because the father of her children was a member. RP (6/16/08) 29, 31. Jordan testified that Nelson had told her he was a member of this gang, and she had also seen Nelson's "GD" tattoo and the black bandanna. RP (6/16/08) 51-55. Both women testified that Nelson's self-proclaimed gang affiliation put them in fear that Nelson would carry out his threat to kill them and their children. RP (6/16/08) 27, 54.

But furthermore, Nelson referenced his self-proclaimed gang membership when making his threats to both Christenson and Jordan. Nelson told Christenson that he was from the "CD," meaning the Central District of Seattle, and he said that he was "Folks" while threatening to kill her and her children. RP (6/16/08) 25-27. Also, Nelson told Jordan, "This is GD. I'll kick your door in. This is Folks. You think I'm playing? I'm not playing. I'll kick your door in. I'll kill the kids. I'll kill you." RP (6/16/08) 62. Thus, Nelson made his purported gang membership of central importance

to the case by referring to his gang ties while making the very threats that formed the basis for the criminal charges against him. Indeed, the gang was an integral part of the threats. Moreover, without any testimony from Christenson and Jordan regarding evidence of Nelson's gang ties, Nelson's threats would not have made sense to the jury, since the average juror probably would not understand the significance of claiming to be "Folks," "GD," or "from the CD" while threatening to kill someone.

The trial court also properly admitted Christenson's and Jordan's testimony regarding their personal observations of violence in Nelson's interactions with Lazett Rodriguez. Christenson testified that Rodriguez had told her that Nelson threatened her and was physically violent, and that Rodriguez had shown her some bruises Nelson had caused.² RP (6/16/08) 17-19. Christenson also testified that she had personally witnessed Nelson be verbally and physically aggressive towards Rodriguez, and that on one occasion, Christenson had taken Nelson and Rodriguez's children to her apartment so that they wouldn't have to witness

² Nelson agrees that the incident where Rodriguez showed bruises to Christenson was admissible, but argues that all other evidence should have been excluded. Appellant's Brief, at 21.

Nelson's violence. RP (6/16/08) 20-24. Christenson stated that all of this made her "[v]ery uneasy, knowing that he was right next door and my kids were in the home." RP (6/16/08) 20. This was further evidence relevant to prove that Christenson's fear was reasonable.

Jordan described an incident where she had seen Nelson run toward Rodriguez with his fist cocked, as if he was going to punch her. RP (6/16/08) 48-49. Jordan testified that Rodriguez "kind of snickered a little bit" and that she and Rodriguez thought the incident was "funny" at the time. RP (6/18/08) 49-50. Although Jordan testified that she thought this behavior was "funny," it is still relevant to the issue of reasonable fear. Moreover, as noted in the previous argument section, this evidence was also favorable to Nelson, and supported his theory of the case that Rodriguez was not afraid of him.

In sum, Nelson has failed to demonstrate that the trial court abused its discretion in admitting testimony from Christenson and Jordan regarding Nelson's gang membership and prior violent incidents with Rodriguez. This evidence was admitted for proper reasons under ER 404(b), and Nelson's claim fails.

- b. The acts described in Rodriguez's petition for an anti-harassment order were admissible to prove her reasonable fear and to assist the jury in assessing her credibility.

As noted above, in addition to proving that Rodriguez's fear of Nelson's threats to kill was reasonable, the prior bad acts described in Rodriguez's petition for an anti-harassment order were admissible to assist the jury in assessing her credibility when she claimed she was not afraid of Nelson. As this Court has observed, "victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." Grant, 83 Wn. App. at 107. Therefore, "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." Magers, 164 Wn.2d at 186. Put another way, "[t]he jury was entitled to evaluate [Rodriguez's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Grant, 83 Wn. App. at 108.

As a preliminary matter, Nelson does not argue that the trial court erred in admitting the descriptions of domestic violence contained in Rodriguez's petition for an anti-harassment order as a

prior inconsistent statement under ER 801(d)(1)(i) and the dictates of State v. Smith, 92 Wn.2d 856, 651 P.2d 207 (1982). Rather, he argues that the evidence was not admissible under ER 404(b). Appellant's Brief, at 22-27. But under this Court's analysis in Grant, this evidence was necessary to assist the jury in evaluating the credibility of Rodriguez's testimony that she was not afraid when Nelson threatened to kill her.

