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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRIS ANTHONY LINDHOLM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 05-1-03828-6

Brief of Appellant

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it granted a new trial on the basis that evidence of defendant's prior abuse against the victim was improperly admitted under State v. Cook.

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3. The trial court erred when it refused to apply the invited error doctrine to this case.

4. This court should reconsider its opinion in State v. Cook that evidence of prior abuse between a defendant and victim is inadmissible for purposes of assessing the credibility of the victim.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err when it reversed defendant's conviction and granted a new trial based on its conclusion that the court had improperly admitted evidence of defendant's prior abuse against the victim pursuant to State v. Cook?

2. Did the trial court err in reversing defendant's convictions and granting a new trial based on the court's giving of an erroneous limiting instruction where the instruction was proffered by the defense, who therefore invited any error related to the instruction?
3. Should this court reconsider its decision in State v. Cook that evidence of prior abuse between the defendant and victim is inadmissible for purposes of assessing the victim's credibility at trial?

C. STATEMENT OF THE CASE.

1. Procedure

On August 5, 2005, the State filed an Information charging CHRIS ANTHONY LINDHOLM, (hereinafter "defendant"), with first degree kidnapping, second degree assault, felony harassment, third degree assault, and unlawful use of drug paraphernalia. CP 167-68. The State charged a firearm sentencing enhancement on the kidnapping, assault and harassment charges. CP 167-68. The victim of the kidnapping, assault and harassment charges was Jill Lindholm, the defendant's estranged wife. CP 167-68.

Trial began on January 31, 2006, before the Honorable John R. Hickman. RP (1/31/06)¹ 3-21. The State sought to admit evidence of defendant's prior abuse against the victim pursuant to State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), to explain the victim's minimization at trial. RP (2/1/06) 63-71. Defendant argued against the admission of the evidence because: (1) the State had not proven the prior incidents by a preponderance of the evidence, and (2) the victim did not fully recant so the evidence was irrelevant. RP (2/1/06) 63-68. Defendant did not argue that the evidence was inadmissible for purposes of assessing credibility. After hearing argument from counsel and conducting a balancing test on the record, the court admitted the prior incidents for purposes of evaluating the victim's credibility.

I think this case is very similar to the case of State v. Grant. I've done the balancing test, and I'm not going to allow counsel to – based on my ruling – to argue about this in closing argument as proof that he was pre-determined or pre-disposed to commit this type of crime because of any alleged bad act that may have occurred as alleged or as described in this petition for order of protection.

So that's a limiting instruction to both counsel, especially the State, that they are not to argue that if I allow this kind of testimony to come out through examination of Ms. Lindholm, it cannot be used in closing argument to indicate that because this may or may not have occurred in Oregon or in Washington State that somehow it would lend him to commit this type of crime. That is specifically going to be prohibited.

¹ The report of proceedings will be referred to as "RP (date of hearing)" throughout this brief.

However, I do find that because this witness, Ms. Lindholm, is a key witness in this case, as it's been pointed out to me more than once by both sides, that her credibility is very important for the jury to have a chance to appraise, and because of the fact that she has given inconsistent statements in writing and on the stand, in comparison to those written statements, and that the portrayal of this marriage and the domestic violence surrounding it are all important in terms of judging the credibility of this particular witness, I will allow the State to ask or inquire regarding the incident that she listed in her sworn statement that was provided on 5/12/05.

RP (2/1/06) 123-26. In response to the court's ruling, defense counsel stated:

Your Honor, the chances are very good that I'm going to propose a limiting instruction in my packet that says something to the effect that, "Evidence of prior incidences involving Chris and Jill Lindholm have been introduced for the limited purpose of determining the credibility of Ms. Lindholm, and this evidence can be considered by you for that purpose and for not other reason." Something to that effect. That's normally what I do in a case like this.

RP (2/1/06) 126. Counsel did, in fact, propose a limiting instruction to that effect. CP 6-47; RP 145. There were no objections to any of the instructions. RP (2/7/06) 3.

The jury returned a verdict of guilty as charged. CP 133-42. Prior to sentencing, defendant filed a motion for new trial. CP 143, 144, 145-161. Citing State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), a recent case from Division Two, defendant claimed that the trial court erred in admitting the prior abuse and improperly instructed the jury as to the

proper use of the evidence. CP 145-161. The State responded that the evidence was properly admitted and that any error with regard to the limiting instruction was invited by the defense. CP 162-66. After hearing argument from counsel and considering the briefs that had been filed, the court granted the defendant's motion for new trial:

I believe this court made a mistake in, No. 1, admitting the evidence in light of the Cook decision for the ability to attack general credibility, and even if I was allowed to do that under the Cook decision, Division II, although it doesn't give much direction on what is a proper limiting instruction, seems to find that my Instruction No. 5 would not be adequate, nor was it for Judge Buckner.

