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NO. 35235-4-II  
Cowlitz Co. Cause NO. 06-1-00493-8

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

STATE OF WASHINGTON,

Respondent,

v.

**MICHAEL MACKEY,**

Appellant.

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**BRIEF OF RESPONDENT**

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## I. ISSUES

1. ARE JURY INSTRUCTIONS, WHEN READ AS A WHOLE, SUFFICIENT WHEN THEY CORRECTLY STATE THE LAW, ARE NOT MISLEADING, AND ALLOW THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE?
2. SHOULD JUDGES EXCLUDE WITNESSES WHO ARE OFFERED TO PROVIDE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS TO PROVE THE CHARACTER OF A PERSON IN ORDER TO SHOW ACTION IN CONFORMITY THEREWITH?
3. MUST AN APPELLANT PROVE BOTH IMPROPER CONDUCT ON THE PART OF THE STATE AND ITS PREJUDICIAL EFFECT TO ESTABLISH PROSECUTORIAL MISCONDUCT?

## II. SHORT ANSWERS

1. Yes. Jury instructions, when read as a whole, are sufficient when they correctly state the law, are not misleading, and allow the parties to argue their theories of the case.
2. Yes. Judges should exclude witnesses who are offered to provide evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.
3. Yes. An appellant must prove both improper conduct on the part of the State and its prejudicial effect to establish prosecutorial misconduct.

## III. FACTS

Rick Huckaby owns a sign business, Advantage Screen Printing, located in a shop at the back of his house in Kelso, Washington. Transcript Volume I, p. 29-30, 64, and 110. The shop has one window, is about twenty four feet by thirty two feet in size, has no walls or dividers

inside the shop, and has two phone lines connected to the shop and house. Transcript Volume I, p. 44, 75, and 80-81. In March and April 2006, Mr. Huckaby employed William Cloninger and Randy Maxwell at the shop. Transcript Volume I, p. 30 and 177.

Early March 2006, the Appellant and his girlfriend, Sara Breeden, went to Advantage Screen Printing to place an order for a large sign. Transcript Volume I, p. 117. The Appellant was real angry with Ms. Breeden for being late. Transcript Volume I, p. 113-114. Mr. Maxwell took the order, spoke to the Appellant, and observed the Appellant express his anger towards Ms. Breeden. Transcript Volume I, p. 112-114 and 116-117. No money was exchanged and there was no discussion about the cost for making the sign. Transcript Volume I, p.33-34 and 154-155.

A couple of weeks after placing the order, the Appellant returned to the shop to check on the status of the sign. Mr. Maxwell and Mr. Cloninger were present at the shop. Transcript Volume I, p. 119-120 and 177-178. The Appellant became pretty angry because the shop had not worked on the sign and threatened to kick the employee's butt if the shop did not finish his sign. Transcript Volume I, p. 119-121 and 177-178. Mr. Maxwell told Mr. Huckaby of the incident and Mr. Huckaby decided not to do the sign for the Appellant. Transcript Volume I, p. 35-37 and 124.

On April 18, 2006, Ms. Breeden went to the shop to check on the Appellant's sign. Mr. Huckaby, Mr. Maxwell, and Mr. Cloninger were present in the shop. Transcript Volume I, p. 40, 124, and 179. Mr. Huckaby advised Ms. Breeden that the shop will not do the Appellant's sign due to the threats the Appellant made towards his employees and returned the Appellant's paperwork to Ms. Breeden. Transcript Volume I, p. 38. The interaction between Mr. Huckaby and Ms. Breeden was cordial and Ms. Breeden left without incident. Transcript Volume I, p. 39 and 128-129.

