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STATE OF WASHINGTON

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Nº. 34678-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant,

v.

CHRIS ANTHONY LINDHOLM,
Respondent.

RESPONSE BRIEF OF RESPONDENT

Appeal from the Superior Court of Pierce County,
Cause No. 05-1-03828-6
The Honorable John R. Hickman, Presiding Judge

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A. INTRODUCTION

Chris Anthony Lindholm hereby responds to Brief of Appellant, State of Washington.

B. COUNTER-STATEMENT OF THE CASE

Mr. Lindholm was convicted by a jury on February 7, 2006 of the crimes of Kidnapping in the First Degree, Assault in the Second Degree, and Felony Harassment, all with Firearm Enhancements as found by the jury. CP 169-174. The victim of these offenses was the defendant's wife, Jill Lindholm. CP 169-174. In addition, the defendant was convicted of the crimes of Assault in the Third Degree and Unlawful Use of Drug Paraphernalia. CP 169-174. The victim of the assault was a Puyallup police officer. CP 169-174.

On February 9, 2006, the defendant filed a motion for a new trial on the grounds that, during closing argument, the State argued to the jury that their duty was to return a verdict that reflected or represented the truth. CP 169-174. Defendant timely objected and moved for a mistrial on the grounds that the argument constituted prosecutorial misconduct by misstating the jury's role and duty to determine whether the State has proven the elements of the charged crimes beyond a reasonable doubt. This court denied the motion for a mistrial, and sentencing in the case was set for March 24, 2006. CP 169-174.

During trial, the trial court denied Mr. Lindholm's motion to exclude prior acts of domestic violence between Mr. Lindholm and his wife in the event that Ms. Lindholm either recanted on the witness stand or minimized Mr. Lindholm's conduct from previously statements she had previously given to the police. CP 169-174, RP 61-70, 122-128.

Ms. Lindholm did in fact partially recant and minimize during her testimony on direct examination. CP 169-174. The trial court, upon conducting the proper balancing test under ER 404(b), ruled that two prior alleged incidents, one occurring on April 28, 2005 in Lincoln City Oregon, and another occurring on April 2, 2005 in Washington would be admissible over Mr. Lindholm's 404(b) objection for the sole limited purpose of allowing the jury to assess the credibility of Ms. Lindholm concerning the inconsistencies of her testimony as compared to her previous statements to police. CP 169-174. The trial court agreed with the State that *State v. Grant*, 83 Wn.App. 98, 920 p.2D 609 (1996), authorized the admission of the prior acts for the sole limited purpose assessing Ms. Lindholm's credibility. CP 169-174.

In his proposed instructions to the jury, Mr. Lindholm included a limiting instruction reflecting the trial court's ruling on the use of prior domestic violence acts being committed for the sole purpose of allowing the jury to assess the credibility of Ms. Lindholm. CP 169-174. The trial

court included this instruction in its instructions to the jury as instruction

#4. CP 169-174. Instruction #4 read:

Evidence has been introduced in this case on the subject of alleged prior incidents between Chris and Jill Lindholm for the limited purpose of determining the credibility of Jill Lindholm. You must not consider this evidence for any other purpose.

CP 169-174.

On March 7, 2006, filed its opinion in the case of *State v. Cook*, 131 Wn.App. 845, 129 P.3d 834 (2006). CP 169-174. Based on *Cook*, Mr. Lindholm supplemented his previously filed motion for a new trial. CP 169-174.

On March 24, 2006, the trial court heard argument of both Mr. Lindholm and the State on Mr. Lindholm's motion for a new trial. CP 169-174. The trial court granted Mr. Lindholm's motion for new trial on grounds that, in light of *State v. Cook*, evidence relating to the two prior incidences of domestic violence were improperly admitted for the generalized purpose of assessing Ms. Lindholm's credibility and that jury instruction #4 was not an adequate limiting instruction. RP 25-26, 3-24-06.¹ CP 169-174.

¹ The hearing on the motion for new trial is numbered separately from the rest of the transcript. Reference to it will be made by giving the RP cite followed by the date of the hearing.

The State filed timely notice of appeal on April 14, 2006. RP 167-168.

On appeal, the State did not challenge any of the Findings of Fact entered by the trial court. Brief of Appellant, p. 1-23.

