

65675-9

65675-9

NO. 65675-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAZARO NICIA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

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A. ISSUES PRESENTED

1. Did the trial court properly admit the defendant's assault on the victim, which had occurred two days earlier, to show the victim's reasonable fear of the defendant's threats to kill and to provide the jury with context for the charged offense?

2. Should this Court abide by established precedent and reaffirm that "true threats" is not an element of felony harassment that needs to be contained in the information?

3. Should the Court remand for re-sentencing after the trial court erroneously included a "washed-out" conviction in the defendant's offender score?

4. Has the defendant failed to establish ineffective assistance of counsel because he cannot establish that it was likely the trial court would have considered the assault and felony harassment same criminal conduct had the argument been made?

5. Is remand required to correct a scrivener's error in the judgment and sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Lazaro Nicia, with one count of Assault in the Second Degree – Domestic Violence, contrary to RCW 9A.36.021(1)(g)¹ and one count of Felony Harassment – Domestic Violence, contrary to RCW 9A.46.020(1)(a)(i)², (2)(b)(ii)³. CP 1-2. The jury convicted Nicia as charged. CP 6-7. The trial court imposed a standard range sentence of 18 months on the Assault in the Second Degree and 12 months on the Felony Harassment to run concurrently. CP 33-35. Nicia appeals. CP 28.

¹ “(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... (g) Assaults another by strangulation or suffocation.”

² “(1) A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened....”

³ (2)(b) “A person who harasses another is guilty of a class C felony if (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person.” See also RCW 10.99.020(3), (4), (5) (b) (stating that a Second Degree Assault, committed by one family member—which includes those in a dating relationship—against another is a crime of domestic violence).

2. SUBSTANTIVE FACTS

a. New Year's Eve – Muckleshoot Casino Incident.

On December 31, 2009, Karina Wood (the victim and ex-girlfriend of the defendant's), the defendant and a group of their friends (Jasmine Quiroz, Felicia Harris and her boyfriend, Curt, Olivia Castro, and Jose "Ricardo" Aguirre, the designated driver) went to the Muckleshoot Casino. 2RP 43-44, 95-96; 3RP 30; 4RP 3-4.⁴ Wood, Quiroz and Harris had attended medical assistant vocational school together. 2RP 42, 93, 95; 3RP 30. Castro also worked as a medical assistant, although she had not attended vocational school with the others. 4RP 2. Wood had met Nicia the previous year at the pawn shop where he worked and, over time, they developed a romantic relationship. 2RP 93-94.

The group of friends dined together. 2RP 96. Throughout the evening and into New Year's morning, everybody—except the designated driver—drank. 2RP 96, 136; 3RP 31-32; 4RP 4. As the night progressed, Nicia became more agitated. 4RP 4. He first became upset after some of the performers at the casino invited the

⁴ The State adopts the appellant's designation of the verbatim report of proceedings. Please see Br. of Appellant at 2 n.1.

women backstage (they did not accept the invitation). 4RP 4-5.

Nicia's reaction frightened Castro. 4RP 5.

A short time later, as everybody started to leave the casino, an innocent remark by Wood incensed Nicia. 2RP 45, 97-99; 3RP 33-34, 41-42; 4RP 5-6. Wood pointed out to Nicia a man wearing a shirt identical to one that she had almost purchased for Nicia earlier that same day. 2RP 45, 97-98; 3RP 9-10; 4RP 4-5. Nicia took off his hat and threw it down. 2RP 98; 3RP 10. He went "ballistic." 2RP 98. Nicia cursed at Wood and yelled, "Why are you looking at him? You're acting like a ho." 2RP 98. In a jealous rage, Nicia repeatedly asked Wood, "You want him?" 2RP 45. He said, "I see you looking at him? You can have him. Go get him." 2RP 48. Nicia called Wood a "bitch," a "whore," a "slut" and a "ho." 4RP 6. Wood tried to explain to Nicia that she had planned to buy him the same shirt, only the store did not have his size. 2RP 98. But Nicia continued to verbally abuse Wood; he kept saying, "F*** you." 3RP 34, 41.

As the group waited for Ricardo, the designated driver, to return from the parking lot with the car, Nicia turned his rage on him. 4RP 6. Nicia's car had an ignition interlock device. 4RP 6. When Ricardo had difficulty starting the car, Nicia called him a

“dumbass” and “stupid MF.” 2RP 46, 100; 4RP 6. He yelled at Ricardo out of frustration, “How stupid can you be” and he then showed Ricardo how to start the car. 2RP 100.

On the way home, Nicia and Wood sat in the last of three rows of seats. 2RP 50, 101; 3RP 35. Wood tried to calm Nicia down—she coddled him, tried to be nice to him and comforted him. 2RP 48. Wood did not respond to Nicia’s provocative questions, such as “Do you wanna (*sic*) f*** him?” 2RP 101. Castro said that she felt scared. 4RP 7. Harris said that Nicia’s verbal abuse of Wood also scared her; she just prayed to God that he would not hit Wood. 3RP 36.

Nicia pinned Wood in the corner of the seat. 2RP 102; 4RP 7. He cursed at Wood and pointed his finger in her face. 2RP 102. Nicia leaned his body against Wood’s body and restrained Wood with his arm against her chest. 2RP 102; 4RP 7. Wood called out to Castro to help. 4RP 7. Wood begged Nicia to stop, to just let it go. 4RP 7. She told Nicia that he was hurting her. 4RP 7.