Fifteen to thirty minutes after Ms. Breeden left, Mr. Huckaby received the first of many telephone calls from the Appellant on his business phone line at the shop. Transcript Volume I, p. 39-40, 50-51, 133-134, and 179. The Appellant identified himself as Mike from Performance Sign and was screaming so loudly that Mr. Huckaby had a hard time figuring out what the Appellant said. Transcript Volume I, p. 39-41 and 135. The Appellant demanded that Mr. Huckaby do his sign and said that he was going to keep calling and harassing the shop until Mr. Huckaby did his sign. Transcript Volume I, p. 41 and 47. Mr. Huckaby told the Appellant that he was not going to do the sign and hung up on the phone. Transcript Volume I, p. 41-42. Mr. Huckaby did not put the first call on speakerphone and did not have any concern from his first

conversation with the Appellant as the Appellant just vented and made no threats. Transcript Volume I, p. 42, 45, and 134. Mr. Maxwell heard a real angry voice yelling loudly out of the receiver, but could not make out the caller or what the caller was saying on this first call. Transcript Volume I, p. 45 and 134-135.

Immediately after Mr. Huckaby had hung up the first call, Mr. Huckaby received a second call from the Appellant on the business phone line at the shop. Transcript Volume I, p. 46, 50-51, and 135. Right from the very start of the phone call, the Appellant was yelling loudly, cursing, and threatening to beat Mr. Huckaby if he did not do the Appellant's sign. The Appellant reiterated that he would continue calling and harassing the shop until his sign was done. Transcript Volume I, p. 46-47 and 52. Mr. Huckaby again did not have any concern from the Appellant's second call and hung up the phone. Transcript Volume I, p. 48-49.

Immediately after hanging up a second time, Mr. Huckaby received third call from the Appellant on the business phone line at the shop and the process repeated itself again for countless times. With each subsequent call, Mr. Huckaby tried unsuccessfully to calm the Appellant down, told the Appellant to stop calling, told the Appellant that he was going to call the Sheriff if the Appellant continued calling the shop, hung up the phone, and became increasing concerned for his safety. With each

subsequent call, the Appellant angrily screamed at Mr. Huckaby and became increasingly more aggressive, more threatening, and more personal. Transcript Volume I, p. 47, 49-53, 55-56, 135-137, 160, 182-183, and 185.

On the fifth, sixth, or seventh call from the Appellant to the shop's business phone line, Mr. Huckaby placed the call over the speakerphone. Transcript Volume I, p. 49. Mr. Maxwell and Mr. Cloninger were present and recognized the Appellant's voice from their prior contacts with the Appellant. Transcript Volume I, p. 54, 139-140, 165, and 180. The minute Mr. Huckaby answered the phone, the Appellant was screaming loudly, cursing, and making threats towards Mr. Huckaby. Transcript Volume I, p. 52, 138-139, 181, and 183. The Appellant sounded very angry as he threatened to beat, shoot, and kill Mr. Huckaby. Transcript Volume I, p. 52, 54-56, 139, 144, 180-183. Mr. Huckaby, Mr. Maxwell, and Mr. Cloninger all took the Appellant's threats seriously. Transcript Volume I, p. 55, 160, and 185. After the ninth or tenth call from the Appellant, Mr. Huckaby called the police. Transcript Volume I, p. 56.

Prior to an officer making contact with Mr. Huckaby, William Barker, a customer and an acquaintance of Mr. Huckaby, stopped at the shop to check on the status of a sign that the shop was making for him. Mr. Barker contacted Mr. Huckaby in his office inside Mr. Huckaby's

house. Transcript Volume I, p. 57, 61-62, 97-98, and 131. A minute into meeting Mr. Barker, Mr. Huckaby answered an incoming call from the Appellant. The Appellant was screaming, cursing, and telling Mr. Huckaby at least twice that he was “dead, you mother fucker.” Transcript Volume I, p. 57, 61-62, 99-101, and 144. Mr. Huckaby tried unsuccessfully to calm the Appellant down and hung up the phone. Transcript Volume I, p. 99 and 101. The call lasted no more than sixteen seconds. Transcript Volume I, p. 106. Shortly after, the Appellant called and was again screaming at Mr. Huckaby. Transcript Volume I, p. 103, 109, and 144.