I am duty bound to follow the law, and according to Division II, I believe Mr. Sepe is correct, that I made an error in allowing it to come in under the category of general credibility of Jill Lindholm, and even if I'm not in error there, they've ruled that my limiting instruction was not proper.

So for that reason, I'm granting the motion for a new trial in light of the ruling provided for in State v. Cook.

RP (3/24/06) 26. The court rejected the State's invited error claim because defense requested the instruction based on the state of the law at the time the instruction was offered. RP (3/24/06) 24. The court entered written Findings of Fact and Conclusions of Law regarding its decision on the motion for new trial. CP 169-74. The State offered supplemental Findings, but the court refused to enter them on the basis that they were "cumulative". RP (3/24/06) 5-6.

This timely appeal follows. CP 167-68.

2. Facts

At the time of this incident, the defendant and Jill Lindholm had been married for 27 years. RP (2/1/06) 8. They had two daughters, Stephanie and Stacy. RP (2/1/06) 10. Defendant held various jobs throughout the marriage, the most recent being a job as a computer scientist at Microsoft. RP (2/1/06) 13. The couple was doing well financially and they were happy in their marriage. RP (2/1/06) 13. Defendant was diagnosed with Hepatitis C in 1999 or 2000. RP (2/1/06) 15. Defendant quit his job at Microsoft and began chemotherapy treatment. RP (2/1/06) 15. During this time, the defendant and Jill lived on defendant's long term disability payments. RP (2/1/06) 16. The disability payments ran out in 2003 and the Lindholms lost their house to foreclosure in 2004. Id. The marriage was still good in June 2004, although strained from the financial issues.

In April 2005, the Lindholms moved to Oregon for one week. The couple lived separately when they returned. RP (2/1/06) 20. Jill did not have any contact with the defendant after they returned from Oregon. RP (2/1/06) 21.

In August 2005, Jill needed repairs done on her car and her daughter made arrangements for the defendant to do the repairs. RP (2/1/06) 21. On August 4, 2005, the defendant came over to repair Jill's car. This was the first time that Jill had seen the defendant since they returned from Oregon. The defendant brought Jill roses and they went to

dinner at The Forbidden City in Puyallup. RP (2/1/06) 24-26. At dinner, Jill told the defendant that she was dating someone. RP (2/1/06) 26. The defendant became irate, threw money on the table and left the restaurant. RP (2/2/06) 121. Jill returned to the defendant's apartment that night, but told him that she didn't want to stay there. RP (2/2/06) 122. Jill eventually agreed to stay because the defendant had been drinking, she didn't have a car and she was scared to say no. RP (2/2/06) 122. Jill asked the defendant to take her home the next morning and the defendant again became irate. RP (2/2/06) 122. The defendant ripped off his clothes and started flailing a gun around. RP (2/2/06) 122. Defendant threatened to kill Jill and himself. RP (2/2/06) 122, 128. Defendant told Jill that if she tried to run, he would shoot her. RP (2/2/06) 128. Jill ran out of the apartment, but the defendant chased her and forced her into his car. RP (2/2/06) 81, 123. Defendant told Jill to take the back roads to his home in South Hill, Puyallup. RP (2/2/06) 81, 129. Defendant held the gun in his lap and pointed it in Jill's direction. RP (2/2/06) 81, 123. The defendant kept telling Jill that he was going to take her out with him. RP (2/2/06) 123. Jill described the conversation in the car as very graphic and violent. RP (2/2/06) 124. At one point, the defendant threatened to kill Jill because he thought she was trying to signal a passing police officer. RP (2/2/06) 129-30. Defendant also told Jill that he would kill her if she attempted to get out of the car. RP (2/2/06) 129-30. Eventually, the couple arrived at the Tesoro gas station in Puyallup. RP (2/2/06) 131. Jill

asked the defendant if he wanted her to go in and pay for gas and he said okay. RP (2/2/06) 131. Jill went inside and immediately told the cashier, "My husband has a gun and he's threatening to kill me." RP (2/2/06) 131. Jill left the store, but returned again and told the clerk, "I'm being held by gunpoint. Call the police." RP (2/2/06) 131.

