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Court of Appeals
Division I
State of Washington

NO. 73544-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABDIQAHAR ADAN,

Appellant.

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

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred when it admitted ER 404(b) evidence of an uncharged crime.

2. There was insufficient evidence to support appellant's conviction for misdemeanor harassment.

Issues Pertaining to Assignments of Error

1. Appellant was charged with second degree assault, felony harassment and unlawful imprisonment against the same complaining witness. The court allowed the complaining witness to testify that appellant raped her a few months before the events that led to the charges. The complaining witness never reported the alleged rape to anyone and appellant was never charged with rape. The complaining witness did not claim the alleged rape was a reason she believed appellant would carry out his threat to kill her. The court, however, admitted the complaining witness's testimony under ER 404(b) as evidence she reasonably feared appellant would carry out his verbal threat to kill her.

a. Where the ER 404(b) evidence was irrelevant was it improperly admitted?

b. If the ER 404(b) evidence had some probative value was that outweighed by its unfair prejudice?

c. Is there a reasonable probability the admission of the improper ER 404(b) evidence affected the trial's outcome?

2. The State charged appellant with felony harassment based on his alleged verbal threat to kill the complaining witness. The jury acquitted appellant of the charge but convicted him of the lesser included offense of misdemeanor harassment. Where the evidence fails to show appellant threatened the complaining witness with bodily harm was there insufficient evidence to support appellant's misdemeanor harassment conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged Abdiqahar Adan with Second Degree Assault (Count 1), Felony Harassment (Count 2) and Unlawful Imprisonment (Count 3). CP 1-7. All counts alleged the crimes constituted domestic violence. Id. The named victim of all three offenses was Marian Mohamed. Id.

A jury acquitted Adan of the assault charge (Count 1) and felony harassment charge (Count 2). CP 77-78. Adan was convicted of misdemeanor harassment, which the court instructed the jury was a lesser included offense of felony harassment, and unlawful imprisonment (Count

3). CP 79-80. The jury found the harassment and unlawful imprisonment were domestic violence crimes. CP 81-82.

Adan was sentenced to 6 months on the unlawful imprisonment conviction. CP 126-131.

Adan was given a suspended sentence of 364 days on the misdemeanor harassment conviction, and ordered to attend the King County Supervised Community Option program for 90 days. CP 132-134.

Adan timely appealed his judgment and sentence. CP 134-145.

2. Substantive Facts

a. State's Case

At the time of trial Marian Mohamed was 32 years old, divorced, and the mother of two children. Her family moved to the United States from Somalia when Mohamed was nine years old. RP 412-414.[1] Adan was 24 years old and moved to the United States from Ethiopia when he was 14 years old. RP 510.

Mohamed and Adan lived in the same apartment complex on Yesler in Seattle. Their families know each other and they began dating in late 2013. RP 414-415, 448-449. The Somalia community frowns on older woman dating younger men, especially if the woman is divorced.

[1] The trial lasted several days but the verbatim report of proceedings is sequentially numbered and referred to as "RP."

RP 445-446. Mohamed's family and their community would not have approved of her dating Adan because Adan is from a different African country and younger than Mohamed, so Mohamed and Adan kept their relationship secret. RP 416, 418. In the spring of 2014 Adan and Mohamed became sexually active. Because it was taboo for the two of them to date, Adan could not meet Mohamed at her apartment and she could not go to Adan's apartment. To keep their relationship hidden the two would meet secretly and have sex in Mohamed's car. RP 416-418.

On October 24, 2014 Adan and Mohamed arranged to meet each other. Adan, who received some money, wanted to take Mohamed to see a movie. At about 7:30 p.m. Adan met Mohamed in front of her mother's apartment in Renton. RP 424-425. Because Mohamed could not be seen with Adan, he called her on her cell phone when he was outside the gate to the apartment complex and Mohamed came out and got into the car Adan was driving. RP 424. Adan brought with him some brandy and marijuana. RP 425, 481. Although the Somalia community also frowns on women smoking cigarettes and drinking alcohol, Mohamed did both. RP 444, 447.

Mohamed testified on direct examination that after Adan picked her up he drove them to the SouthCenter mall. Mohamed said she had one drink while the two sat in the car in the parking lot and talked. They then

went to the mall's theater to see what movies were playing. According to Mohamed, Adan wanted to see the movie "Gone Girl" but it started later than Mohamed wanted so she suggested they see another movie. Adan became annoyed with her and they went back to the car. RP 426.