Deputy Tory Shelton, of the Cowlitz County Sheriff’s Office, responded to Mr. Huckaby’s 911 call. Transcript Volume II, p. 195 and 197-198. After talking to Mr. Huckaby, Mr. Maxwell, and Mr. Cloninger, Deputy Shelton contacted the Appellant at his place of business, arrested the Appellant, and read the Appellant his rights. Transcript Volume II, p. 199-200 and 202. The Appellant admitted to calling Mr. Huckaby in the morning to “bitch them out” and initially denied making any threats towards Mr. Huckaby. Transcript Volume II, p. 202-203. Deputy Shelton confronted the Appellant with the threats made towards Mr. Huckaby and the Appellant stated, “Well, in that case, he threatened to kill me, too.” Transcript Volume II, p. 204.

Ms. Breeden testified that the Appellant was upset at her for being late, but did not exhibit any signs of anger when he first met Mr. Maxwell to make the sign. Transcript Volume III, p. 21-23 and 37-38. On April 18, 2006, Ms. Breeden notified the Appellant of Mr. Huckaby's decision not to do the sign and witnessed the Appellant making three quick phone calls to Mr. Huckaby. The conversation between Mr. Huckaby and the Appellant got heated with both sides raising their voice, yelling, and cursing, but at no time did the Appellant make any threats. Transcript Volume III, p. 27-33 and 43. After the third phone call made by the Appellant to Mr. Huckaby, Ms. Breeden left to go to work. Transcript Volume III, p. 33 and 43. At no time did Ms. Breeden testify to hearing Mr. Huckaby make any threats towards the Appellant. Transcript Volume III, p.21-46.

Justin Pellham, a part-time employee of the Appellant and Ms. Breeden's son, testified that he was twenty feet away from the Appellant when the Appellant initially called Mr. Huckaby and heard both the Appellant and Mr. Huckaby get upset, but never heard the Appellant make any threats. Transcript Volume III, p. 47-50 and 52. After the first several calls, Mr. Pellham left the Appellant's shop. Transcript Volume III, p. 50-52. At no time did Mr. Pellham testify to hearing Mr. Huckaby make any threats towards the Appellant. Transcript Volume III, p. 47-57.

The Appellant testified that on April 18, 2006, he made eight phone calls to Mr. Huckaby and that some conversations between Mr. Huckaby and himself got heated with both sides raising their voices, but at no time did he make any threats towards Mr. Huckaby. Transcript Volume III, p.63-68 and 77-78. The Appellant wanted the sign to advertise his shop and originally anticipated the sign being completed within five days by Don Haines. But when Mr. Haines did no work on the sign for six months, the Appellant took the sign to Mr. Huckaby. The Appellant indicated he was not upset with the eight months delay in getting his sign and was not upset with either Mr. Haines or Mr. Huckaby for causing the delay. Transcript Volume III, p. 70-71 and 72-76. The Appellant indicated he did not originally call with the intent to “bitch them out,” but by the sixth call, he had called to “bitch them out.” Transcript Volume III, p. 78. The Appellant admitted to telling Deputy Shelton that “well, in that case, Rick had threatened to kill me, too.” Transcript Volume III, p.79. At no time did the Appellant testify to hearing Mr. Huckaby make any threats towards him. Transcript Volume III, p. 57-81.

The Appellant sought to have Mr. Haines testify on his behalf. Mr. Haines originally agreed to do the sign for the Appellant, but could not work on the sign for six months; thus, the Appellant took the sign to Mr. Huckaby. The Appellant sought to have Mr. Haines testify about how his

parting of ways with the Appellant was amicable and void of any tension or agitation. Transcript Volume III, p. 4-5, 7-8, and 112. The Appellant felt Mr. Haines was relevant because “our theory of the case is that Mr. Mackey didn’t fly off the handle; he didn’t raise his voice and cuss until the other side raised their voice and cussed; and it was, frankly, because Mr. Mackey couldn’t pick up his sign blank. It is therefore probative and supportive of our theory of the case that just the immediate predecessor in time to Mr. Huckaby, by maybe days, if that, was Mr. Haines, who reported that everything was hunky-dorey, calm and nice, because that testimony defeats, or at least supports, the defense theory that, apparently, the State’s witnesses are making this up, for whatever reason.” Transcript Volume III, p. 5-6.