After Nicia argued for about 20 or 30 minutes, Quiroz pretended to call her young daughter and told Nicia that her daughter was crying—that he had scared her and that her daughter

was scared for Wood. 2RP 49, 103; 4RP 7. Nicia finally calmed down. 2RP 103.

A short time later, Castro, Wood and Nicia went to Wood's apartment.⁵ 4RP 8. Wood told Nicia to leave or to sleep on the couch because he had humiliated her in front of her friends. 4RP 8.

The next morning (January 2), Wood talked to Nicia over the telephone while he was at work. 2RP 104. Wood told him that if he behaved again as he had the previous day, their relationship would end. 2RP 104. Nicia kept telling Wood how sorry he was. 2RP 104.

b. January 3rd – Acme Bowl Incident.

On January 3rd, Nicia and Wood went to the Acme Bowling Alley with Quiroz, some of her children and her boyfriend, Harris, her son and her boyfriend, and Elvis, the designated driver for the night. 2RP 51, 105. When Nicia arrived at Wood's apartment, he brought her flowers and apologized. 2RP 105. Nicia said that when he drinks alcohol, he gets out of control. 2RP 105. Nicia said that he was sorry, that he would not behave that way again, and that he loved her so much. 2RP 105. But at the bowling alley,

⁵ Castro had flown in from Hawaii a few days earlier to spend New Year's Eve with Wood. 4RP 3.

everybody, except the designated driver, drank alcohol. 2RP 54, 67; 3RP 38. Harris felt the tension. She said that Nicia was “like a walking time bomb.” 3RP 39, 43.

Toward the end of the night, Wood saw her stepbrother's brother whom she had not seen for years; he was leaving the bowling alley with his wife. 2RP 54, 107. Wood pointed the man out to Nicia and said words to the effect of that is my brother's brother. 2RP 107. Nicia did not believe Wood. 2RP 107. Once again, Nicia accused Wood of wanting to “f*** these motherf*****.” 2RP 107. Nicia asked Wood, “Do you want him?” 2RP 54. He demanded that Wood quit looking at the man. 2RP 107.

After Elvis was finally able to start Nicia's car (he, too, had difficulty with the ignition interlock device and Nicia berated Elvis as he had Ricardo). 2RP 108. Wood told Nicia that he needed to stop being so disrespectful to people. 2RP 108.

On the drive home, Wood and Nicia sat in the seats behind Elvis and Quiroz.⁶ 2RP 56. Nicia continued to berate Wood. 2RP 56. Nicia beat the car ceiling and threw stuff. 2RP 56, 112. Quiroz thought that Nicia was going to break the light; he scared

⁶ Harris, her son and her boyfriend had driven to Acme Bowl in a separate car. 3RP 40. Castro did not join her friends that night; she visited family members. 4RP 9, 11.

her. 2RP 56. Eventually, after they stopped at another party, Elvis drove Quiroz to her home and then he dropped Nicia and Wood off at Wood's apartment. 2RP 58-59, 113.

Wood's friends called her to make sure that she was okay. 2RP 114. Wood went into the kitchen to make a hot links sandwich. 2RP 114-15. She tried to avoid Nicia, but he wanted a confrontation. 2RP 114-15. Nicia yelled about how no one appreciates him—everyone disrespects him. 2RP 115.

Wood called Castro. She told Castro that Nicia was at it again. 2RP 116. Nicia accused Wood of lying and demanded that she hang up the phone. 2RP 116. Nicia paced. He told Wood how he could "own" her and her "slutty little friend," and then he slapped the telephone out of Wood's hand. 2RP 116.

Wood called Castro back. Castro advised Wood not to hang up—she was concerned that Nicia might hurt Wood. 2RP 117; 4RP 22. Matters escalated. Nicia screamed, "I'll kill you, I'll kill you, bitch, I'll kill you." 2RP 118. Wood went from room to room as she tried to get away from Nicia, but he kept cornering her. 2RP 119, 142. She told him to leave, but Nicia lunged at her (over the hot water as she tried to cook) and he tried (unsuccessfully) to knock the telephone out of Wood's hand. 2RP 119, 123, 141.

Wood tried to remain calm. 2RP 123, 135. As she drained the hot water from the pot, Nicia slapped the pot and hot water flew on Wood's arm. 2RP 124-25, 134-35. Wood told Castro (who was still on the telephone with Wood) that she had been badly burned. 4RP 13-14. Frantic, Wood rushed from room to room. 2RP 126-27. She realized that she had run in the wrong direction—away from the front door. 2RP 127.

As Wood turned to flee in the opposite direction, Nicia grabbed her by the throat and slammed her against the wall. 2RP 127, 148. He held Wood against the wall by her throat. 2RP 127. Nicia choked Wood tighter and tighter, until she could not make a sound, then he eased up, only to choke her again. 2RP 127, 149-50. Wood struggled to break free. 2RP 127-28, 150-51. She panicked. The more she resisted, the tighter Nicia choked her. 2RP 129. Castro heard Wood gasp for air. 4RP 14. Wood tried to peel Nicia's hands away from her throat. 2RP 151. Wood then decided to no longer fight back. 2RP 151.