Mohamed said when they got to the car Adan was still annoyed with her, started to scream at her, and called her unpleasant names. Adan then "removed" her from the car and drove away. RP 427. A short time later Adan returned and apologized. Mohamed got back into the car and Adan drove to a restaurant a few blocks away. Mohamed said that while they drove to the restaurant Adan continued to yell at her. When they got to the restaurant's parking lot Adan wanted to have sex with Mohamed so he took off all his clothes and got into the back seat. RP 427-428. Mohamed was not interested in sex but instead wanted Adan to take her home. Adan, however, wanted something to eat so he drove to the IHOP restaurant in Seattle's Capital Hill neighborhood. RP 429. Mohamed did not remember what time they arrived at the IHOP. RP 429.

While they were inside the IHOP restaurant Adan took Mohamed's cell phone. RP 436. When the waiter came to their table Mohamed walked out of the restaurant. She was within walking distance of her apartment on Yesler, so she started to walk home. RP 430, 472. Before

Mohamed got to her apartment Adan drove up and "physically" put her back into the car. RP 431.

Adan then started yelling at Mohamed again and began banging his head as he drove. Adan told Mohamed that he was going to kill her and dump her body in the lake. RP 432. Adan told Mohamed that in Africa things happen to women and nobody cares. When Mohamed responded that she was glad she was in America and not Africa, Adan punched her twice in the mouth then grabbed her by the hair and shoved her head against the car's passenger side window. Mohamed said she believed she was going to die because Adan knocked her teeth out when he punched her. RP 434. Mohamed did not remember if she hit or bit Adan but she said if she did it was in self-defense. RP 436.

Adan drove them to Coleman Park on Lake Washington. RP 432. Adan parked the car in the park's parking lot, dragged Mohamed from the car and slapped her knocking her glasses off her face. Adan then pulled Mohamed towards to the lake. RP 437-438. When they got to the water Adan started washing blood off his hands and told Mohamed "look what you made me do." RP 435. Mohamed then heard a dog and saw a woman walking. Mohamed said she either asked or mouthed to the woman to call 911. RP 439-440.

When Mohamed was confronted with statements she made to police Mohamed admitted she told police she and Adan decided to see the movie "Equalizer" that started at 10:30 p.m., contrary to her earlier testimony Adan wanted to see the movie "Gone Girl" but she did not because that movie started too late. RP 460-461. Mohamed admitted she told Adan they should wait in the mall's parking lot until the movie "Equalizer" started. RP 462. Contrary to her direct testimony that Adan became annoyed with her when she did not want to see "Gone Girl" and they went back to the car, Mohamed admitted she and Adan went inside the theater and started watching the movie "Equalizer" but she left and went back to the car while the movie was still playing, that Adan came out to the car to check on her, and she told him to go back inside and finish watching the movie but instead he suggested they leave. RP 464-467.

Mohamed also admitted that although she did not want anything to eat, she agreed to go with Adan to the IHOP and order something to drink. RP 467-470. Mohamed testified while they were sitting at the IHOP Adan was yelling at her and everyone was staring at them. RP 471. However, police spoke to the IHOP employees and they told police there was no altercation between Mohamed and Adan. RP 328.

Mohamed admitted she told police that she slipped out of the IHOP, began walking home, and got to her apartment complex before

Adan found her. RP 471-473, 476. Contrary to her direct testimony that Adan took her cell phone at the IHOP, she admitted she had her phone when she was walking home from the IHOP and that Adan kept calling her but she kept hitting the ignore button. RP 473-474. Mohamed claimed that when Adan physically put her into the car at her apartment complex she did not run or scream for help because she did not want to wake up her neighbors because then they would then know about her relationship with Adan. RP 476-477.

Mohamed admitted she told police she had three shots of the brandy, contrary to her testimony on direct examination that she had one drink in the mall's parking lot. Mohamed admitted she told police that she was feeling "tipsy" and admitted that in her interview with defense counsel she said she was "pretty tipsy." RP 483-484.

Mohamed also admitted she knows self-defense and could have defended herself when Adan took her from the car to the lake but she claimed she did not want to hurt him, even though he threatened to kill her. RP 495-496. Mohamed testified that before the incident she never felt threatened by Adan because "he's crazy about me." RP 497.