C. ARGUMENT

1. **The trial court correctly interpreted this Court's decision in *State v. Cook* and did not err in granting Mr. Lindholm's motion for a new trial**

In its Opening Brief, the State asserts that the trial court misinterpreted *Cook* to bar admission of evidence of Mr. Lindholm's alleged prior abuse of Ms. Lindholm for purposes of determining Ms. Lindholm's credibility since she had recanted her testimony. Opening Brief, p. 14-15. The State argues that,

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 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 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.

Opening Brief, p. 14-15 (emphasis added). The State's assertion is incorrect.

- a. Under *State v. Cook*, evidence of a defendant's prior domestic abuse of a recanting witness is admissible only to assess the witness' state of mind at the time of the recantation—not to assess the witness' general credibility

Prior to this court's decision in *State v. Cook*, 131 Wn.App. 845, 129 P.3d 834 (2006), where an alleged victim of domestic violence reported abuse but then recanted his or her testimony to deny or minimize the abuse in the instant case, the generally accepted law in Divisions I and III was that evidence of the defendant's prior assaults on the alleged victim was admissible to assess the alleged victim's general credibility as a witness. *State v. Grant*, 83 Wn.App. 98, 104-107, 920 P.2d 609 (1996).

In *State v. Cook*, 131 Wn.App. 845, 129 P.3d 834 (2006), this court held that,

We agree with [*State v. Grant*, 83 Wn.App. 98, 104-107, 920 P.2d 609 (1996)] that a defendant's prior acts of domestic abuse against the alleged victim may be admissible under ER 404(b). But for the reasons that follow, *we disagree with Grant that such evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility.*

When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and *potentially*

admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act.

Cook, 131 Wn.App. at 851, 129 P.3d 834 (emphasis added).

In its Opening Brief, the State concedes that under *Cook*, “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 recantation.” Opening Brief, p. 15. This is the proper interpretation of this court’s decision in *Cook*. As discussed below, and contrary to the State’s assertion, it is also the interpretation of *Cook* adopted by the trial court in granting Mr. Lindholm’s motion for a new trial.

b. The State mischaracterizes the trial court’s ruling.

The State argues that the trial court misinterpreted *Cook* to hold that the evidence relating to the prior alleged abuse of Ms. Lindholm was per se inadmissible. The State’s argument lacks support in the record.

The trial court took great care to explain why it was admitting the evidence of the prior alleged instance of abuse between the Lindholms;

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.

However, I do find that because this witness, Ms. Lindholm, is a key witness in this case, as it's 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 incidents that she listed in her sworn statement that was provided on 5-12-05.

And again, I believe that this is more probative than prejudicial as it relates not to whether this gentleman committed the offense, *but it relates to the credibility of a key witness* and her portrayal of this marriage and the issue of domestic violence that she has related both in her general testimony and in regarding to this incident itself, *and for those limited purposes I will allow cross-examination* similar to what you've done to date for impeachment purposes on her prior inconsistent statements.

RP 122-126 (emphasis added).

It is clear from the trial court's explanation of its ruling that the evidence of the alleged prior incidents of domestic abuse were being admitted for the sole purpose of determining the general credibility of Ms. Lindholm.

The trial court took equally great pains to explain its reasoning in granting Mr. Lindholm's motion for a new trial;

The real issue is whether a new trial should be granted in light of this decision from Division II, *State of Washington versus Kristoffer Cook*. Our instruction No. 5 [sic]² quotes, “Evidence has been introduced in this case on the subject of alleged prior incidents between Chris and Jill Lindholm for the limited purpose of determining the credibility of Jill Lindholm. You must not consider this evidence for any other purpose.”

The instruction that was given in *Cook* was, “Evidence has been introduced in this case on the subject of prior incidents of domestic violence between Ms. O’Brien and Mr. Cook for the limited purpose of assessing the credibility of” – and then it has in parentheses – “witness, Cindy O’Brien. You must not consider this evidence for any other purpose.

The purpose for the court allowing the prior DV incidents in the Lindholm case was because I believed in good faith it reflected on the credibility of Jill Lindholm, who was a key witness in this particular case.