Wood slumped to the ground. 2RP 128. She felt a sensation similar to drowning and she could not catch her breath. Wood thought that she was going to die. 2RP 129, 134, 152. Wood blacked out. 2RP 130, 152.

When Wood regained consciousness, Nicia was in another room talking to someone on his telephone. 2RP 130. Wood ran to her telephone and Castro was still on the open line.⁷ 2RP 131; 3RP 4. Castro had heard the entire violent episode. 4RP 11-15. She heard Nicia repeatedly tell Wood, “I’ll kill you, I’ll kill you”—and Castro believed him. 4RP 23.

Castro told Wood that when she heard Nicia choking her, she called 911.⁸ 2RP 131; 3RP 13; 4RP 14. The 911 dispatcher was also on the line; she asked, “Ma’am, are you okay?” 2RP 131; 3RP 4. Wood responded that Nicia had just choked “the shit” out of her. 3RP 23. Castro and the dispatcher assured Wood that the police were on their way. 2RP 131.

Wood told Nicia that he had better leave—the police were on their way. 2RP 154. While Wood spoke to the dispatcher, Nicia told her not to talk to the police; he still threatened her. 3RP 24. Nicia then tried to apologize. He said that he was sorry, that this

⁷ Throughout the struggle, Wood protected the telephone—she knew that the only way she could get help was to keep the telephone line open. 2RP 143-47. Just before Nicia grabbed her by the throat, Wood managed to throw the telephone into her bathroom, where it was hidden from Nicia’s view. 2RP 144-48.

⁸ Castro explained how her telephone enabled her to place a three-way call. 4RP 17.

had gone too far, that he needed to stop drinking. 2RP 15; 3RP 205.

After the police had arrived and arrested Nicia, Nicia screamed at Wood, "I'll kill you, bitch. I'll kill you, bitch. Bitch, I'll kill you." 2RP 133.

c. Nicia's Defense.

Nicia said that on New Year's Eve, as everyone walked out of the Muckleshoot Casino, a man came in. 4RP 41. Wood said to Castro, "Oh look at him, he's so hot, that's what I want." 4RP 41. Nicia responded, "That's disrespectful, I don't appreciate you disrespecting me like that." 4RP 41. He got mad and walked away. 4RP 41. Nicia told Wood that she could do whatever she wanted when he is not around, but not in front of him. 4RP 42.

On the ride home, Wood asked Nicia why he was so jealous. 4RP 43. Wood apologized to Nicia. 4RP 44. That night, he slept on the couch because Wood would not sleep with him. 4RP 43-44.

Nicia said that at Acme Bowl, Elvis introduced him and Wood to a couple of women that Elvis wanted to party with.

4RP 50. Wood made rude comments about the women—she called them white bitches.⁹ 4RP 50.

Nicia, who drank too much, felt ill. 4RP 48, 51-53. Nicia wanted to leave to “sleep it off,” but Wood wanted to stay. 4RP 53. After Nicia and Wood finally arrived back at Wood’s apartment, she tossed him pajamas. 4RP 56. Nicia heard Wood talking to Castro; Wood was still upset because Nicia had defended those “white bitches.” 4RP 56.

Nicia tried to hug Wood and apologize. 4RP 57. Wood “went off on him.” 4RP 57. Wood kept hitting Nicia—he covered his face. 4RP 57. She screamed at Nicia to call your bitches’ friends (*sic*). 4RP 58. Nicia called Ricardo and left a message for him to come pick Nicia up. 4RP 58.

When Nicia turned around, Wood had a big kitchen knife. 4RP 58. Nicia left another message for Ricardo. He told Ricardo to hurry because Wood had a knife. 4RP 58. Ricardo said that he heard Nicia’s message as he left it and, over the open line, he heard Nicia say, “Put the knife down, put the knife down.” 4RP 98. Ricardo heard Wood respond, “Okay, okay, okay, I will put the knife down.” 4RP 98.

⁹ Wood is African-American. 2RP 30.

After Wood put down the knife, Nicia picked up the knife and put it away. 4RP 60-61. Nicia said that Wood then picked up a hammer. 4RP 60-61, 63.

When the police arrived, he said only that a friend had a hammer in her hand. 4RP 63. He did not say anything about a knife—just that they had a little argument. 4RP 63.

Nicia denied throwing water at Wood. 4RP 64. Except for when Wood beat him and he pushed her away, Nicia denied pushing, beating, striking or choking Wood. 4RP 64. He said, “I am not a woman beater.” 4RP 61.

Additional procedural and substantive facts will be discussed in the sections to which they pertain.

C. ARGUMENT

1. THE NEW YEAR’S EVE INCIDENT CONTRIBUTED TO THE VICTIM’S REASONABLE FEAR AND PROVIDED THE JURY WITH CONTEXT FOR THE CHARGED CRIME.

