

NO. 40526-1-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

RICHARD A. PLECHNER,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
MASON COUNTY  
The Honorable Amber L. Finlay, Judge  
Cause No. 09-1-00109-0

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PATRICIA A. PETHICK, WSBA NO. 21324  
Attorney for Appellant

P.O. Box 7269  
Tacoma, WA 98417  
(253) 475-6369

COURT OF APPEALS  
DIVISION II  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plechner his constitutional right to proceed pro se.
2. The trial court erred in allowing the State to present evidence that Plechner had told Det. Heldreth two months before the current incident that he would take matters into his own hands should anyone steal from him where this evidence was irrelevant under ER 403 in establishing any matter at issue and inadmissible under ER 404(b) as it merely established propensity.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Count II (felony harassment).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Plechner his constitutional right to proceed pro se? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing the State to present evidence that Plechner had told Det. Heldreth two months before the current incident that he would take matters into his own hands should anyone steal from him where this evidence was irrelevant under ER 403 in establishing any matter at issue and inadmissible under ER 404(b) as it merely established propensity? [Assignment of Error No. 2].
3. Whether there was sufficient evidence to uphold Plechner's conviction for felony harassment (Count II)? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Richard A. Plechner (Plechner) was charged by information filed in Mason County Superior Court with one count of assault in the second

degree—strangulation (Count I) and one count of felony harassment (Count II). [CP 156-157]. Both counts included an allegation of domestic violence—that the crimes were committed against a family or household member. [CP 156-157].

Prior to trial, the State moved for the admission of a statement Plechner made to Det. Heldreth two months before the current incident that he would take matters into his own hands should anyone steal from him, which the court allowed.<sup>1</sup> [Vol. II RP 83-144; Vol. III RP 282-288]. Plechner was tried by a jury, the Honorable Amber L. Finlay presiding. Near the end of the State's case, the court denied Plechner's request to proceed pro se because the court was not comfortable doing that midstream in trial. [Vol. III RP 289-311]. Plechner had no objections and took no exceptions to the court's instructions which included the lesser included offense of assault in the fourth degree for Count I and the lesser included offense of gross misdemeanor harassment for Count II. [CP 115-145; Vol. III RP 380-381]. The jury found Plechner guilty of assault in the second degree (Count I) and guilty of felony harassment (Count II)

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<sup>1</sup> This court should note that the trial court addressed the State's motion as a CrR 3.5 hearing finding that Plechner's Miranda rights were not violated. [Vol. II RP 83-144]. The State has yet to file the required written CrR 3.5 findings and conclusions. The trial court also considered the admissibility of Plechner's statement in terms of ER 404(b). The State argued that Plechner's statement was admissible to show lack of mistake or accident, but the court allowed for the admission of Plechner's statement as intent. [Vol. III RP 282-288].

entering a special verdict finding that the victim and Plechner were “members of the same family or household.” [CP 110, 112, 114; Vol. III RP 430-432].

The court sentenced Plechner to a standard range sentence of 80-months on Count I and to a standard range sentence of 60-months on Count III based on an offender score of 9 on both counts with both sentences running concurrently for a total sentence of 80-months. [CP 8-24; Vol. IV RP 569-571].

Timely notice of appeal was filed on March 29, 2010. [CP 6-7]. This appeal follows.

2. Facts

On March 17, 2009, Sherri Wurzbacher (Sherri) went to the home of her sister, Gina Wurzbacher (Gina). [Vol. II RP 170, 237-238]. Shelly Gardner (Shelly), Gina’s friend, was there and agreed to take Sherri to get cigarettes, and coffee. [Vol. II RP 170-172, 238; Vol. III RP 314-315]. While Sherri and Shelly were gone, Gina spoke on the phone with Sherri’s boyfriend, Plechner, about concerns she had about wanting Sherri to go into treatment mentioning that Sherri had come to her home at 2 AM to pay money Sherri owed to Gina. [Vol. II RP 169-170, 223, 237, 239-241; Vol. III RP 267-270]. Plechner became upset believing that Sherri had stolen money from him in order to pay Gina. [Vol. II RP 241-242]. Gina

believed Sherri had in fact taken Plechner's money. [Vol. III RP 270].