Megan Ryan was the cashier working at the time. RP (2/1/06) 163. Ryan testified that Jill initially came in with the defendant and quickly told Ryan to call the police. RP (2/1/06) 164-65. The second time that Jill came in she was alone and this time she told Ryan to, "Call the cops, my husband is holding me hostage." RP (2/1/06) 164-66. Ryan told the manager, who then called the police. RP (2/1/06) 166. The manager locked Jill in the back office to keep her safe. RP (2/1/06) 166. The defendant came into the store and asked where his wife was. RP (2/1/06) 167. Defendant was upset and yelling profanities. RP (2/1/06) 168. Defendant walked around the store and kept asking about his wife. RP (2/1/06) 168. The defendant eventually left without his wife. RP (2/1/06) 168.

While the defendant was inside the store looking for Jill, Puyallup police arrived and set up containment outside of the gas station. Officer Kleffman observed the defendant exiting the store and ordered him to stop. RP (2/2/06) 15. Defendant did not obey commands and fled on foot. RP (2/2/06) 17-18. Officers engaged in a foot pursuit through a neighboring apartment complex and greenbelt area. RP (2/2/06) 19, 29.

During the pursuit, officers observed the defendant reach into his right pocket and attempt to pull something out. RP (2/2/06) 19. After several minutes of pursuit, defendant came face to face with Sgt. Brokaw. RP (2/2/06) 30. Sgt. Brokaw ordered the defendant at gunpoint to put his hands up. RP (2/2/06) 32. Defendant refused to obey. RP (2/2/06) 32. Defendant lunged at Sgt. Brokaw and attempted to tackle him. RP (2/2/06) 34-36. Brokaw was able to arrest the defendant and place him into handcuffs. RP (2/2/06) 37. Sgt. Brokaw conducted a search of the defendant and located a glass smoking pipe in defendant's pants pocket. RP (2/2/06) 39. Sgt. Brokaw testified that the defendant appeared to be under the influence of a stimulant or engaged in a psychotic episode. RP (2/2/06) 64.

Officers later found a firearm in the brush area near the greenbelt. RP (2/2/06) 89. The gun was a .38 caliber Derringer with two rounds in the chamber. RP (2/2/06) 90. Evidence technicians were able to lift a print from the weapon, but unable to do a fingerprint comparison due to lack of detail. RP (2/2/06) 98, 102. The gun was tested for operability and determined to be operable. RP (2/2/06) 112.

Puyallup Police Officer Joseph Pihl contacted the victim in the backroom of the Tesoro gas station. RP (2/2/06) 78. Officer Pihl knocked on the door three times before Jill answered. RP (2/2/06) 78. Upon opening the door, Jill immediately stated, "Did you get him?" RP (2/2/06) 80. Jill was distraught and her speech was rapid and hard to understand.

RP (2/2/06) 78. After Officer Pihl obtained a statement from Jill, Detective Tamera Pihl took over. RP (2/2/06) 119. Throughout their contact, Jill appeared very nervous, scared, jittery and upset. RP (2/2/06) 119.

i. Victim's Trial Testimony

At trial, Jill testified that she returned willingly to the defendant's apartment after dinner at The Forbidden City. RP (2/1/06) 29. Jill testified that she spent the night at the defendant's place and was not held against her will. RP (2/1/06) 29.

The couple returned to Jill's apartment the following day. RP (2/1/06) 31. Jill testified that both the defendant and she had been smoking methamphetamine that day. RP (2/1/06) 35. When they arrived at Jill's apartment, Jill told the defendant that the man she was seeing was the defendant's best friend. RP (2/1/06) 33. Jill testified that the defendant got "real mad" and put a gun to his head and threatened to kill himself. RP (2/1/06) 34. At about this same time, the Lindholms' daughter Stephanie called and sensed that something was wrong. RP (2/1/06) 39. Stephanie subsequently called the police. RP (2/1/06) 39. Jill told the defendant that he had better leave because the police were coming. RP (2/1/06) 42. Jill testified that she went with the defendant freely and drove along back roads to avoid the police. RP (2/1/06) 42. Jill attempted to pull over at the Milton Police Department, but the defendant said, "If you stop, I'll kill you!" RP (2/1/06) 45. Jill said she took the

threat seriously. RP (2/1/06) 45. Jill told the defendant that she needed gas so they stopped at the Tesoro gas station. RP (2/1/06) 43, 48. Jill went inside and told the clerk to call the police because the defendant was trying to kill himself. RP (2/1/06) 48. When Jill realized that the police were not coming, she returned to the store and told the clerk that the defendant was trying to kill her. RP (2/1/06) 48-49. The clerk got the manager, who put Jill in the back office and locked the door. RP (2/1/06) 51. Jill testified that her only concern at the time was that the defendant was going to blow up the pumps and kill himself because he was smoking at the gas pumps. RP (2/1/06) 51.