Decisions concerning the admissibility of evidence are within the discretion of the trial court and are reviewed for abuse of that discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

Under ER 404(b), evidence of prior acts is inadmissible to show propensity to commit a crime, but may be admissible for other purposes, such as to prove motive, opportunity, intent, or to provide a jury with a complete story of the events surrounding the crime, as res gestae or transaction evidence. ER 404(b); State v. Tharp, 27 Wn. App. 198, 205, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591 (1981). Under this exception, evidence of other crimes is admissible “[t]o complete the story of the crime on trial by providing its immediate context of happenings near in time and place.” Tharp, at 204 (quoting EDWARD M. CLEARY, MCCORMICK’S EVIDENCE § 190, at 448 (2d ed. 1972)). “Each act must be ‘a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.’” Powell, 126 Wn.2d at 263 (quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

When considering the admissibility of evidence under ER 404(b), the trial court must find by a preponderance of the evidence that the prior act occurred.¹⁰ State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). The court must then identify the purpose of the evidence, explain how the evidence is relevant to

¹⁰ Nicia does not deny that the prior acts occurred.

such purpose and conduct a balancing of the probative value versus the potential for unfair prejudice on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Relevant evidence is evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. A fact bearing on the credibility or probative value of other evidence is relevant. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

The trial court’s failure to balance the probative value and prejudice of the evidence on the record is harmless if this Court can determine from the record that the trial court would have admitted the evidence or if the trial’s outcome would have been the same absent the evidence. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996). As this Court has previously stated: “[W]hat purpose is served by reversing a conviction where the questioned evidence is relevant and admissible? The trial court’s failure to articulate its balancing process on the record does not make admissible evidence inadmissible.” State v. McGhee, 57 Wn. App. 457, 460-61, 788 P.2d 603 (1990) (quoting State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986)).

a. Nicia Has Failed To Preserve Review Of This Issue Vis-à-vis Wood's And Castro's Testimony.

As a preliminary matter, this Court should decline to review any alleged error by the trial court in permitting Wood and Castro to testify about the New Year's Eve incident.

A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Because Nicia did not object to Wood's or Castro's testimony regarding the New Year's Eve incident, he has lost his opportunity for review. Id.

Nicia argues that his lack of a proper objection vis-à-vis Wood's and Castro's testimony about the New Year's Eve incident should be forgiven because the trial court had already denied his motion regarding Quiroz's testimony. Br. of Appellant at 11. At trial, Nicia argued Quiroz's testimony was irrelevant and prejudicial. 2RP 4-8. However, it is clear from the record that Nicia's objection was based on Quiroz's failure to have heard or seen first-hand any threatening behavior. See 2RP 4-8.

Nicia did not object to Wood or Castro testifying about the New Year's Eve incident. Unlike Quiroz, Wood and Castro had first-hand knowledge of what Nicia said and did. Nicia had an

obligation to bring to the trial court's attention any objection that he had to Wood's and Castro's testimony. See Boast, 87 Wn.2d at 451. It cannot be said that any further objection by Nicia would have been a useless endeavor. This Court should accordingly decline to review any alleged error vis-à-vis Wood's and Castro's testimony.

b. The New Year's Incident Demonstrated Wood's Fear Was Reasonable.

The State charged Nicia with Felony Harassment, which required the State to prove that Nicia's threats to kill Wood—by his words or conduct—placed Wood in reasonable fear that the threat would be carried out. RCW 9A.46.020 (1)(a)(i), (b)¹¹; CP 23. Whether the victim's fear is reasonable is determined by an objective standard. State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999).

Evidence of a defendant's prior violent misconduct is relevant on the issue of whether the victim's apprehension and fear of bodily injury or death is objectively reasonable. See State v. Magers, 164 Wn.2d 174, 182-83, 189 P.3d 126 (2008). In Magers, the supreme court held that the State had properly presented

¹¹ The elements of Felony Harassment are set forth in nn.3-4, supra.

evidence of Magers's prior violent misconduct to demonstrate the victim's reasonable fear of bodily injury, an element of the charged crime, Assault in the Second Degree. Magers, at 182-83.

In reaching its decision, the court in Magers found the Court of Appeals' decisions in State v. Ragin¹², and State v. Barragan¹³, instructive. Magers, at 182-83. The defendants in Ragin and Barragan had each been charged with felony harassment; thus, the crime victim's fear was at issue.

In Ragin, the charge stemmed from threatening telephone calls made by the defendant from jail. Enraged, Ragin threatened to murder the victim and his family. Ragin, at 409-10. This Court held that it was not error to admit evidence of the defendant's prior violent acts to demonstrate that it was reasonable—and not an overreaction—for the victim to be fearful of the defendant's extreme threats. Id. at 410-11.

In Barragan, the defendant and the victim, Mr. Garcia, were jail inmates. Barragan, at 757. Barragan stabbed Garcia in his temple with a pencil and threatened to kill him. Id. Division Three of the Court of Appeals affirmed the trial court's admission of

¹² 94 Wn. App. 407, 972 P.2d 519 (1999).

¹³ 102 Wn. App. 754, 9 P.3d 942 (2000).

Barragan's other fights in other penal institutions and a fight between Barragan and another cellmate witnessed by Garcia earlier that day. Id. at 759. On review, the court said that Barragan's prior violent acts were relevant to the reasonableness of Garcia's fear. Id.

Here, the trial court found that the New Year's Eve events were relevant to prove that Wood was placed in reasonable fear that Nicia would kill her on January 3rd, an issue central to the Felony Harassment charge.¹⁴ As in Magers, Ragin and Barragan, the jury here needed to know what Wood knew at the time of Nicia's threat to determine whether Wood's fear was reasonable.