Traci Jenssen was the woman Mohamed saw at the park walking the dog and asked to call 911. It was between 8:00 and 9:00 a.m., over 12 hours from the time Adan met Mohamed in front of her mother's

apartment. Jenssen noticed Mohamed walking towards her and Adan was following Mohamed. RP 188. The two, however, were not walking from the lake where Mohamed testified Adan dragged her. Adan was not running after Mohamed but was walking about 10 to 12 feet behind her. RP 192-196. Jenssen noticed Mohamed had a bloody mouth and lip. RP 189. Mohamed mouthed to Jenssen to call 911 and Jenssen told Mohamed she was sorry but she could not help. RP 190. As Jenssen left the park she saw Adan hug Mohamed then hold her at arm's length and scream at her. RP 191. When Jenssen got to the top of a hill, out of sight of the two, she called 911 while she walked back to her house. RP 191.

At about 8:45 a.m. Seattle Police officers Mark Gallegos and Demethra Behn were dispatched to Coleman Park. RP 215. When Gallegos pulled into the parking lot he saw Adan and Mohamed standing in an area overlooking the lake. As he walked towards them he saw Adan give Mohamed a bear hug and tell her that he loved her. It appeared to Gallegos that Mohamed was trying to pull away from Adan. RP 216. Gallegos directed Mohamed to talk to Behn while he spoke with Adan. RP 217. Adan appeared agitated but was very cooperative, and had what looked like scrape marks or bites on his arm and on his fingers. RP 217-218, 223, 259-260, 269-270.

When Mohamed approached Behn, Mohamed's hand covered her mouth and it was bloody. RP 167-168. It looked like Mohamed's two lower teeth were loose and about to fall out. RP 169.

Mohamed was taken to the hospital. Her two lower incisors were injured. RP 290, 295, 377. Mohamed told the medical personnel that her teeth were injured when her boyfriend slammed her head into the car window and punched her once in the face. RP 291, 351-352, 371. Although Mohamed testified Adan punched her when he was driving them to Colman Park, shortly before the police arrived at 8:45 a.m., Mohamed nonetheless told the medical personnel she was injured at about midnight. RP 314. Mohamed also told them that her boyfriend said he was going to kill her and take her phone so nobody would find her. RP 298, 351-352. A dentist saw Mohamed at the hospital and he was able to return her teeth to their pre-injury alignment. RP 392.

b. Defense Case

Adan testified that he and Mohamed grew up in the same apartment complex. Mohamed's mother was the apartment's manager. RP 511. In August 2012, Adan had a young girl give Mohamed his phone number because he believed Mohamed was interested in him. RP 511. The two then began exchanging text messages. Between August and

December 2012 Mohamed twice asked Adan to meet her in a nearby park and once they walked to the park together. RP 512.

Adan did not hear from Mohamed again until the following September when he ran into Mohamed and her son while he was walking home. They talked and Mohamed gave Adan her new phone number. RP 512-513. By early November 2013 their relationship became intimate and they stated to see each other about four times a week. RP 513. They kept their relationship secret from their families, friends and neighbors because of cultural and religious taboos. RP 514. Although Mohamed was divorced, older than Adan, drank and smoked cigarettes, and wore non-traditional clothes when she with Adan, he nonetheless loved her. RP 519.

On October 24, 2014 Adan received some money so he and Mohamed agreed to go to a movie. Adan borrowed a car and met Mohamed at her mother's apartment complex in Renton at about 7:00 p.m. When Mohamed got into the car she took off her traditional Islamic clothes and told Adan she wanted to go to the lake instead of a movie because she only had a few hours. RP 520-522. Adan, however, convinced Mohamed to go see a movie with him so they drove to the Southcenter mall. RP 522.

After Adan parked in the parking lot they sat in the car and drank brandy that Adan brought with him. Adan also smoked some marijuana.

Adan said Mohamed was not in a good mood. She pointed to nearby restaurants and the theater and told Adan that is where her other boyfriends took her. RP 522-523. After that Adan gave Mohamed what he described as the "silent treatment." Mohamed then made up with him. RP 523.

The two eventually decided to see the movie "Equalizer." The move started at 10:30 p.m. After buying the tickets they went back to the car to wait for the movie to start and Mohamed continued drinking. They finally went into the theater about 11:00 p.m., after the movie had started. RP 526-528. Adan did not know how much Mohamed had to drink, but he had to help her walk to their seats. RP 526, 529. About ten minutes after they took their seats, Mohamed got up and tried to leave the theater through the emergency exit. Adan directed her to the right exit and Mohamed told him she was just going to use the restroom so Adan went back into theater. RP 530. Mohamed then called Adan on his cell phone and asked him to come back out to the car. Id.