The *Cook* case says, ... ‘We agree with *Grant* that a defendant’s prior acts of domestic abuse against the alleged victim may be admissible under ER 404(b), but for the reasons that follow, we disagree with *Grant* that such evidence should be considered by the jury for the generalized purpose of assessing the victim’s credibility’

Well, that’s exactly why this evidence was admitted, and that’s exactly why I gave the same limiting instruction in No. 5 [sic] that was given by Judge Buckner in Kristopher Cook.

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

² The court is actually referring to Jury Instruction No. 4.

instruction, seems to find that my Instruction No. 5 [sic] was not proper.

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 of Washington versus Kristopher Cook.

RP 24-26, 3-24-06.

It is patently obvious from the trial court's holding that the trial court understood that *Cook* did not bar evidence of prior domestic violence per se, but only barred it for purposes of determining general credibility. It is also patently obvious that the trial court granted Mr. Lindholm's motion for a new trial on the basis that the trial court had erroneously admitted the information relating to the alleged instance of prior abuse for the purpose of determining the general credibility of Ms. Lindholm. The State's assertion that the trial court had a "mistaken belief that evidence of [Mr. Lindholm's] prior abuse was improperly admitted" is clearly baseless.

The trial court's interpretation of the *Cook* decision is identical to the State's interpretation of *Cook* as set forth in the State's Opening Brief. The record clearly indicates that the trial court interpreted *Cook* correctly

and properly granted Mr. Lindholm's motion for a new trial on the basis that the evidence relating to the alleged prior assaults was improperly admitted for general credibility purposes rather than state-of-mind-at-the-time-of-recantation purposes. The State's argument fails.

2. The invited error doctrine does not apply to this case

The State bears the burden of proof on invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003).

Here, Mr. Hendrickson did not "set up an error." Mr. Hendrickson simply requested the court give the jury the then-proper limiting instruction under *Grant*. Prior to sentencing, Division II clarified the law. Accordingly, Mr. Hendrickson moved the trial court for a new trial based on the clarification of the law.

Even if this court concludes an error occurred, the invited error doctrine does not apply because Mr. Hendrickson is not "complaining" about the "error" on appeal. Mr. Hendrickson "complained" about the "error" at trial in the form of a motion for new trial. Mr. Hendrickson cannot be said to be "complaining" about the "error" on appeal since the State is the appellant, not Mr. Hendrickson.

3. **This court should not reconsider its opinion in *State v. Cook***

- a. The time for a motion to reconsider the decision in *Cook* has passed.

RAP 12.4 provides in pertinent part,

(a) **Generally.** A party may file a motion for reconsideration only of a decision by the judges (1) terminating review, or (2) granting or denying a personal restraint petition on the merits.

(b) **Time.** *The party must file the motion for reconsideration within 20 days after the decision the party wants reconsidered is filed in the appellate court.*

(Emphasis added)

No motion for reconsideration of Petition for Review was filed by the State in the *Cook* case. Further, the decision in *Cook* was filed in the Court of Appeals on March 7, 2006. Notice of Appeal was filed by the State on April 14, 2006. Even if this court were to consider the filing of the notice of appeal in this case as a motion for reconsider of the *Cook* decision, the notice was filed long after the 20 day time limit for such a motion mandated by RAP 12.4. If the State wished to seek modification of the *Cook* decision, it should have done so when it had the opportunity.

- b. The state fails to cite any authority which would support its request for this court to reconsider the *Cook* decision

The State presents two arguments in support of its request that this court reconsider its decision in *Cook*: (1) Divisions I and III have followed *Grant* for over ten years (Opening Brief, p. 19), and (2) under ER 609 prior crimes of a witness are admissible to impeach that witness provided the crimes carried more than a year incarceration time; were crimes involving dishonesty; and the court instructs the jury to consider the prior convictions only on the issue of the defendant's credibility and may not be considered for any other purpose, including the defendant's guilt.

Opening Brief, p. 19-21. Both of these arguments fail.

- (i). *Division II is not bound by the practices or decisions of other divisions of the Appellate Court.*

The decisions and practices of Divisions I and III are not binding authority on this court. *Eriksen v. Mobay Corp.*, 110 Wn.App. 332, 41 P.3d 488 (2002). This court was aware of the adherence to *Grant* Divisions I and III at the time it decided in *Cook*, but declined to adopt the reasoning of the *Grant*.