On January 3rd, Wood knew that Nicia flew into jealous rages fueled by his alcohol consumption. 2RP 96-98, 155; 3RP 38. Nicia was like a "walking time bomb." 2RP 117; 3RP 39. A simple comment by Wood—that she saw a man wearing the same shirt that she had thought about buying Nicia earlier that day or pointing out to Nicia her stepbrother's brother whom she had not seen in years—triggered Nicia's rage. 2RP 45, 48, 96-98, 107. Wood knew that incidents escalated even when she did not argue or raise

¹⁴ 2RP 7.

her voice. 3RP 12. On both nights, Nicia asked rhetorical questions, meant only to provoke Wood, such as “Do you wanna f*** him?” 2RP 45, 48, 54, 68, 101, 107. And, Wood knew that Nicia believed he owned her and her “slutty little friend” [Castro]. 2RP 116.

On January 3rd, Wood knew that Nicia’s jealous rages prompted physical violence. Nicia would corner her, which made Wood feel unsafe and frightened Wood’s friends. 2RP 56, 142; 3RP 35-36, 42; 4RP 7. On the drive home from the casino, Nicia backed Wood into the corner of the car by cursing at her and putting his finger in her face. 2RP 102. Nicia pinned her down with his arm against her chest. 2RP 102; 3RP 7. Although Wood asked Nicia to stop because he was hurting her, Nicia did not relent. 3RP 7. Similarly, on January 3rd, Nicia held Wood against a wall by placing his forearm against her body. 2RP 128. Only, that night, he violently choked Wood; he strangled her until she lost consciousness. 2RP 126-30, 148-51; 4RP 14, 18.

The jury needed to know all that Wood knew on January 3rd to determine whether it was reasonable for Wood to think that she was “going to die,” when Nicia repeatedly screamed, “I’ll kill you, I’ll

kill you, bitch, I'll kill you.”¹⁵ 2RP 118, 152. It was not an abuse of the trial court’s considerable discretion to admit evidence of the New Year’s Eve incident to provide the jury with the tools it needed to assess the reasonableness of Wood’s fear.

c. The Evidence Bore On Wood’s Credibility.

The trial court also admitted the New Year’s Eve incident because “it goes to the question of the dynamics of the relationship, pursuant to State v. Grant^[16] and State v. Magers^[17].” 2RP 7.

In Grant and Magers evidence of the dynamics of domestic violence relationships was admissible to prove the victim’s state of mind; i.e., that the victim reasonably feared the defendant (as discussed above), and to allow the jury to assess the victim’s credibility. Grant, 83 Wn. App. at 106-09; Magers, 164 Wn.2d at 184-86. Although in Grant and Magers the evidence of domestic violence was admissible to explain the victim’s inconsistent statements or conduct, this Court noted that other jurisdictions have admitted prior acts of domestic violence for broader purposes, such

¹⁵ Castro, who contemporaneously heard what was happening, also thought that Wood was going to die. 4RP 19. When Castro heard Nicia say, “I’ll kill you, I’ll kill you,” she believed him. 4RP 23.

¹⁶ 83 Wn. App. 98, 920 P.2d 609 (1996).

¹⁷ 164 Wn.2d 174.

as to corroborate the testimony of witnesses. See Grant, 83 Wn. App. 109-10 n.7.

A victim's credibility is also relevant where a defendant's theory at trial is that the victim fabricated an assault.¹⁸ See State v. Nelson, 131 Wn. App. 108, 116, 125 P.3d 1008, rev. denied, 157 Wn.2d 1025 (2006). In Nelson, the defendant claimed at trial that Ms. Nelson was lying. Nelson, at 112. The State thus sought to admit evidence of Nelson's prior assaultive behavior to explain Ms. Nelson's equivocal statements to the police. Id. On appeal, Division Three of this Court held that the evidence was admissible to establish a plausible explanation for Ms. Nelson's inconsistent statements, but also "*to rebut Mr. Nelson's claim that it showed [the victim] fabricated the assault.*" Id. at 116 (emphasis added).

As in Nelson, Nicia's theory at trial was that Wood had fabricated the assault and harassment charges. 2RP 11-14. Nicia claimed that it was Wood "who went off on me and started hitting me." 4RP 57. Nicia said that Wood attacked him with a "big kitchen knife" and a hammer.¹⁹ 4RP 58, 60-63; see also 4RP 98

¹⁸ See 2RP 11-14 (opening statement).

¹⁹ Despite Nicia's allegation that Wood had assaulted him, Nicia did not request any self-defense jury instructions.

(defense witness Ricardo stated that he retrieved a voice mail message the day after the January 3rd incident and heard Nicia beg Wood to “put the knife down.”). The theme of the defendant's closing argument was that Wood was not credible—she gave inconsistent statements to the police and her testimony was not only internally inconsistent, it was contradictory to other witness's testimony. 4RP 127-36.

This Court should find that Nicia's prior acts of violence from the New Year's Eve incident were admissible to corroborate Wood's testimony. See Nelson, 131 Wn. App. at 116.

Nicia contends that the trial court erred when it admitted the evidence pursuant to Grant and Magers because the ruling would essentially allow prior acts of misconduct to be admitted in every case, even when the domestic violence dynamic is not helpful in explaining the victim's state of mind. Br. of Appellant at 14. The State disagrees.