The two then drive around the mall's parking lot listening to music and Mohamed started drinking again. RP 523-533. A few hours later Adan drove Mohamed back to her mother's apartment in Renton. When they arrived Mohamed told Adan she wanted to go back to the mall. They return to the mall and while there they got into an argument. Adan

then drove Mohamed back to Renton a second time and asked her to leave. Mohamed started crying and told Adan she still wanted to have a good time. RP 535-536. Adan drove them to another parking lot, where they sat in the car and listened to music until they started arguing again. RP 537. Adan for the third time took Mohamed back to the Renton apartment. Id. This time Mohamed got out of the car, but before Adan left Mohamed got back into the car and told Adan she wanted to go to Seattle. RP 538.

Adan then drove to the Yesler apartment complex where both he and Mohamed lived. They arrived at about 6:00 a.m. and while Mohamed waited in the car Adan went into his apartment and got some more marijuana. RP 539-542. After leaving the apartment complex Adan drove to the nearby park where the two often went. They decided to have sex but before they finished they started to argue again. RP 542-543. Adan then suggested they go to the IHOP restaurant because he was hungry. Mohamed reluctantly agreed but said she did not want anything to eat. They got to the restaurant at about 7:00 a.m. RP 544-545.

At the restaurant Mohamed and Adan got into yet another argument. Mohamed left the table. When Mohamed did not return Adan called her cell phone and then sent her text messages because Mohamed did not answer her phone. RP 546-547. Mohamed finally called Adan

back and when he asked her were she was she told him she was near the park they were at earlier. Adan drove to the park but could not find her so he drove towards their apartment complex on Yesler. When he was less than a block away from the complex Adan saw Mohamed walking. RP 548.

Adan stopped and Mohamed got into the car. Mohamed had left her keys to her apartment at her mother's apartment so she suggested they go to the lake to wait until she could call the apartment's manager to let her inside. RP 550. While driving to the lake Mohamed got angry at Adan over something he said about her uncle. Mohamed started punching Adan. By this time Adan had become frustrated with Mohamed's erratic behavior and he told her she was bipolar. Although he was driving, Mohamed bit Adan's hand. Adan pushed Mohamed's head away from his hand and her head hit the car's front passenger door. RP 551-555. Mohamed told Adan that he crossed the line and she is going to get her "niggas" to take care of him. RP 556. When Adan parked the car in the Colman Park parking lot Mohamed was on her cell phone and she told Adan he had better watch his back. RP 558. Mohamed got out of the car and Adan grabbed her phone and took out the battery. The phone's SIM card fell out as well. RP 559.

Adan then walked down to the lake to clean the blood off his hands. As he walked back toward Mohamed he saw her talking to a woman with a dog. RP 560-561. After the woman walked away Mohamed came to Adan and asked Adan to help her look for her glasses, which she apparently lost. Adan found the glasses, took them to her, and was holding her when police arrived. RP 562-563. Adan said he never prevented Mohamed from going anywhere, and he never threatened to kill her. RP 564.

c. Facts Pertaining to Assignment of Error 1

Prior to trial the state moved to admit evidence that Adan once sexually assaulted Mohamed. RP 26-28. Mohamed never reported the alleged assault to police, but revealed it in an interview with defense counsel. RP 27. The state argued the evidence was relevant to the felony harassment charge on the issue of whether Mohamed reasonably feared Adan was going to carry out his threat to kill her. Id.

The court found that based on Mohamed's statements at the interview Adan raped Mohamed, and evidence of the rape was admissible to show Mohamed reasonably feared Adan would make good on his threat to kill her. The court read Mohamed's interview statements to indicate Adan tried to choke her during the rape, which showed physical violence.

RP 135. The court also found any prejudice in the admission of the evidence was outweighed by its probative value. RP 133-136.

Adan objected the evidence was not relevant to show Mohamed reasonably feared Adan would carry out the threat to kill her, and its admission would prejudice Adan's right to a fair trial. RP 35. Adan argued Mohamed did not allege there was any sexual assault or threat of a sexual assault in connection with the events that led to the charges against him. RP 35. There was no evidence that Adan threatened Mohamed to facilitate the alleged rape or that he threatened her during the alleged rape. RP 140-142. And, the evidence would be extremely prejudicial because the jury would perceive Adan as a rapist. That perception would taint the jury's ability to fairly assess the evidence. RP 35.