Plechner went to Gina's house to confront Sherri. [Vol. II RP 242-244].

When Sherri and Shelly arrived back at Gina's home at about 10:30 AM, Plechner was there and began yelling at Sherri that she had stolen money from him. [Vol. II RP 172, 245-248; Vol. III RP 315-317]. Plechner approached Sherri grabbing her throat yelling that he was going to kill her and bury her body at Hanks Lake (Plechner had property there). [Vol. II RP 172-175, 247-249; Vol. III RP 318]. Sherri had difficulty breathing and testified that Plechner had made a similar threat against another woman thinking that if Plechner did not stop something serious could happen. [Vol. II RP 174-176, 187-189, 191-192, 211, 227, 233-235]. Gina and Shelly tried to get Plechner to stop and 911 was called. [Vol. II RP 249-250; Vol. III RP 258-260, 319-323]. Plechner let Sherri go, and left before the police arrived. [Vol. II RP 189-190, 252-253; Vol. III RP 324].

Shelton Police officer Christopher Kostad (Kostad) responded to the 911 call and upon arriving at the scene was told by Sherri that Plechner had strangled her. [Vol. II RP 156-159]. Shelton Police Detective Harry Heldreth (Heldreth) arrived at Gina's home and contacted Sherri, Gina, and Shelly. [Vol. III RP 333-336]. While he was at Gina's home, the phone rang; it was Plechner. [Vol. III RP 335]. Heldreth spoke to

Plechner saying he wanted to talk to him about what had just happened. [Vol. III RP 335]. Plechner told him that he didn't know what he was talking about. [Vol. III RP 335].

Heldreth then took Sherri to the police station to get her statement. [Vol. III RP 336]. Heldreth noticed that Sherri's neck was red and that she had what appeared to be finger marks around her neck. [Vol. III RP 338].

Later that afternoon, Heldreth again spoke on the phone with Plechner, who told Heldreth that he had not been at Gina's home and did not know what Heldreth was talking about. [Vol. III RP 346-348].

Heldreth testified that on January 5, 2009, Plechner had come to the police station to make a theft complaint. [Vol. III RP 349]. While doing so, Plechner told Heldreth that next time someone stole from him he would not call the cops and that he was going to take matters into his own hands. [Vol. III RP 355].

Plechner did not testify at trial.

D. ARGUMENT

(1) PLECHNER WAS DENIED HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

A criminal defendant has a constitutional right to waive assistance of counsel and proceed pro se at trial. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); Sixth Amendment to the United

States Constitution; Art. 1, section 22 of the Washington Constitution; State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978). In order to exercise the right, a defendant's request must be unequivocal, knowingly and intelligently made, and it must be timely. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). To determine the validity of a defendant's self-representation request, the trial court examines the facts and circumstances and the entire record. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The court should also engage in a colloquy with the defendant to ensure that he or she understands the risks and consequences of self-representation. State v. Vermillion, 112 Wn. App. at 851. However, a defendant's technical legal knowledge is "not relevant to an assessment of his knowing exercise of the right to defend himself." Faretta, 422 U.S. at 836.

An appellate court reviews a trial court's denial of a defendant's self-representation request for an abuse of discretion that lies along a continuum, corresponding to the timeliness of the request: (a) if made well before the trial...unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial is about to commence or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during trial the right to proceed

pro se rests largely in the informed discretion of the trial court. State v. Vermillion, 112 Wn. App. at 855, *citing* State v. Fritz, 21 Wn. App at 361. However, a defendant cannot seek self-representation in order to delay or obstruct the administration of justice, and a defendant can waive self-representation by disruptive words or misconduct. State v. Vermillion, 112 Wn. App. at 851. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995).