Jill admitted that there had been prior incidents of abuse by the defendant. On April 2, 2005, defendant slapped Jill on her face. RP (2/1/06) 129. On April 3, 2005, defendant threatened Jill with a knife, stabbed the bed mattress, and then kicked a hole in the living room wall. RP (2/1/06) 130. On April 20, 2005, defendant grabbed Jill by the back of the head and wouldn't let go. Jill believed the defendant was going to kill her. RP (2/1/06) 130. On April 28, 2005, defendant hit Jill with closed fists on her head. RP (2/1/06) 131.

D. ARGUMENT.

1. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S MOTION FOR A NEW TRIAL.

Generally, an appellate court reviews the trial court's decision on a motion for new trial for an abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). A court's exercise of discretion must be based upon tenable grounds and tenable reasons and must then fall within a range of acceptable choices given the facts and the law. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). The court's decision to grant a new trial in this case, however, was based on a purely legal determination.² The trial court granted a new trial on the basis that State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), barred the admission of the ER 404(b) evidence that the court had previously admitted. Because the court's order was based on an interpretation of law,

² When making its ruling, the court stated, "I am duty bound to follow the law." RP (3/24/06) 26. Additionally, the State proposed a supplemental conclusion, "That the decision was based on a matter of law", but the court rejected the conclusion as "cumulative" thereby suggesting that his ruling was, in fact, a purely legal decision. RP (4/14/06) 5-7.

this court should review the court's decision de novo.³ See Marvik v. Winkelman, 126 Wn. App. 655, 661, 109 P.3d 47 (2005)(citing Ayers v. Johnson and Johnson Baby Prods. Co., 117 Wn.2d 747, 768, 818 P.2d 1337 (1991))(deference ordinarily given to trial court's ruling on a new trial does not apply when court's decision is based on an issue of law).

- a. The trial court erred in granting a new trial on the basis that evidence of defendant's prior abuse against the victim was improperly admitted under *State v. Cook*.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), review denied, 106 Wn.2d 1003 (1986). But evidence of prior acts may be admitted for other limited purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The permitted purposes listed in ER 404(b) are not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

³ Even if this court disagrees with the State that a de novo review is appropriate, the trial court's order granting a new trial should be reversed under an abuse of discretion standard. A court's exercise of discretion must be based upon tenable grounds and tenable reasons and must then fall within a range of acceptable choices given the facts and the law. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). The court's misreading of Cook was so flagrant that it constituted an untenable reason for granting a new trial.

In State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), Division One of the Court of the Appeals held that evidence of the defendant's prior assaults on the victim was properly admissible under ER 404(b) because it was relevant in assessing the victim's credibility as a witness and in determining whether the assault in fact occurred.⁴ Grant, 83 Wn. App. at 100.

Approximately ten years after Grant was decided, this court issued its opinion in State v. Cook, 131 Wn. App. 845, 129 P.2d 834 (2006). The Cook court agreed with Grant that evidence of a defendant's prior abuse against the alleged victim may be admissible. Cook, 131 Wn. App. at 847. The court broke from Grant, however, by holding that a generalized instruction that informs the jury that it may consider the prior abuse to assess the victim's credibility but fails to eliminate the possibility that the jury will consider the evidence for improper propensity purposes is inadequate. Id.

In this case, the trial court misread Cook when it determined that Cook barred the admission of the defendant's prior abuse. Cook does not hold that evidence of this type is per se inadmissible. Rather, the Cook

⁴ Division Three follows Grant. See State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006).

court held that evidence of prior abuse is not admissible for purposes of assessing credibility, but *is* admissible to assess a victim's state of mind at the time of the recantation. The trial court, however, misread Cook and erroneously granted a new trial based on a mistaken belief that evidence of defendant's prior abuse was improperly admitted. RP (3/24/06) 26.

Under Cook, the trial court properly admitted evidence of defendant's prior abuse in this case. Thus, the issue in this case is not whether the evidence was improperly admitted, which it was not, but whether the jury was properly instructed regarding how it could consider the evidence.