During the State's direct examination, counsel asked Mohamed if there was an incident the previous spring that led to a break in her relationship with Adan. RP 418. Mohamed told the jury that one evening she and Adan agreed to meet at the park where they usually met. Adan walked to the park and Mohamed drove there in her car. RP 419. While they sat in the front seat of Mohamed's car Adan told Mohamed that he was always sacrificing for her, and he disparaged her appearance. RP 419-420. According to Mohamed, Adan then picked her up, put her in the back seat, and had sex with her against her will. RP 421-422. Mohamed

said she screamed but Adan had locked the car's doors and shut the windows so nobody heard her and she stopped. RP 421. When asked if Adan used "brute force" Mohamed did not testify any force was used but instead responded "He started having sex with me." RP 421-422. Mohamed never reported the incident to anyone because she had children, was divorced, older than Adan, and they could not be seen together. RP 422, 450. She never testified Adan choked her.

Following Mohamed's testimony Adan moved for a mistrial. RP 506. Adan argued Mohamed's testimony that Adan raped her was not probative and it prejudiced his right to a fair trial. Id. The court denied the motion. RP 507.

C. ARGUMENTS

1. THE COURT IMPROPERLY ADMITTED IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE OF AN UNCHARGED OFFENSE.

ER 404(b) is a categorical bar to admission of evidence of prior crimes for the purpose of proving a person's character and showing that the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). There are no exceptions to this rule. Gresham, 173 Wn.2d at 421. "Instead, there is one improper purpose and an undefined number of proper purposes." Id. Such evidence may be

admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); See, 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 804.16 at 520 (5th ed. 2007) ("Over the years, most of the attention has been focused on the various ways in which evidence of prior misconduct is admissible despite the restrictions in Rule 404(b). . . . Nevertheless, it should be remembered that the general thrust of Rule 404(b) is that other crimes, wrongs, or acts are inadmissible to suggest a person's general propensities.").

Before admitting ER 404(b) evidence for an undefined purpose, the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

However, "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." Gunderson, 181 Wn.2d at 923 (quoting State v. Saltarelli, 98 Wash.2d 358, 362, 655 P.2d 697 (1982)). Evidence is only logically

relevant if (1) it tends to prove or disprove the existence of a fact and (2) that fact is of consequence to the outcome of the case. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986); ER 401. Even relevant evidence should be excluded if its prejudicial effect outweighs its probative value. ER 403.

An element of felony harassment is that the victim reasonably feared the defendant would carry out the threat to kill. RCW 9A.46.010(1)(b). "Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 847 (1995). The court ruled Mohamed's allegation that Adan raped her a number of months earlier was admissible to show Mohamed reasonably feared Adan was going to carrying out his verbal threat to kill her. The rape allegation was not substantially probative on the issue of whether Mohamed reasonably feared Adan was going to kill her.

For example, in State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995) *abrogated on other grounds*, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002), Binkin was charged with felony harassment for telephoning his estranged wife and threatening to kill her. Binkin's estranged wife testified that she believed Binkin was capable of carrying out the threat because his aggressiveness had been increasing over time.

Id. This Court found Binkin's prior threat to kill his estranged wife's unborn child by dragging it out of her body and trampling it, was admissible to show that her fear Binkin would carry out his threat to kill her was reasonable. Id. at 292. This Court reasoned, consistent with his estranged wife's testimony explaining why she believed Binkin would carry out his threat to kill her, that the prior threat was evidence of Binkin's growing aggressiveness and anger. Id.

In contrast, Mohamed's testimony that Adan raped her some months before the incident was not logically relevant to the issue of whether she reasonably feared Adan would carry out his verbal threat to kill her. When the prosecuting attorney asked Mohamed why she feared Adan would carry out his verbal threat to kill her, Mohamed responded it was because Adan knocked out her teeth. RP 433-434. See, State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998) ("The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence.").

While rape can be a violent act, unlike in Binkin where Binkin threatened to kill the victim's unborn child and then the victim herself, Mohamed did not testify that Adan threatened to kill her or use 'brute force" during the alleged rape. Mohamed did not testify the rape incident was a factor that caused her to believe Adan would carry his verbal threat

to kill her. Mohamed never testified that because of the rape, she believed Adan would or was capable of making good on the threat to kill her and dump her body in the lake, nor did she testify that Adan's behavior had become more violent and aggressive following the rape incident and leading up to the October 24-25 incident.[2] Indeed, Mohamed testified that she never felt threatened by Adan before (RP 497) despite the rape.

