

No. 43332-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUANE M. RADER,

Appellant.

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

The Honorable Lisa Sutton, Judge
Cause No. 11-1-01290-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court erred in admitting, pursuant to ER 404(b), testimony of Rader's ex-wife, not the victim in this case, for the purpose of proving a common scheme or plan.

2. Whether the court abused its discretion in admitting the testimony of a domestic violence expert.

3. Whether the court erred in finding that Rader could not invoke the physician-patient privilege because the public interest outweighed his interest in the privacy of certain statements made to a treating physician's assistant.

4. Whether the doctrine of cumulative error applies to justify a reversal of Rader's conviction.

5. Whether there was sufficient evidence to support the aggravating factor that the crimes were domestic violence and committed within sight or hearing of the victim's minor child.

B. STATEMENT OF THE CASE.

The State accepts the statement of substantive and procedural facts contained in the Appellant's Opening Brief.

C. ARGUMENT.

1. The court correctly admitted the testimony of Rader's former wife pursuant to ER 404(b) to establish a common scheme or plan.

Rader assigns error to the ruling of the trial court admitting the testimony of Rader's ex-wife, Ria Rader, pursuant to ER 404(b), for the purposes of establishing a common scheme or plan. He argues that the evidence established propensity rather than a

common scheme or plan, was not relevant to proving elements of the charged offenses, and the prejudicial effect outweighed the probative value.

ER 404(b) reads:

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). “Critically, there are no ‘exceptions’ to this rule,” Gresham, 173 Wn.2d at 421, (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.9, at 497 (5th ed. 2007)), just “one improper purpose and an undefined number of proper purposes.” Gresham, 173 Wn.2d, 421, 269 P.3d 207 (2012). Evidence of prior misconduct is admissible for the proper purposes even if it also reflects upon the defendant’s character. KARL B. TEGLAND,

WASHINGTON PRACTICE: COURTROOM HANDBOOK ON EVIDENCE Ch. 5 at 242 (2011-2012).

Pursuant to this rule, the State sought to admit, and the trial court found admissible, testimony of Ria Rader describing Rader's abusive acts toward her during their marriage. CP 27-28, 147-156, RP 17-36, 339-57. Many of them were similar to acts that Heather Rader, the victim in the charged offenses, described Rader directing toward her. RP 38-64, 412-98. Some of them were not similar.

An appellate court reviews a trial court's interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." Id. The trial court begins with the presumption that evidence of other bad acts is inadmissible, and the State bears the burden of establishing that the evidence falls under one of the exceptions to the general prohibition. Id.

Before the trial court admits evidence of other bad acts which indicate a common scheme or plan, those acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an

element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). If the evidence is admitted, the court must give a limiting instruction. Id. at 864.

The court’s finding of a preponderance of the evidence will be upheld if it is supported by substantial evidence. State v. Baker, 89 Wn. App. 726, 732, 950 P.2d 486 (1997). “Substantial evidence is defined as evidence of a kind and quantity that will persuade an unprejudiced, thinking mind of the existence of the fact to which the evidence is directed.” State v. Tharp, 27 Wn. App. 198, 203, 616 P.2d 693 (1980). “When any reasonable view of disputed facts supports the trial court’s finding, it will not be disturbed on appeal.” Baker, 89 Wn. App. at 732. Relevancy determinations are also reviewed for abuse of discretion. Id. at 734. Uncharged acts must have substantial probative value; the court’s weighing of probative value versus prejudicial effect must appear on the record, and that is also reviewed for abuse of discretion. Id. at 736. A trial court has “wide discretion” in balancing the probative and prejudicial values of evidence. State v. Coe. 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a decision on an improper

basis, often, though not necessarily, an emotional one. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices. Id.

The trial court itself does not make a factual finding that a common scheme or plan exists, only that the evidence is sufficient to permit the jury to conclude that there was a common scheme or plan. State v. Carleton, 82 Wn. App. 680, 683-84, 919 P.2d 128 (1996).

Appellants who show that a trial court erroneously admitted evidence under ER 404(b) must also show that the trial court's error was not harmless. Gresham, 173 Wn.2d at 433.

a. Rader's conduct toward his two wives was more similar than dissimilar.

The testimony of the two wives at the ER 404(b) hearing, which was the evidence before the court when deciding the admissibility of Ria Rader's statements, demonstrated striking similarities in the way Rader had treated them. Ria Rader testified that the physical violence began about one month after they were married. RP 17, 35. Heather Rader said that although there were a couple of big arguments, without violence, before their marriage, the relationship changed dramatically after their formal marriage on January 3, 2011.¹ RP 40. Notably, the two nonviolent incidents occurred on Thanksgiving Day, 2010, the day before the unofficial marriage ceremony, and in December, 2010, after the ceremony but before the legal documents were signed. RP 40-41. Both women said Rader pushed them. RP 20, 42-43, 55. Both said Rader grabbed them by the hair and hit their heads against hard surfaces. RP 21, 30, 43, 55. Both testified Rader would prevent them from leaving. RP 18, 20, 30, 36, 47-48. Both said Rader threatened to hurt or kill them and their children. RP 21, 30-31, 44-45, 48-49, 58-59. He told Ria Rader that she was stupid and not

¹ The couple held an unofficial ceremony the day after Thanksgiving, 2010, but did not sign the documents that made the marriage legal until January 3, 2011. RP 411-12.

good enough, RP 21, and that women in general were evil, useless, worthless, and needed to be killed, RP 24. He told Heather Rader that she was worthless and he deserved better. RP 41.