The Court in Grant recognized that “domestic violence tends to recur, and to intensify in frequency and degree of violence over time.” Grant, 83 Wn. App. at 109. There is a “cycle of violence” in these relationships that certainly affected the victim's state of mind. See e.g., State v. Dejarlais, 88 Wn. App. 297, 303, 944 P.2d 1110

(1997) (acknowledging that forgiveness and reconciliation occurs routinely after an episode of violence and prior to another episode of increased violence), aff'd, 136 Wn.2d 939 (1998).

The cycle of violence was present here. Wood said that the morning after the New Year's Eve incident, Nicia told her how sorry he was. 2RP 104. When Nicia arrived at Wood's home to go bowling, he brought her flowers and apologized. 2RP 105. Nicia told Wood that he would not behave again as he had on New Year's Eve, and that he loved her so much. 2RP 105. Nicia's remorse and Wood's forgiveness preceded another episode of increased violence (the Acme Bowl incident), which was immediately followed by Nicia's contrition. 2RP 155²⁰; 3RP 20.

In order for the jury to understand why Wood went into the kitchen to make something to eat, and tried to avoid direct contact with Nicia, or why Wood called Castro and desperately tried to keep an open telephone line, or why Wood went from room to room—in her own home—and tried to get away from Nicia, or why she felt that when she was around Nicia, there was “always a feeling of danger” or why she tried to remain calm and not escalate the

²⁰ Nicia apologized; he said that things had gone too far and that he needed to stop drinking.

episode or why she felt “unsafe” or why she made the conscious decision not to fight back, the jury needed to have a sense of the cycle of violence and how it affected Wood’s state of mind. See 2RP 114, 116-19, 123-26, 141-47, 151; 3RP 12.

Nicia argues that because the New Year’s Eve incident “did not involve threats to commit violence,” it could not have contributed to Wood’s fear. Br. of Appellant at 16-17. The State disagrees. Nicia did not threaten to commit violence, he committed violence. Nicia pinned Wood in the corner of the car and held her there with his forearm. Nicia jabbed his finger at Wood; he screamed and berated her. 2RP 48-49, 102; 3RP 33-37, 41-42; 4RP 6-9. Wood told Nicia to stop—that he was hurting her—but he did not. 4RP 7. Indubitably the New Year’s Eve incident, a part of the cycle of violence, contributed to Wood’s fear.

The trial judge exercised his discretion properly when he admitted evidence that showed the dynamics of domestic violence relationships.

d. The New Year’s Eve Incident Completed The Story For The Jury.

Although the court did not specify that the New Year’s Eve incident was admissible under the res gestae exception to

ER 404(b), this Court may affirm the trial court's ruling on any basis supported by the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000).

Washington Courts have applied the res gestae doctrine to events occurring up to two days before the crime charged. Powell, 126 Wn.2d at 263; see also State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998); State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) (two-day-long crime spree admissible as res gestae).

In Powell, the supreme court found that events or statements that were made involving either the defendant or his victim in the last two days of the victim's life were relevant and admissible as res gestae evidence to establish that the hostilities between Powell and his victim continued until her demise. Powell, at 263.

In Boot, the defendant was convicted of aggravated Murder in the First Degree for having shot the victim three times in the face. Boot, at 787. Division Three of this Court held that the trial court properly admitted several incidents of the defendant's other criminal activity under the res gestae exception to ER 404(b). The court explained that Boot and his codefendant's actions close in time to the murder were necessary to show how the two acted together and that the "evidence established an escalating chain of events of

increasingly serious crimes in a short period of time ... necessary to permit the jury to get the whole picture.” Id. at 790.

Similarly, in this case, the New Year’s Eve events established a pattern of Nicia’s hostilities toward Wood and an escalating chain of events (or cycle of violence), which logically preceded the charged crimes. These New Year’s Eve events were a “piece in the mosaic” necessary to understand the immediate context of the charged crime, properly admissible under the *res gestae* exception. Powell, 126 Wn.2d at 263.

e. Error, If Any, Was Harmless.

Even if the trial court erred in admitting evidence of the New Year’s Eve incident, the error was harmless.

The erroneous admission of ER 404(b) evidence is harmless unless there is a reasonable probability that the error materially affected the outcome of the case. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). “To determine the probable outcome, the focus must shift to the evidence which remains after the prior acts of misconduct have been excluded.” State v. Myers, 49 Wn. App. 243, 250, 742 P.2d 180 (1987).

The remaining evidence of Nicia’s guilt was overwhelming. The evidence included Wood’s description of Nicia’s January 3rd

vicious physical assault and his repeated threats to kill her, all overheard by Castro. 2RP 114-55; 3RP 26; 4RP 1015, 18-23. Wood told the 911 dispatcher that, Nicia had “choked the shit out of her” and said, “I’ve never been choked so hard in my life.” 3RP 23-24. Wood had a bubbling burn on the inside of her arm that Quiroz said was “really, really bad.” 2RP 60-61; see also 2RP 84-86. The burn mark was very red and the skin was peeling off. 2RP 22. A distraught and emotional Wood told the responding police officers and EMTs that she had pain in her throat when she swallowed and that she had been assaulted with a fist and choked. 2RP 20-22, 29, 38-39, 84. Wood had bruising around her collarbone, consistent with strangulation. 2RP 61-62. And, after Nicia stated, “I’m not a woman beater,” the jury heard that Nicia had prior convictions for Assault in the Second Degree and Assault in the Fourth Degree for having held a knife to his former wife’s throat and having slapped her. 4RP 61, 82 (trial court’s ruling), 86-89.