The court held Mr. Haines’ testimony was irrelevant and excluded his testimony. The court noted that “I don’t think that the defendant is allowed to introduce, essentially, a prior good act that says, on a different occasion, I acted in conformity with my position at trial now, and the fact that I acted in conformity with my position at the trial now is relevant. If it were a prior bad act, it would clearly not be relevant. I think the argument that was made in chambers by Mr. Nguyen, that if he’d shopped at Safeway before and paid for his groceries, and he were charged with shoplifting this time, it would not be admissible to show that on prior

occasions he paid for his groceries. So, that's the reason for the ruling.”

Transcript Volume III, p. 9.

The Appellant also sought to have jury instructions saying that the Appellant had to form the intent to harass, intimidate, or torment prior to or at the time of making the phone calls to Mr. Huckaby. In particular, the Appellant proposed three jury instructions, which state:

Instruction # 1: To convict the defendant of the crime of Telephone Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 4-18-06, the defendant made a telephone call to Rick Huckaby,
- (2) That the defendant threatened to kill Rick Huckaby,
- (3) That the defendant acted with intent to harass or intimidate Rick Huckaby at the time the call was initiated; and etc...

Instruction # 2: The State must prove beyond a reasonable doubt that the Defendant formed the intent to harass, intimidate, torment, embarrass, or threaten to kill before or at the time the call was initiated.

Instruction # 3: You are instructed that harassment is not speech although it may take the form of speech. The Statute prohibits only telephone calls made with intent to harass. Phone calls made with intent to communicate are not prohibited.

At the time of the trial, the decision of the Court of Appeals, Division 2, in State v Lilyblad was still pending. The court did not give the Appellant's proposed jury instructions number one and two, but did give the Appellant's proposed jury instruction number three, which was

numbered seven for trial purposes. Transcript Volume III, p. 81-94 and Defendant's Proposed Instructions To The Jury.

In closing, the State argued that the first couple of calls by the Appellant to Mr. Huckaby did not amount to telephone harassment because Mr. Mackey was an unhappy customer who was simply venting, Transcript Volume III, p. 94-100, but with subsequent calls, there was an escalation in the severity of threats from the Appellant and the Appellant ceased to be an unhappy venting customer and committed the crime of telephone harassment. The State's theory was that either the call placed over the speakerphone as witnessed by Mr. Maxwell and Mr. Cloninger or the call as witnessed by Mr. Barker inside the house constituted felony telephone harassment because the Appellant called Mr. Huckaby for the sole purpose of harassing, tormenting, or intimidating Mr. Huckaby as evident by his screams, curses, threats to kill Mr. Huckaby, and admission of calling Mr. Huckaby to "bitch them out." Transcript Volume III, p. 100-107 and 136-137.

In closing, the defense focused on jury instruction number seven, the Appellant's proposed instruction number three, and argued that the Appellant called not to harass, torment, or intimidate Mr. Huckaby, but to retrieve the sign. Transcript Volume III, p. 119-124. The defense also questioned why the State did not subpoena Mr. Haines. In particular,

defense stated, "We know that this sign project languished for some six months with another guy. And we know, and it's unrebutted -- they could've subpoenaed him, they know who he was -- that at the end of that time, Mr. Mackey pulled the plug on the project and went somewhere else, and there was no hard feelings, there was no raised voices, there was no angry language." Transcript Volume III, p. 112.