- b. Any error in how the jury considered the 404(b) evidence was invited by the defendant because he proffered the limiting instruction. The trial court erred when it refused to apply the invited error doctrine in this case.

The doctrine of invited error bars a defendant from claiming on appeal that jury instructions were deficient when the defendant proposed the instructions. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000)(citing State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), modified by 43 P.2d 526 (2002). This is true even if the defendant simply proposes standard Washington Pattern Jury Instructions (WPIC) approved by the courts. Studd, 137 Wn.2d at 548-49; Summers, 107 Wn. App. at 381. In

fact, “even where constitutional rights are involved, [an appellate court is] precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.” State v. Winings, 126 Wn. App. 75, 107 P.3d 141, 149 (2005)(citing Bradley, 141 Wn.2d at 736); In re Det. of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998); see also, Studd, 137 Wn.2d at 547.

The invited error doctrine is strict in Washington.⁵ The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the “to convict” instruction. Id. (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)(failing to specify the intended crime in a conviction for attempted burglary); Summers, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001)(omitting the knowledge element of unlawful possession of a firearm). The doctrine has been applied even in cases where the error resulted from neither negligence nor bad faith. See e.g., Studd, 137 Wn.2d at 547.

⁵ The Supreme Court has rejected the opportunity to adopt a more flexible approach. See Henderson, 114 Wn.2d at 872 (the dissent there argued that “the doctrine should be applied prudently, with respect to the facts of each case,” but acknowledges that “this court’s history of applying the doctrine of invited error with little analysis or discussion implies that the doctrine is strictly applied regardless of circumstances.” (Utter J., dissenting)(citations omitted).

In Studd, a consolidated case, the six defendants all proposed instructions that were modeled after WPIC 16.02, which was a proper statement of the law at the time the instruction was offered. After trial, the Supreme Court in State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), ruled that a similar instruction erroneously stated the law of self-defense. Studd, 137 Wn.2d at 545. While concluding that the error was of constitutional magnitude, and therefore presumed prejudicial, the Supreme Court held that the defendants who had proposed the instruction had invited the error and could not therefore complain on appeal. Studd, 137 Wn.2d at 546-47.

In this case, the defense proffered the instruction that permitted the jury to consider evidence of prior abuse for purposes of assessing the victim's credibility. CP 6-47. Defendant, therefore, invited any error related to that instruction. The invited error doctrine should have prohibited the defendant from obtaining relief on his motion for new trial. The trial court erred when it refused to apply the invited error doctrine to this case. RP (3/24/06) 24.

The fact that the instruction was a proper statement of the law at the time it was offered by the defense does not prohibit the application of the invited error doctrine. In Studd, Justice Madsen expressed concern that the invited error doctrine was being applied to defendants who were

requesting jury instructions modeled on WPIC instructions that had met with the court's general approval, but the majority was satisfied that there was authority for such a result. The court stated:

Indeed, we have previously refused to address the retroactivity of a United States Supreme Court opinion where a legal presumption declared unconstitutional had been used, four years earlier, in a jury instruction requested by a criminal defendant. See In re Personal Restraint of Griffith, 102 Wn.2d 100, 101-02, 683 P.2d 194 (1984)(citing Sandstrom v. Montana, 442 U.S. 510, 512, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979)). We reached this conclusion despite the fact that "the unconstitutional instruction was standard in this state, In re Hagler, 97 Wn.2d 818, 819, 650 P.2d 1103 91982), and had been *expressly approved* by this court." Griffith, 102 Wn.2d at 104 (Utter, J., dissenting)(emphasis added)(citing State v. Mays, 65 Wn.2d 58, 66, 395 P.2d 758 (1964).

Studd, 137 Wn.2d at 548. Clearly, the court's decision not to apply the invited error doctrine because the instruction was a correct statement of then-existing law was erroneous. See RP (3/24/06) 24.

The trial court erred when it refused to apply the invited error doctrine to this case. By proffering the instruction that is at issue in this case, defendant invited any error related to the instruction. The trial court should have concluded that the defendant invited any error related to the instruction and then denied defendant's motion for a new trial. The court erred in granting a new trial.

2. THIS COURT SHOULD RECONSIDER ITS
OPINION IN STATE V. COOK, 131 Wn. App. 845,
129 P.3d 834 (2006).

Until recently, Washington courts have routinely admitted evidence of a defendant's prior abuse against a recanting victim for the purpose of assessing the victim's credibility at trial. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006).