Here, near the end of the State's case in chief, Plechner expressed his dissatisfaction with his appointed counsel and asserted his constitutional right to represent himself. [Vol. III RP 289-311]. The trial court in response to Plechner's request questioned him as to the nature of his dissatisfaction with counsel to which Plechner explained there was a disagreement with how the defense was being conducted suggesting he could make an offer of proof in that regard to support his request to proceed pro se. [Vol. III RP 290-308]. The court expressed concern that in doing so Plechner would be inviting error by making incriminating statements, and, after a short recess, denied Plechner's motion to proceed pro se holding that Washington does not allow bi-furcated representation and that allowing Plechner to make an offer of proof as to the defense he wished to pursue that his counsel would not pursue would constitute such representation and that he could not

proceed pro se because at this point “we’re midstream in trial.” [Vol. III RP 309-311].

The court did not inquire as to Plechner’s level of education, did not inquire whether he had an understanding of the procedures involved in a trial including objections and cross-examination or an understanding of the rules of evidence, and did not inquire whether Plechner was unequivocally asserting his right to self-representation. These were the very inquiries necessary for the court to make a decision in its informed discretion whether to allow Plechner to proceed pro se or not.

The trial court’s reasoning in denying Plechner’s constitutional right to proceed pro se because “we’re midstream in trial” does not constitute a proper exercise of informed discretion in light of the record indicating that the trial court failed to make the proper inquiries at the time Plechner asserted his right to proceed pro se. The trial court should have granted Plechner’s constitutional right to proceed pro se. This court should reverse Plechner’s convictions and remand for a new trial in order to afford him his right to represent himself on the charges.

- (2) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PREJUDICIAL EVIDENCE THAT PLECHNER HAD TOLD DET. HELDRETH TWO MONTHS BEFORE THE CURRENT INCIDENT THAT HE WOULD TAKE MATTERS INTO HIS OWN HANDS SHOULD ANYONE STEAL FROM HIM WHERE THIS EVIDENCE WAS IRRELEVANT TO ANY MATTER AT ISSUE UNDER ER 403 AND INADMISSIBLE UNDER ER 404(b).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the

defendant's connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, the State was allowed to elicit testimony from Det. Heldreth that two months before the incident involving Sherri on January 5, 2009, Plechner had said "next time somebody steals money from him, he was not gonna call the cops and he was going to take matters into his own hands." [Vol. III RP 355]. The State argued that the admission of this evidence was proper to show Plechner's intent, lack of accident or mistake, and motive when he assaulted and threatened Sherri on March 17, 2009. [Vol. III RP 283-286]. Plechner objected arguing that the statement demonstrated actions in conformity therewith and that the statement was unfairly prejudicial. [Vol. III RP 286-287]. The court found the statement admissible under ER 404(b) as demonstrating intent. [Vol. III RP 287-288].

The court's rationale is unpersuasive. As argued by the State in closing, a person believing that money had been stolen from them and taking matters into their own hands to confront the suspected thief is not a defense to charges of assault and harassment. [Vol. III RP 408-410]. Plechner's statement to Det. Heldreth is not relevant to show any element of the crimes for which Plechner was charged—it does not establish that he assaulted Sherri nor does it establish that he threatened her. Any claim

of relevancy as contrasted to the prejudicial effect fails when considering that this testimony only served to establish in the jury's mind that because Plechner made a threatening statement in the past that he acted on those words in the instant case. The court failed to consider this fact and weigh the probative value of the statement against its prejudice when allowing for the admission of the statement. Despite any claim to the contrary, this evidence merely established propensity with any claimed probative value being outweighed by danger of unfair prejudice under ER 403.

If the only logical relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue's) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Plechner made a

threatening statement in the past that he acted on those words in the instant case.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have questioned Sherri's credibility with the result that Plechner would have been found guilty of only the lesser included offenses on both charges if at all.

The prejudice resulting from the introduction of this evidence denied Plechner his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). The evidence materially affected the outcome and the error in admitting this evidence was of major significance and not harmless.