- (ii). *The ER 609 exception for allowing evidence of a witness's prior convictions for crimes of dishonesty is not comparable to the 404(b) exception allowing evidence of prior instances of domestic abuse in a prosecution for domestic violence where the complaining witness recants.*

The State equates the limiting instruction given when prior convictions for crimes of dishonesty of a witness are admitted under ER 609 to the *Grant* ER 404(b) limiting instruction.

The State argues that,

jurors have been properly considering prior crime evidence for purposes of assessing a witness's credibility for years. ER 609 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 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 5.05. 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).

[...] [O]ur 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 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 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.

Opening Brief, p. 20-23.

While superficially this argument appears somewhat meritorious, under closer scrutiny it breaks down.

To support its assertion that jury instructions patterned after WPIC 5.05 are sufficient to protect a defendant from impermissible propensity inferences made by a jury, the State asserts that Division One believes such an instruction is sufficient, and then cites *Anderson*.

The quoted *Anderson* language, is a re-wording of the oft-repeated maxim that a jury is presumed to follow the instructions given by the court. *See State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The remaining cases cited by the State explain what an impermissible propensity inference is (*Newton*), explain why evidence of prior convictions is inherently prejudicial (*Jones*), and highlight that Washington Courts have held that it is important and necessary to instruct

the jury to only consider the evidence of prior convictions for certain purposes (*Summers, Brown, Anderson*).

Arguments that are not supported by citation to legal authority will not be considered on appeal. RAP 10.3(a)(5); *see also State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). This court should disregard the State's argument that a general limiting instruction is sufficient under ER 404(b) because courts have held it is sufficient under ER 609 because this argument is not supported by any cited authority.

Not only does the State fail to cite authority for its argument, but the argument does not address this Court's concerns in *Cook*. The *Cook* court was not concerned with whether or not the jury would follow the instructions given by the court, but with whether or not the instructions given by the court were adequate to prevent improper propensity inferences by the jury. The authority cited by the State simply does not address the issue raised by this court in *Cook* that "a general admonition to consider the prior abuse in determining the alleged victim's credibility is insufficient to ensure that the evidence is not improperly used to prove the defendant's propensity to commit the crime charged." *Cook*, 131 Wn.App. at 854, 129 P.3d 834.

The State's argument is both unsupported by authority and irrelevant. However, should this court find that the State has cited

authority to support its position and the State's argument is relevant, the State's argument is still incorrect because the ER 609 prior conviction exception is not analogous to the ER 404(b) prior abuse exception.

In *Cook*, this court ruled that the 404(b) exception for prior incidences of abuse required a limiting instruction which was more forceful than the general limiting instruction given in ER 609 cases and which had been given in ER 404(b) cases previously. *Cook*, 131 Wn.App. at 837-838, 129 P.3d 834. The State argues that the *Cook* opinion should be reconsidered since other courts have ruled that the general limiting instruction is sufficient in ER 609 situations.

In order for an ER 609 admission of prior crimes to be analogous to the *Grant* 404(b) exception, the witness against whom the prior crimes are being admitted would have to be the defendant and the prior crimes would have to be crimes identical or nearly identical to those for which the defendant was currently being charged. ER 609 does not apply to the introduction of evidence regarding prior assaults between spouses since assault is not a crime involving dishonesty. *State v. Rhoads*, 101 Wn.2d 529, 681 P.2d 841 (1984).

A less restrictive instruction is warranted in an ER 609 situation since the defendant retains the ultimate control over whether or not evidence of his prior convictions will be presented to the jury. If the

defendant doesn't testify, then his prior convictions are not admissible under ER 609. By not testifying, a defendant may protect himself completely from any improper propensity inferences by the jury. Further, should the defendant choose to take the stand, the prior crimes will not necessarily be identical to the crimes the defendant is charged with committing since only crimes of dishonesty are admissible under ER 609.

Under the ER 404(b) exception, the defendant has no control over whether or not evidence relating to prior abuse is admitted. For the ER 404(b) exception to be admissible, the defendant will always be facing a charge of domestic violence and the evidence sought to be introduced will always be of crimes similar to or identical with the charges the defendant is facing. This lack of control over the introduction of evidence as well as the heightened prejudice from evidence of prior identical acts warrants the more stringent and restrictive jury instruction mandated by this court in *Cook*.