In response to subject of not subpoenaing Mr. Haines, the State sought to explain the reason was because he was not a relevant witness. The State wanted to point out the fact that what the attorney says is not evidence and only testimony from the stand is to be considered; thus, the fact that some did not testify is not to be considered as evidence. But before the State finished it's rebuttal on this point, defense counsel objected. In particular, State commented that "One other thing you have to remember, ladies and gentlemen, what comes out of this man's voice is not evidence. The only thing that's evidence is what comes out on the stand. He talked about, well, why didn't you subpoena the guy who did the job before? Who brought that up, ladies and gentlemen? It was Mr. Crandall. He brought that up in his opening, yet he didn't call the witness. And he wants the State to call a witness, when it's the defense that -- (Mr. Crandall objects and there is a side bar). Transcript Volume III, p. 127-130.

The court held that Mr. Haines did not have relevant testimony and gave a curative instruction to the jury that “There have been arguments made, and inference raised, about the ability of a potential witness to testify in this matter, that is the person to whom the sign job was originally given. This matter was discussed outside your presence, and as a matter of law I ruled that those conversations were not relevant to this issue. So, going back to my instructions, you’re to disregard any remark that’s made by any lawyer that’s not supported by the evidence that’s been admitted in this case.” Transcript Volume III, p. 130-131. The jury found the Appellant guilty of felony telephone harassment and the Appellant timely appealed his conviction.

#### IV. ARGUMENTS

1. **THE TRIAL COURT’S JURY INSTRUCTIONS, WHEN READ AS A WHOLE, WERE SUFFICIENT BECAUSE THEY CORRECTLY STATED THE LAW, WERE NOT MISLEADING, AND ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE.**

“Generally, [the court] [reviews] a trial court’s choice of jury instructions for abuse of discretion. State v. Douglas, 128 Wash.App. 555, 561-62, 116 P.3d 1012 (2005). But we review de novo jury instructions challenged on an issue of law. State v. Lucky, 128 Wash.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds, State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997).

It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000). Jury instructions are sufficient if they (1) correctly state the law, (2) are not misleading, and (3) permit counsel to argue his or her theory of the case. State v. Mark, 94 Wash.2d 520, 526, 618 P.2d 73 (1980). The jury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror. State v. Walden, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).” State v. David, 134 Wash.App. 470, 483 (2006), State v. Soper, 135 Wash.App. 89, 101-102 (2006), State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995).

In State v. Lilyblad, 134 Wash.App. 462 (2006), the defendant called her two sons at their paternal grandmother’s house and engaged in a normal conversation with her two sons. Shortly after talking to her sons, the defendant spoke to the paternal grandmother. At some point in their conversation, an argument broke out and the defendant threatened to kill the grandmother. *Id.* at 465. The defendant was charged with felony telephone harassment and at trial, the trial court instructed the jury, ‘Make a telephone call’ refers to the entire call rather than the initiation of the call. A jury found the defendant guilty of felony telephone harassment. *Id.* at 464-465. This court held that to convict a defendant of telephone harassment, the State must prove that the defendant had intent to harass,

intimidate, torment, or embarrass when the defendant initiates the telephone call. *Id.* at 469. Therefore, this court reversed and remanded the case for a new trial because the ‘Make a telephone call’ instruction was defective and contrary to the requirement the State prove the intent to harass, intimidate, torment, or embarrass when a defendant initiates the telephone call. *Id.* at 465-469.

Unlike Lilyblad, there are three major distinguishing factors, which make the jury instructions in the present case sufficient. In the present case, the trial court did not give a similar ‘Make a telephone call’ instruction to negate the State’s burden of proving the Appellant formed the intent to harass, intimidate, torment, or embarrass when he initiated the telephone calls to Mr. Huckaby. Moreover, the jury instructions in the present case, when taken as a whole, are sufficient because they (1) correctly state the law, (2) are not misleading, and (3) permit counsel to argue his or her theory of the case. Pirtle, 127 Wash.2d at 656 and Walden, 131 Wash.2d at 473.