In Grant, a victim of prior domestic violence was assaulted by her husband. Later she minimized the assault in response to a question from her husband's lawyer. Grant, 83 Wn. App. at 106-07. Division One ruled that evidence of prior crimes was admissible under ER 404(b) to explain the victim's seemingly inconsistent statements, especially when the victim's credibility was vital. Grant, 83 Wn. App. at 109.

The Grants' history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no contact order, and why she minimized the degree of violence The jury was entitled to evaluate her 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 107-08.

Divisions One and Three have repeatedly followed the Grant holding over the last ten years. Division Two, however, recently broke from the Grant holding and concluded that evidence of prior abuse was

inadmissible for purposes of assessing the victim's credibility. Cook, 131 Wn. App. at 851. The court reasoned that a jury's assessment of credibility would necessarily result in a propensity consideration, which is strictly prohibited under ER 404(b). Cook, 131 Wn. App. at 853. The court did not rely on any independent evidence that would support its claim, other than its own assumptions about how the jurors would analyze the evidence. See Cook, 131 Wn. App. at 853-54. But there is nothing to suggest that a jury would engage in an analysis like the court assumes, especially when the jury is also instructed that they are not to consider the evidence for *any other* purpose, as they were in this case. CP 97-132 (Inst. No. 4).

Moreover, jurors have been properly considering prior crime evidence for purposes of assessing a witness's credibility for years. ER 609⁶ authorizes the admission of a witness's prior crimes for purposes of attacking the witness's credibility. When evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a defendant, the

⁶ ER 609(a) provides:
For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

jury is instructed that the conviction is admissible only on the issue of the defendant's credibility and may not be considered for any other purpose, including the defendant's guilt. See WPIC 5.05⁷. Division One believes that an instruction modeled after WPIC 5.05 is sufficient to prevent the jury from engaging in a propensity analysis and ultimately misusing the prior crime evidence:

If we are to continue in our belief that a trial by a jury of 12 peers offers the fairest determination of guilt or innocence, then we must credit the jury with the intelligence and conscience to consider evidence of prior convictions only to impeach the credibility of the defendant if it is so instructed.

State v. Anderson, 31 Wn. App. 352, 641 P.2d 728 (1982).

The State cannot conceive of a situation where the potential for improper use of evidence is greater than in the ER 609 context. In fact, our Supreme Court has recognized the potential hazards of admitting a defendant's prior conviction into evidence:

[t]he jury may assume, first, that the person with a criminal record has a "bad" general character, and deserves to be sent to prison whether or not they in fact committed the crime in question[, and second,] the jury may perceive the

⁷ WPIC 5.05 provides:
Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

prior convictions as proof of the defendant's criminal propensities, making it more likely the defendant committed the crime charged.

State v. Newton, 109 Wn.2d 69, 73, 743 P.2d 254 (1987); see also, State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984)("[P]rior conviction evidence is inherently prejudicial" when the defendant is the witness because it tends to shift the jury focus "from the merits of the charge to the defendant's general propensity for criminality"). Even so, our courts have continuously held that an instruction which limits the jury's consideration of the defendant's prior crimes for purposes of assessing the defendant's credibility is sufficient to prevent the potential misuse. State v. Summers, 73 Wn.2d 244, 246-47, 437 P.2d 907 (1968)("Due to the potentially prejudicial nature of prior conviction evidence, these limiting instructions are of critical importance"); State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989)("We agree with the trial court that the purpose and effect of the limiting instruction is to minimize the damaging effect of properly admitted evidence or prior convictions of a witness by explaining to the jury the limited use of that evidence"); Anderson, supra.

Evidence of prior abuse between a defendant and a victim should be admissible for purposes of assessing the victim's credibility at trial. Division Two should trust that a jury will follow the court's instructions that they are to consider the evidence for purposes of assessing the victim's credibility and for no other purpose. If a limiting instruction

modeled after WPIC 5.05 is sufficient to prevent a jury from using evidence of defendant's prior *crimes* as propensity evidence (ER 609), then surely an instruction like the one given in this case is sufficient to prevent the misuse of prior *abuse* evidence. There is simply no persuasive evidence to suggest that a jury will necessarily engage in a propensity analysis if presented with evidence of defendant's prior abuse. This court should therefore reconsider its opinion in Cook that prior abuse evidence is inadmissible for purposes of assessing a victim's credibility.

E. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court reverse the trial court's grant of a new trial and reinstate defendant's conviction.

DATED: July 13, 2006.

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Pierce County
Prosecuting Attorney


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/26/09 [Signature]
Date Signature

[Handwritten mark]

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