In sum, it was not necessary to allow Mohamed to tell the jury Adan raped her months earlier because under the facts in this case there was no nexus between the alleged rape and Mohamed's fear that Adan would carry out his verbal threat to kill her. Without some nexus the evidence did not logically make it more probable that Mohamed reasonably feared Adan would carry out the threat. Merely because the element of a crime is a person's "reasonable fear" it is not a license to admit unfairly prejudicial evidence of a defendant's uncharged crimes if those crimes were not a reason the person was fearful. Evidence of the uncharged rape did not have "substantial" probative value.

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[2] In State v. Magers, 164 Wn.2d 174, 186, 189 P. 3d 126 (2008) the Court ruled that prior acts of domestic violence are admissible under ER 404(b) to assist the jury in judging the credibility of a recanting victim. (plurality opinion); Id. at 194 (Madsen, J., concurring). However, the court recently declined to extend Magers to cases where the complaining witness neither recants nor contradicts prior statements. Gunderson, 181 Wn.2d at 925.

Even if the evidence had some slight probative value, its probative value was outweighed by its unfair prejudice. ER 404(b) is not a license to inject all manner of prejudicial evidence into a case. Evidence is unfairly prejudicial when it is more likely to arouse an emotional response than a rational decision by the jury, or has an undue tendency to suggest a decision on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence of other bad acts invite jurors to believe the defendant deserves to be punished for a series of immoral acts, which "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Prior sex offenses fall into that class of evidence recognized as extremely prejudicial. Saltarelli, 98 Wn.2d at 363.

The uncharged rape evidence likely resulted in the jurors believing Adan was a rapist who had gone unpunished for his crime. Understandably the jurors would have had a strong emotional reaction of animosity toward Adan and believed he had an immoral and a criminal character. It is reasonable to conclude the jurors were enable to put aside those feelings about Adan and base their decision solely on the evidence.

The Supreme Court has warned against the admission of bad acts evidence where "its effect would be to generate heat instead of diffusing light, or . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, the scales should be tipped in favor of the defense and exclusion of the evidence. Smith, 106 Wn.2d at 776. Under the facts in this case, the uncharged rape evidence should have been excluded.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citation omitted).

There is a reasonable probability the outcome of the trial would not have been the same without the improper ER 404(b) propensity evidence. The State did not have a strong case. It rested on Mohamed's credibility.

The court instructed the jury on self-defense consistent with Adan's testimony that Mohamed bit him and he only pushed her head

away to stop her. CP 106 (instruction 15). The jury acquitted Adan of the assault charge despite Mohamed's testimony and injuries. It necessarily disbelieved Mohamed that Adan struck her and pushed her head in a fit of rage over an argument.

The jury also acquitted Adan of the felony harassment charge, despite Mohamed's testimony that Adan threatened to kill her and that she believed he would carry out the threat. By acquitting Adan of felony harassment, jurors necessarily did not believe Mohamed that Adan threatened to kill her, or that Mohamed reasonably feared that Adan would carry out the threat to kill her. Because the evidence supporting each of those elements was Mohamed's testimony, it also supports the conclusion jurors questioned Mohamed's credibility.

Despite the jury's clear misgivings about Mohamed's credibility, borne out by the significant inconsistencies in her story, it found Adan guilty of the lesser offense of misdemeanor harassment[3] and unlawful imprisonment. Those offenses were likewise only supported by Mohamed's testimony. It is not difficult to infer the jury convicted Adan of those offenses even though it disbelieved Mohamed's testimony supporting the assault or felony harassment charges because juror's

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[3] The court instructed the jury on misdemeanor harassment as a lesser-included offense of felony harassment. CP 111 (instruction 20); CP 113 (instruction 22).

believed Adan was likely a rapist and was never held accountable for the crime. It is reasonable to infer the same credibility concerns might have led to acquittals on all the charges had the jury not been exposed to the uncharged rape allegation. The jury's decision to convict Adan of the unlawful imprisonment and misdemeanor harassment charges was likely an emotional response to the improper rape evidence: That Adan is a bad and immoral person with a propensity for criminality. Therefore Adan must have committed some crime against Mohamed even if not assault or felony harassment.