Nicia claims that the improperly admitted evidence “made Nicia look like a hothead, a jerk and a bully.” Br. of Appellant at 19. It strains incredulity to think that the jury did not come to that conclusion after it heard the evidence of what occurred on January 3rd. After all, trials are truth-seeking functions. See State

v. Hughs, 56 Wn. App. 172, 175, 783 P.2d 99 (1989) (discussing how suppression of evidence may impede the truth-seeking function of criminal trials).

There was overwhelming evidence of Nicia's guilt. Thus, even if the trial court erred when it admitted evidence of the New Year's Eve incident, there is no reasonable probability that it materially affected the case. The error was harmless.

2. THE DEFINITION OF "TRUE THREAT" IS NOT AN ELEMENT OF FELONY HARASSMENT AND NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT.

Nicia contends that "true threat" is an essential element of the crime of Felony Harassment and must be included in the charging document. Br. of Appellant at 22-26. As support for his argument, Nicia relies on the state supreme court's decision in State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). Schaler, however, expressly left open the question of whether the required mens rea is an essential element of the crime that must be included in the charging document. Moreover, the court emphatically stated in Schaler that it did not address the issues raised in this Court's opinion in Tellez, which held that true threat is not an essential

element and thus need not be included in the charging document.

Nicia's claim should be rejected.

The crime of Harassment is defined in RCW 9A.46.020(1)(a)(i) and (b) as follows: A person is guilty of felony harassment if, without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened, or to any other person, and by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

A person is guilty of Felony Harassment if the person harasses another person by threatening to kill the person threatened or any other person. RCW 9A.46.020(2)(b).

The charging document in this case set forth the elements of the crime as follows:

That the defendant LAZARO ISAIAS NICIA AKA LAZARIO ISAIAS NICIA in King County, Washington on or about January 3, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Karina Wood, by threatening to kill Karina Wood, and the words or conduct did place said person in reasonable fear that the threat would be carried out.

CP 1-2.

Any statute that criminalizes a form of speech “must be interpreted with the commands of the First Amendment clearly in mind.” State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)). “True threats” are not protected speech, and may be prohibited. State v. J.M., 144 Wn.2d 472, 477, 28 P.3d 720 (2001). Statements that are not true threats are protected speech, and may not be prohibited. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Thus, in order for a statute that prohibits threats to comply with the First Amendment, the statute must be interpreted as proscribing only true threats. Id. A “true threat” is “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” Id. Thus, in defining statutes that prohibit threats, Washington courts have defined the term “threat” as used in those statutes as prohibiting “true threats” only. See J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats).

In State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010), Atkins contended that the information relating to his Felony

Harassment charge was deficient because it did not include the essential element of a true threat. Id. at 802. This Court held that true threat was not an essential element of the felony harassment charge. Id. In Atkins, the Court found Tellez dispositive. Id. at 806.

In Tellez, 141 Wn. App. at 483-84, the Court held that the concept of “true threat” serves to define and limit the constitutional scope of the threat element in the felony telephone harassment statute, and is not an element of the crime. The Court held that the “true threat” requirement need not be included in the charging document. Id. Likewise, while the “true threat” concept limits the constitutional scope of the harassment statute as well, it is not an element of the crime of felony harassment. The charging document in this case set forth the elements of the crime of felony harassment. See State v. Allen, 161 Wn. App. 727, ___ P.3d ___, 2011 WL 1745014, at *11-14 (Slip Opinion filed May 9, 2011 (holding that Tellez was dispositive and that true threat merely defines and limits the scope of the essential threat element and need not be included in the charging document)).

Nicia’s reliance on Schaler is misplaced. In Schaler, the defendant challenged the *jury instructions*, not the charging

document, for the first time on appeal. Schaler, 169 Wn.2d at 282. This Court aptly noted in Allen: “Schaler expressly left open the question of whether the required mens rea is an essential element of the felony harassment charge such that it needed to be included in the information. . . .” Allen, 2011 WL 1745014 at *12. The court in Schaler “emphatically stated . . . that its opinion did not address the issues raised in Tellez.” Allen, 2011 WL 1745014 at *14 (citing Schaler, 169 Wn.2d at 288 n.6). No Washington court—including the court in Schaler—has ever held that a true threat is an essential element of any threatening-language crime. See Allen, 2011 WL 1745014 at *14 (quoting Tellez, 141 Wn. App. at 483). Nicia’s claim accordingly fails.

3. THE STATE AGREES THAT NICIA’S OFFENDER SCORE WAS MISCALCULATED.

Nicia alleges that one of his prior felonies (the Felony Harassment conviction) should not have been included in his offender score because it washed out under RCW 9.94A.525(2)(c). He is correct.

This Court reviews a sentencing court’s offender score calculation de novo. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002), rev. denied, 149 Wn.2d 1006 (2003).

An erroneously scored prior conviction is a legal error. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A sentence based on an improperly calculated score lacks statutory authority. Id. "A sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced." Id. at 869.

The sentencing court calculates a defendant's offender score according to RCW 9.94A.525. Generally, a prior Class C felony is not included if the offender has spent five consecutive years in the community without committing a crime that results in a conviction.²¹ RCW 9.94A.525(2)(c).