The Appellant focuses on the exclusion of two of his proposed jury instructions as the basis, which rendered the jury instructions defective. The Appellant argues the instructions did not require the State to prove that the Appellant formed the intent to harass, intimidate, or torment when he initiated the phone calls to Mr. Huckaby. The Appellant does not argue

deficiency on any other basis so arguments are limited to the alleged defect stated above. The Appellant's argument is misplaced because jury instruction number seven, which was the Appellant's proposed jury instruction number three, meets the requirements set out in Lilyblad and permits the Appellant to argue his theory of the case.

Jury instruction number seven states, "You are instructed that harassment is not speech although it may take the form of speech. The statute prohibits only telephone calls made with intent to harass. Phone calls made with intent to communicate are not prohibited." Taken in conjunction with the other jury instructions and taken as a whole, Pirtle, 127 Wash.2d at 656 and Walden, 131 Wash.2d at 473, the only way the Appellant could be convicted of felony telephone harassment is if the State proves beyond a reasonable doubt that he formed the intent to harass, intimidate, or torment when he initiated the telephone calls to Mr. Huckaby.

In its closing, the State argued that either the call placed over the speakerphone as witnessed by Mr. Maxwell and Mr. Cloninger or the call as witnessed by Mr. Barker inside the house constituted felony telephone harassment because the Appellant called Mr. Huckaby for the sole purpose of harassing, tormenting, or intimidating Mr. Huckaby as evident by his screams, curses, threats to kill Mr. Huckaby, and admission of calling Mr.

Huckaby to “bitch them out.” Focusing on jury instruction number seven, the defense argued that the Appellant was not guilty of felony telephone harassment because his intent when he initiated the calls to Mr. Huckaby was not to harass, torment, or intimidate, but to retrieve the sign. The jury found the Appellant guilty of felony telephone harassment because there was sufficient evidence to support his conviction.

The Appellant admitted to calling Mr. Huckaby to “bitch them out,” told Mr. Huckaby that he would continue to call and harass, screamed and cursed at Mr. Huckaby as soon as Mr. Huckaby answered the Appellant’s calls, and threatened to kill Mr. Huckaby. It is clear from the evidence and the Appellant’s admission that he formed the intent to harass, intimidate, or torment Mr. Huckaby prior to him calling Mr. Huckaby. This is distinguishable from Lilyblad where the defendant engaged in normal conversation with the victim and during the course of that conversation an argument broke out with the defendant making a threat against the victim. The facts in the present case are those, the statute was intended to punish. The Appellant was not denied his constitutional rights because the jury instructions correctly stated the law to allow both sides to argue their theories of the case and the evidence overwhelmingly supported his conviction.

2. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING A WITNESS WHO WAS OFFERED TO PROVIDE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS TO PROVE THE CHARACTER OF A PERSON IN ORDER TO SHOW ACTION IN CONFORMITY THEREWITH.**

“[The court] [reviews] the trial court’s admission or exclusion of evidence for abuse of discretion. State v. Pirtle, 127 Wash.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Perrett, 86 Wash.App. 312, 319, 936 P.2d 426, review denied, 133 Wash.2d 1019, 948 P.2d 387 (1997). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wash.App. 186, 190, 647 P.2d 39 (1982), rev’d on other grounds, 99 Wash.2d 538, 663 P.2d 476 (1983). And we may affirm on any ground the record adequately supports even if the trial court did not consider that ground. State v. Costich, 152 Wash.2d 463, 477, 98 P.3d 795 (2004).” State v. Nam, 136 Wash.App. 698, 150 P.3d 617, 622 (2007). The trial court has broad discretion in determining the relevance and, therefore, the admissibility, of evidence. State v. Swan, 114 Wash.2d 613, 658, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

Pursuant to ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. One of the Appellant's theories at trial was that the State's witnesses were making false allegations against the Appellant. To demonstrate this, the Appellant sought to introduce evidence of a prior good act with Mr. Haines to show that the Appellant was nice and everything was hunky-dorey, thus, the evidence supported the Appellant's claim that States witnesses were lying because the Appellant's action on April 18, 2006, was in conformity with his previous conduct with Mr. Haines. This is clearly not admissible under ER 404(b).