Rodriguez testified during the pretrial ER 404(b) hearing that she exaggerated her claims in the petition because her public housing was being threatened, and she claimed that she had never told Christenson or Jordan that Nelson was violent or threatening towards her. RP (6/16/08) 87-96. Rodriguez also claimed that, although Nelson had threatened to kill her, "[i]t was nothing" and she wasn't afraid. RP (6/16/08) 99. Therefore, it was necessary to introduce Rodriguez's prior descriptions of domestic violence so that the jury could evaluate the credibility of Rodriguez's minimizations and recantations.

During Rodriguez's trial testimony, she admitted that Nelson had called her and threatened to kill her on March 24, 2008. RP (6/18/08 p.m.) 9. She also authenticated her own 911 call, during which she reported that Nelson had threatened to "shoot [her]

brains out" and that she was "very scared of him now." RP (6/18/08 p.m.) 13; CP 44, 46. Nonetheless, Rodriguez claimed that she had "exaggerated" the situation, and that she "would never be scared" of Nelson. RP (8/18/08 p.m.) 15.

Because of Rodriguez's claim that she was not afraid, the trial prosecutor confronted her with statements she had made in her petition, including the following: 1) that Nelson had threatened to kill her if she ever left him; 2) that Nelson had put his hands around her neck and said, "Die, die"; 3) that Nelson had pulled a knife and threatened to stab her; 4) that Nelson became "very violent" when he was drunk; 5) that Nelson had chased her with his car; 6) that Nelson had damaged her car; 7) that Nelson had punched her hard enough to cause bruising and had fondled her breasts against her will; 8) that Rodriguez was afraid Nelson would try to take the children; 9) that Nelson said he would keep her dead body in a closet and have sex with it; and 10) that she was afraid of what Nelson would do to her when he found out about the anti-harassment order. RP (6/18/08 p.m.) 21-32.

Based on this Court's analysis in Grant, and as approved by the Washington Supreme Court in Magers, it was entirely appropriate to admit the statements in Rodriguez's petition

describing the history of her relationship with Nelson. This evidence was necessary for the jury to evaluate the credibility of Rodriguez's trial testimony, and provided the jury with a context for the dynamics of the relationship. Nelson cannot show that it was an abuse of discretion to admit this evidence. Indeed, without this evidence, the jury would not have had an adequate basis to evaluate Rodriguez's testimony.

Nonetheless, Nelson claims that the trial court erred in failing to conduct an ER 404(b) analysis on the record after finding Rodriguez's petition admissible under ER 801(d)(1)(i), and that this failure provides a basis to reverse Nelson's convictions in and of itself. Appellant's Brief, at 22-24. Nelson is correct that the trial court should have performed an ER 404(b) analysis on the record, and that the failure to do so was error. See State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). However, there is no need for reversal if the record is sufficient to establish that the evidence in question is relevant and admissible. State v. Goglin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986) (citing State v. Tharp, 96 Wn.2d 591, 600, 637 P.2d 961 (1981)). Such is the case here.

The reasons for admitting this evidence are set forth in great detail in the record, both in the State's briefing and in its argument

before the trial court. CP 68-71; RP (6/12/08) 30-37, 56-57; RP (6/16/08) 124-27. In fact, Nelson's trial counsel admitted that there was a basis to admit the 404(b) evidence with respect to Rodriguez because "it goes to show why her state of mind is in question. Why she's recanting." RP (6/12/08) 66.

In sum, Nelson has not demonstrated that admitting any evidence under ER 404(b) constituted a manifest abuse of the trial court's discretion. To the contrary, this evidence was properly admitted to prove the victims' reasonable fear that Nelson would carry out his threats to kill them, and to assist the jury in evaluating Rodriguez's credibility. This Court should reject Nelson's claims, and affirm.

3. NELSON DID NOT PRESERVE HIS SEVERANCE MOTION BECAUSE HE DID NOT RENEW IT AT OR BEFORE THE CLOSE OF THE EVIDENCE AS REQUIRED.