The record reveals that Nicia was sentenced for a Felony Harassment conviction on April 12, 2002. CP 49. Although the record contains no information of when Nicia was released from confinement pursuant to that conviction, the State has verified that Nicia's confinement ended on July 9, 2003. Nicia's next crime was committed on December 19, 2008, more than five years since the last date of release from confinement. CP 49. Consequently, it

²¹ Felony Harassment is a Class C felony. RCW 9A.46.020(1)(a)(i), (2)(b)(ii).

was error to include the prior Felony Harassment in his offender score. Nicia is entitled to be re-sentenced.

4. NICIA RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Nicia argues ineffective assistance of counsel because at sentencing, "his attorney failed to argue his harassment and assault offenses should be counted as the same criminal conduct in determining his offender score." Br. of Appellant at 30-35. The State disagrees. Nicia continued to threaten to kill Wood after the assault was completed; thus, there was a break in time during which Nicia formed a new criminal intent. Nicia cannot show that there is a reasonable probability such an argument would have been successful had it been made. This claim fails.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the

absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Here, then, Nicia must show that it was objectively unreasonable not to raise a same criminal conduct argument, and that there is a strong probability such an argument would have been successful had it been raised.

If a defendant fails to establish either prong, the Court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

Under RCW 9.94A.589(1)(a), whenever a person is to be sentenced for two or more current offenses, the sentence range for each offense shall be determined by using all other current offenses as if they were prior convictions in calculating the defendant's offender score. The statute further provides that if some or all of the current offenses encompass the "same criminal conduct," then those current offenses "shall be counted as one crime." RCW 9.94A.589(1)(a).

The term “[s]ame criminal conduct’ ... means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), aff’d, 148 Wn.2d 350 (2003). Criminal intent in this analysis is not the mens rea element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Importantly, if any one element is missing, multiple offenses cannot be considered the same criminal conduct and they must be counted separately in calculating the defendant’s offender score. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). This Court must narrowly construe the language of RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841, rev. denied, 142 Wn.2d 1014 (2000).

The offenses in the instant case involved the same victim and were committed in the same place. However, there was a distinct break in time between the end of the assault (when Wood lost consciousness) and some of the threats to kill, during which Nicia had sufficient time to form two different intents.

When Wood regained consciousness, she saw and heard Nicia on his telephone trying to get a ride. 2RP 130. Wood then grabbed her telephone. 2RP 130-31. As she spoke to the 911 dispatcher, Nicia told her not to call the police and he threatened her again. 3RP 24. After Wood told Nicia that the police were on their way, he became quiet. 2RP 132, 154. Nicia then tried to apologize to Wood; he said that he was so sorry, that things had gone too far and that they needed to stop drinking. 2RP 155; 3RP 20. He gathered his belongings and put them by the front door. 2RP 155.

When Wood saw Nicia move his belongings to the porch, she ran to the door and locked it. 2RP 132, 155; 3RP 4-5. Nicia then loaded his belongings into Ricardo's van and, as he returned to the porch to gather more items, he banged on Wood's door and called out Wood's name. 3RP 7, 23. The dispatcher advised Wood not to let him in. 3RP 5.

After the police had arrived, and while Wood spoke to a police officer, Nicia kept repeating, "I'll kill you, bitch. I'll kill you bitch. Bitch, I'll kill you." 2RP 133.

Nicia's threats to kill made contemporaneously with his assault on Wood, shared the same criminal intent. Undeniably,

Wood believed that Nicia would carry out his threat to kill her because he was strangling her. 2RP 134. Wood said that she thought she would die on the hallway floor. 2RP 1134.

However, after Wood lost consciousness, the assault was over. There were a couple of identifiable breaks that provided Nicia an opportunity to reflect, such as when Wood told her that the police were on their way (Nicia then began the contrition part of the cycle of violence²²), after Wood locked Nicia out of her apartment and when the police arrived.

After the assault was over, Nicia's intent, objectively viewed, changed. Nicia's threats were no longer intertwined with the assault. These later threats (after Wood regained consciousness) were intended to procure Wood's silence—to frighten her so that she would not make a statement to the police. No doubt, Nicia feared an arrest and another prosecution for Assault in the Second Degree.

²² 2RP 155; 3RP 20.

Nicia cannot establish ineffective assistance of counsel because he cannot establish the likelihood that the trial court would have found the crimes to be the same criminal conduct had the issue been argued.

Moreover, opting not to argue same criminal conduct could have been counsel's legitimate trial strategy to avoid highlighting the defendant's egregious conduct. As such, defense counsel's failure to argue same criminal conduct cannot form the basis of an ineffective assistance claim and Nicia's argument on this point fails.

5. THE STATE AGREES THAT A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Nicia correctly points out that the trial court found that the crime of Felony Harassment as charged in Count II occurred on January 3, 2010. CP 1-2. The judgment and sentence, however, indicates that this crime occurred on January 30, 2010. CP 32. The Court should remand to correct this scrivener's error.

D. CONCLUSION

For the reasons above, this Court should affirm Nicia's convictions for Assault in the Second Degree and Felony Harassment. The Court should, however, remand for re-sentencing

with the correct offender score and to correct a scrivener's error in
the judgment and sentence.

DATED this 11 day of August, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
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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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. LAZARO NICIA, Cause No. 65675-9-1, 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.



Name Bora Ly
Done in Seattle, Washington

08/11/2011
Date

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