On appeal, the Appellant now claims Mr. Haines is required to rebut the State's argument that the Appellant, out of rage and frustration, retrieved the sign from Mr. Haines and brought it to Mr. Huckaby is inaccurate and misleading. At no time did the State argue the position articulated by the Appellant because the evidence from Mr. Maxwell and Ms. Breeden clearly showed that the Appellant was upset at Ms. Breeden for being late to the initial meeting with Mr. Maxwell. At no time did the State argue or imply that the Appellant was so upset from Mr. Haines' inability to do the sign that it manifested itself into the acts observed by Mr. Maxwell in the early days of March 2006. The Appellant testified that he was not upset with Mr. Haines. In addition, defense counsel's

offer of proof, in his attempt to call Mr. Haines as a witness, indicated that the exchange between Mr. Haines and the Appellant was cordial; thus, there was no reason for the State to argue otherwise. Furthermore, the State, in its closing, directed the jury that what happened prior to April 18, 2006, was just background information and nothing the Appellant did amounted to a crime until either the phone call place over the speakerphone or the call witnessed by Mr. Barker.

Therefore, the court correctly excluded Mr. Haines because his testimony was irrelevant and violated ER 404(b). The Appellant fails to show that the trial court abused its discretion in excluding Mr. Haines; thus, the Appellant was not denied of his right to a fair trial.

**3. THERE IS NO PROSECUTORIAL MISCONDUCT WHEN THE APPELLANT FAILS TO ESTABLISH BOTH IMPROPER CONDUCT ON THE PART OF THE STATE AND ITS PREJUDICIAL EFFECT.**

“To establish prosecutorial misconduct, [the appellant] has the burden of establishing the conduct’s impropriety as well as its prejudicial effect. State v. Bryant, 89 Wash.App. 857, 873, 950 P.2d 1004 (1998), review denied, 137 Wash.2d 1017, 978 P.2d 1100 (1999). [The court] [reviews] allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Bryant, 89 Wash.App. at 873, 950 P.2d 1004.

Reversal is required only if “there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” Bryant, 89 Wash.App. at 874, 950 P.2d 1004 (quoting State v. Luvane, 127 Wash.2d 690, 701, 903 P.2d 960 (1995).” State v. Gerdts, 136 Wash.App. 720, 150 P.3d 627, 632-633 (2007).

There was no prosecutorial misconduct because the State acted properly and the Appellant was not prejudiced. In closing, the defense argued the State could have subpoenaed Mr. Haines, but chose not to; thus, creating an inference that the State was hiding relevant evidence from the jury. In rebuttal, the State attempted to explain the reason for not subpoenaing Mr. Haines was because he was not a relevant witness. The State wanted to point out the fact that what the attorney says is not evidence and only testimony from the stand is to be considered; thus, the fact that someone did not testify is not to be considered as evidence. But before the State finished its rebuttal on this point, defense counsel objected and the court gave a curative instruction to the jury. The State’s rebuttal argument was proper to an issue raised by the Appellant in light of the arguments presented.

Moreover, the issue involves a witness that was excluded by the court for being irrelevant; thus, both parties’ comments on Mr. Haines’ absence have little effect on the outcome of the case. This is especially

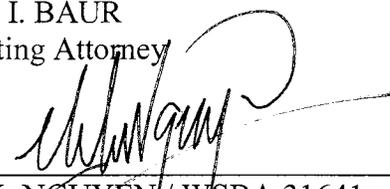
the case given the court gave the jury a curative instruction about how comments about the absence of Mr. Haines from both attorneys are not relevant. Therefore, there is no prosecutorial misconduct as the Appellant fails to establish both improper conduct and a substantial likelihood that the improper conduct affected the verdict.

V. CONCLUSIONS

The Appellant's appeal should be denied because the jury instructions were sufficient, the trial court did not abuse its discretion in excluding Mr. Haines as a witness, and there was no prosecutorial misconduct.

Respectfully submitted this 25 day of April 2007.

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