Lastly, Nelson argues that if the trial court properly admitted evidence of prior acts of domestic violence, then the trial court erred in denying Nelson's motion to sever count I from the other counts. More specifically, Nelson contends that although the prior acts described in Lazett Rodriguez's petition for an anti-harassment order may have been relevant to prove that Rodriguez was placed

in reasonable fear by Nelson's threats, this evidence was not relevant with respect to Rachel Christenson and Jamilla Jordan. Appellant's Brief, at 28-31. This argument should be rejected. Nelson did not preserve this issue for appeal because he did not renew his motion to sever count I at or before the conclusion of the evidence as required. Therefore, the only issue before the court is whether the counts against Nelson were properly joined in the first place, which plainly they were. Accordingly, this Court should affirm.

Motions for severance are governed by CrR 4.4, which states in part,

If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

CrR 4.4(a)(2). Accordingly, a defendant who fails to renew a severance motion also fails to preserve the issue for appeal. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329, rev. denied, 109 Wn.2d 1008 (1987).

Nelson made a pretrial motion to sever count I, which was denied. RP (6/12/08) 12-22. Nelson did not renew this motion at or

before the close of the evidence. Therefore, Nelson has waived the issue of severance on appeal.

Because severance is waived, the only issue properly before this Court is whether joinder was appropriate in the first place in accordance with CrR 4.3. Under this rule, offenses are properly joined when they are similar in nature or are based on a series of connected acts:

Two or more offenses may be joined in one charging document . . . 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). Washington courts favor liberal joinder, and the defendant bears the burden of showing that a trial involving multiple offenses would be so manifestly prejudicial as to outweigh concerns for judicial economy. State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993).

Offenses are of the "same or similar character" if they bear a general likeness to one another, even if they were committed at different times and in different places. 5 W. LaFave, J. Israel, N.

King & O. Kerr, Criminal Procedure § 17.1(b), at 7-8 (3d ed. 2007). For example, "it is permissible to join together several instances of the same crime, such as bank robbery, though they were committed by the defendant at distinct times and places and not as part of a single scheme." Id. at 7. In addition, crimes are "connected together" for purposes of the rule if the offenses "are sufficiently related" that there is "a large area of overlapping proof." Id., § 17.1(a), at 6 (citing United States v. Graham, 275 F.3d 490 (6th Cir. 2001)). The crimes in this case meet both of these criteria.

In this case, the crimes are of the same character because the same crime, i.e., felony harassment, was alleged in each count. CP 51-55. Moreover, these crimes were connected together because there was substantial overlapping proof. For instance, Lazett Rodriguez and Rachel Christenson both called 911 to report threats on the same date (March 24, 2008), and they gave their reports to the same police officer (Officer Orvis) at the same time. RP (6/17/08) 34-47; RP (6/18/08 a.m.) 20-21; RP (6/18/08 p.m.) 9-13. Moreover, as discussed at length above, evidence regarding Nelson's relationship with Rodriguez was necessary not only to prove count I, but was also necessary to explain the circumstances

of the threats he made to Christenson and Jamilla Jordan, and the proof of each crime was overlapping for this reason as well.³

In sum, these crimes were of the same character, and were based on a series of connected acts. Therefore, joinder was proper under CrR 4.3, and this Court should affirm.

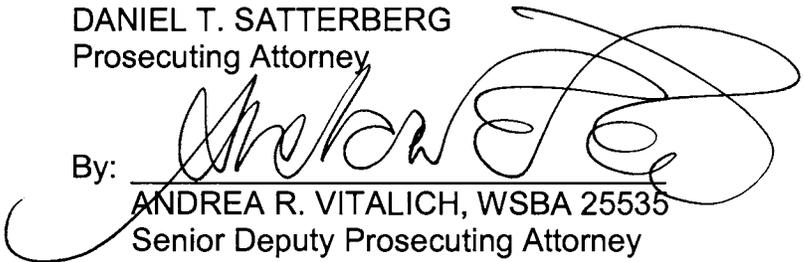
D. CONCLUSION

The trial court exercised properly exercised its discretion in allowing the State to amend the information and in making its evidentiary rulings, and the crimes charged were properly joined for trial. For the foregoing reasons, the State asks this Court to affirm Nelson's convictions for four counts of felony harassment.

DATED this 20th day of August, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

³ Moreover, because these crimes were so interconnected, the trial court properly exercised its discretion in denying Nelson's pretrial motion for severance. Thus, even if the severance issue had been preserved, it would not have had merit.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANTHONY NELSON, Cause No. 62329-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

8/20/09
Date

2009 AUG 20 PM 4:49
STATE OF WASHINGTON
FILED