The jury was instructed to consider the rape evidence only for the purpose of determining Mohamed's state of mind. RP 418; CP 98 (instruction 7). The instruction, however, did not cure the prejudice engendered by the improper evidence. First, as argued above, the evidence was not admissible for any proper purpose.

Second, there is some evidence that is not susceptible to such a limitation because it is just too influential to ignore. Courts have recognized that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P. 2d 198 (1968)); see also State v. Copeland, 130

Wn.2d 244, 284, 922 P.2d 1304 (1996) (in context of prosecutorial misconduct); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (same). The evidence Adan raped Mohamed was the kind of inherently prejudicial evidence that impressed itself on the minds of the jurors. The limiting instruction did not cure the prejudicial nature of the evidence.

The evidence supporting the harassment and unlawful imprisonment charges was Mohamed's testimony. The jury found Mohamed' credibility challenging, and the evidence of the uncharged rape was inherently and extremely prejudicial. Under these facts, it cannot be concluded the evidence was of minor significance when overall the evidence as a whole was not overwhelming. Bourgeois, 133 Wn.2d. at 403. The admission of the evidence was not harmless and Adan's convictions should be reversed.

2. THERE WAS INSUFFICENT EVIDENCE TO SUPPORT THE MISDEMEANOR HARASSMENT CONVICTON

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428,

173 P.3d 245 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict Adan of the offense of misdemeanor harassment, the State was required to prove that without lawful authority Adan knowingly threatened to cause Mohamed bodily injury immediately or in the future by words that placed Mohamed in reasonable fear that the threat will be carried out. RCW 9A.46.020(1); CP 23. A threat is a direct or indirect communication of the intent to do the act threatened. RCW 9A.04.110(28).

There was no evidence Adan threatened Mohamed with bodily injury. The only threat was the alleged threat to kill Mohamed. RP 432, 434, 439, 494, 495. Mohamed also testified she and Adan had never before physically fought, and she never before believed that Adan was going to kill her. RP 496-497.

The Court's decision in State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), is instructive. In that case, C.G., a high school student, became disruptive and when the vice-principal escorted C.G. from class, C.G. said to him, "I'll kill you Mr. Haney, I'll kill you." C.G., 150 Wn. 2d at 607 (internal quotation marks omitted). The vice-principal testified that based on what he knew about C.G., although the threat was against his life, he feared only bodily injury to himself or someone else. Id.

On appeal, the C.G. argued that the evidence was not sufficient to support felony harassment because "the State did not prove that [the vice-principal] was placed in reasonable fear that [C.G.] would kill him." C.G., 150 Wn.2d at 607. The Court concluded "a conviction of felony harassment based upon a threat to kill requires proof that the person threatened was placed in reasonable fear that the threat to kill would be carried out." Id. at 606. In dicta the Court observed, "...the State will still be able to charge one who threatens to kill with threatening to inflict bodily injury, in the nature of a lesser included offense, thus enabling a misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury." Id. at 611.

On the facts in C.G. the vice-principal's testimony supported a reasonable fear C.G. would only inflict bodily harm, even though she threatened to kill him. Thus, the facts support the C.G. Court's observation.

Here, on the other hand, Mohamed never testified that Adan threatened her with bodily harm or that she feared Adan would inflict bodily harm. Unlike the vice-principal in C.G., Mohamed did not testify that she did not believe Adan would kill, but believed he would only injure her. Moreover, there was no other evidence to infer Adan was becoming

more aggressive towards Mohamed over time. According to Mohamed, Adan threatened to kill her and she believed he would carry out that threat. On these facts the State failed to prove Adan threatened Mohamed with bodily harm. The evidence was insufficient to support Adan's misdemeanor harassment conviction.

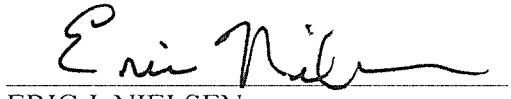
D. CONCLUSION

For the above reasons, Adan respectfully requests this Court dismiss his conviction for misdemeanor harassment. Alternatively, Adan requests this Court reverse his misdemeanor harassment along with his unlawful imprisonment conviction.

DATED this 12 day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73544-6-I
	)	
ABDIQAHAR ADAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF OCTOBER 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ABDIQAHAR ADAN
1837 E. YESLER WAY
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF OCTOBER 2015.

x Patrick Mayovsky