While the ER 609 exception and the ER 404(b) exception are superficially similar in that each exception allows the introduction of prior bad acts of someone involved with the case, the underlying logic and facts supporting each exception renders the application of each exception sufficiently distinct from the other to discredit any further analogy between them. The fact that courts have held that general limiting

instructions are sufficient for the ER 609 exception does not mean that a general limiting instruction sufficiently protects a defendant from impermissible propensity inferences by the jury in an ER 404(b) situation.

The *Cook* decision is an acknowledgment that, as the United States Supreme Court has written and the Washington Supreme Court has concurred, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction” (*State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), citing *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949)), and that if such prejudicial information is to be admitted, it must be admitted in very limited situations and the jury must be properly instructed as to the very limited scope of the relevance of the evidence.

c. This Court’s decision in *Cook* was correct and should be affirmed

In *Cook*, this court disagreed with *Grant* that evidence of prior instances of domestic violence are admissible to determine the general credibility of a victim of domestic violence where the victim recants her testimony. *Cook*, 131 Wn.App. 845, 851-853, 129 P.3d 834. In ruling that such evidence was admissible to determine the general credibility of the complaining witness, the *Grant* court relied on the Division II decision

in *State v. Wilson*, 60 Wn.App. 887, 808 P.2d 754 (1991), *review denied*, 117 Wn.2d 1010, 816 P.2d 754 (1991),

Citing *State v. Wilson*, 60 Wn.App. 887, 808 P.2d 754 (1991), *review denied*, 117 Wn.2d 1010, 816 P.2d 754 (1991), the State contends that evidence of Grant's prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess Ms. Grant's credibility as a witness and accordingly to prove that the charged assault actually occurred. We agree.

Grant, 83 Wn.App. at 105-107, 920 P.2d 609.

In *Wilson*, evidence of prior physical assaults by Wilson against the victim was introduced at trial. *Wilson*, 60 Wn.App. at 888-889, 808 P.2d 754. On appeal, Wilson argued that the evidence was inadmissible under ER 404(b). *Wilson*, 60 Wn.App. at 891, 808 P.2d 754. The trial court ruled that the evidence was admissible to explain why the victim submitted to the sexual abuse and failed to report or escape it, to rebut the implication that the molestation did not occur, and to show Wilson's intent to dominate the victim and create an environment in which he could sexually abuse her. *Wilson*, 60 Wn.App. at 890, 808 P.2d 754. This court upheld the trial court's determination that the evidence was admissible because, "evidence of the assaults was offered to show something other than that Wilson had a violent character or to show that he acted in conformity with that character." *Wilson*, 60 Wn.App. at 891, 808 P.2d 754.

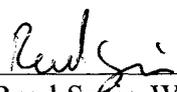
The *Grant* court adopted the State's argument and improperly expanded the *Wilson* decision to a situation different from that before the court in *Wilson*. The evidence was admitted in *Wilson* in order to explain the victim's state of mind in submitting to the sexual abuse and failing to report or escape it, *not* to determine the victim's general credibility. The *Cook* decision properly clarified the *Wilson* decision and properly disagreed with *Grant*'s extension of *Wilson* to allow evidence of prior abuse between a defendant and an alleged victim for purposes of determining the general credibility of the alleged victim. *Cook* was a reaffirmation of the rule established in *Wilson* that proof of prior abuse is admissible to illuminate the victim's mindset.

D. CONCLUSION

For the reasons stated above, this court should affirm the carefully considered ruling of the trial court and decline to reconsider its decision in *Cook*.

DATED this 8th day of September, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

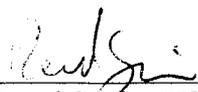
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 8th day of September, 2006, I delivered a true and correct copy of the Brief of Respondent to which this certificate is attached by United States Mail, to the following:

Mr. Chris Lindholm, BKG# 2005216081
PCC
910 Pacific Ave. South
Tacoma, WA 98402

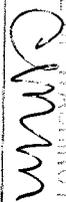
And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 8th day of September, 2006.



Reed Speir, WSBA No. 36270

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