(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT PLECHNER WAS GUILTY OF FELONY HARASSMENT (COUNT II).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Plechner was charged and convicted in Count II of felony harassment. [CP 112, 156-157]. As instructed by the court in Instruction No. 19, the State bore the burden of proving beyond a reasonable doubt the following:

1. That on or about March 17, 2009 the defendant knowingly threatened to kill Sherri L. Wurzbacher immediately or in the future;
2. That the words or conduct of the defendant placed Sherri L. Wurzbacher in reasonable fear that the threat to kill would be carried out;
3. That the defendant acted without lawful authority; and
4. That the threat was made or received in the State of Washington.

[CP 136; Vol. III RP 391].

In State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), the State Supreme Court considered the issue of whether a conviction for felony harassment could stand where there was a threat to kill but the person threatened believed only that they might be harmed in the future and there was no evidence that the threatened person believed that they would be killed. In State v. C.G., the juvenile defendant became disruptive in class and was ordered to a study carrel for a “time out.” The school’s vice principal was called and the juvenile was ordered from the classroom. As the juvenile was leaving the classroom she yelled obscenities at the school’s vice principal and repeatedly threatened to kill the vice principal. At the adjudicatory hearing, the vice principal testified that the juvenile’s threat caused him concern because he believed the juvenile might harm him or someone else in the future; the vice principal did not testify that he

believed the juvenile would in fact kill him. The State Supreme Court, analyzing the issue in terms of statutory construction, held that in order to convict an individual of felony harassment based upon a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.

State v. C.G., 150 Wn.2d at 612.

It is on this point—whether Plechner’s threat to kill Sherri placed her in reasonable fear that the threat to kill would be carried out—that the State cannot sustain its burden of proof on Count II (felony harassment). The record establishes that Plechner threatened to kill Sherri according to the testimony of Sherri, Gina, and Shelly all of whom were present when Plechner attacked Sherri.<sup>2</sup> [Vol. II RP 172-175, 247-249; Vol. III RP 318]. However, even though she was “shocked, scared, and confus[ed]” about Plechner’s attack, Sherri testified only that she thought “if anybody else had not been around, something more serious would have happened to me.” [Vol. II RP 175, 189]. Sherri conceded only that it was “possible” that Plechner would carry out his threats not that she actually and reasonably believed Plechner would kill her in the future. [Vol. II RP

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<sup>2</sup> Plechner’s attack on Sherri involved him grabbing her throat causing her difficulty in breathing to the extent that Sherri testified when asked to describe the pain that “I thought I was going to be choked out. I thought I was going to be choked to death,” which formed the basis of Count I (assault in the second degree—strangulation). [Vol. II RP 233]. This testimony did not relate to Count II (felony harassment).

175]. In fact, Sherri testified that Plechner had made a similar threat to kill another woman whom he believed had stolen from him, but she was not scared of Plechner. [Vol. II RP 211-212]

Here, like State v. C.G., there is a threat to kill. Here, like State v. C.G., the person threatened believed they might be harmed. Thus, here, like State v. C.G., this court should find that the State has failed to satisfy its burden of proof in establishing that the person threatened reasonably believed that the threat to kill would be carried out. This court should reverse Plechner's conviction for felony harassment in Count II.

E. CONCLUSION

Based on the above, Plechner respectfully requests this court to reverse and dismiss his convictions for assault in the second degree—strangulation (Count I) and felony harassment (Count II).

DATED this 22<sup>nd</sup> day of October 2010.

Patricia A. Pethick  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 22<sup>nd</sup> day of October 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Richard A. Plechner  
DOC# 975117  
Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

Monty Cobb  
Mason County Dep. Pros. Atty.  
P.O. Box 639  
Shelton, WA 98584-0639

Signed at Tacoma, Washington this 22<sup>nd</sup> day of October 2010.

Patricia A. Pethick  
Patricia A. Pethick

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