Ria Rader testified that Rader threw things at her on three or four occasions, RP 18-19, 27-29, while Heather Rader did not mention thrown objects. Ria Rader also said Rader had once punched her in the arm, RP 19, 28, whereas Heather Rader did not testify about being hit. Ria Rader testified that Rader threatened to shoot himself, RP 23, 31, but he did not make that threat to Heather Rader. And, of course, Rader never set Ria Rader on fire.

Rader points to such dissimilarities as the fact that when Rader threw Heather Rader down and hit her head she was indoors, whereas when he threw Ria Rader down and hit her head she was outdoors. Appellant's Opening Brief at 31. That is a distinction without a difference.

Heather Rader's credibility was a central issue at trial. At the time of her burns, she had given a false account of the incident, which she had repeated to several people. Only six months later did she call law enforcement and tell them that Rader had deliberately set fire to her legs. In State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), the court held that prior acts of domestic

violence committed against a recanting victim were admissible to permit the jury to assess the victim's credibility. Id. at 186. Rader points out that there are no cases permitting the State to offer evidence of a person other than the victim of the charged crime for prior bad acts of the defendant in a domestic violence context where the crime is not a sex offense. Appellant's Opening Brief at 32. That is true, but there are no cases prohibiting it, either. It appears to be a nuance not addressed by the appellate courts to date. There are numerous cases permitting evidence from witnesses other than the victim of charged sex offenses to testify about the defendant's prior bad acts. See, e.g., Lough, 125 Wn.2d 847. Rader argues that those cases should not apply to non-sex offenses because sex offenders are particularly prone to using the same technique on multiple victims and because sexual crimes are difficult to prove. Appellant's Opening Brief at 32. But domestic violence crimes are also difficult to prove, particularly when the victim has lied or recanted. In both situations, the difficulty in proving the crime is usually because of the defendant's actions. In Lough, for example, Lough had drugged the victims, making their perceptions unreliable and their memories hazy. In domestic violence cases, as in this case, victims don't report because the

defendant threatens to hurt them or their loved ones if they do. There is every reason to apply the analysis of the sex offense cases to domestic violence cases, and permit prior misconduct committed against a person other than the victim of the charged crimes to come into evidence.

The courts have referred to a “pattern” of conduct when considering whether a common scheme or plan has been shown. Again taking an example from Lough, the court said that even the passage of considerable time since the prior bad acts may be “without real significance if the older offense is part of a ‘pattern’ of similar misconduct occurring over a period of years.” Lough, 125 Wn.2d at 858; *see also* DeVincentis, 150 Wn.2d at 13 (“[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.”) A common scheme or plan can be shown where a person commits “markedly similar” acts against “similar victims under similar circumstances.” Lough, 125 Wn.2d 852.

This is different from using the prior bad acts to establish the identity of the person who committed the charged crimes. In that event, where the State is attempting to prove that the current crime was committed by the defendant because he had committed a

similar crime, or crimes, in the past, the similarity between the charged and the uncharged acts must be greater. To prove that the defendant used a unique modus operandi, the method used in both crimes, or sets of crimes, must be “so unique” that proving that he committed one essentially proves he committed the other. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). A prior act is admissible for this purpose “only if it bears such a high degree of similarity as to mark it as the handiwork of the accused.” Coe, 101 Wn.2d at 777.

Here the State was not attempting to prove a “signature” crime, but to prove that Rader had “a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes.” State v. Sexsmith, 138 Wn. App. 497, 504-05, 157 P.3d 901 (2007), *citing to* DeVincentis, 150 Wn.2d. at 19. The purpose is to prove a plan instead of a person. “It requires a slightly lower level of similarity, inconsistent with that required to show identity.” State v. Foxhoven, 161 Wn.2d 168, 179, 163 P.3d 786 (2007).

[A]dmission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of a crime is at issue. Sufficient similarity is reached only when the trial

court determines that the “various acts are naturally to be explained as caused by a general plan . . .”

DeVincentis, 150 Wn.2d. at 21, *citing to* Lough, 125 Wn.2d. at 860.

The court in Lough cited the following language from 2 John H. Wigmore, *Evidence* § 357, at 335-42 (James H. Chadbourn rev. ed. 1979), referring to sex offense cases:

Courts have shown altogether too much hesitation in receiving such evidence. Even when rigorously excluded from any bearing it may have upon character . . ., it may carry with it great significance as to a specific design or plan of rape. There is no reason why it should not be received when it does convey to the mind, according to the ordinary logical instincts, a clear indication of such a design. There is room for much more common sense than appears in the majority of the rulings.

In Rader’s case he committed very similar acts against both of his wives, women on whom he had some legal claim. The evidence was that the violence did not begin until after marriage, and that it escalated quickly. There was no evidence that he acted violently towards men or women to whom he was not married. The actions themselves were similar, although not identical. Rader mentions several times that the two women had never met, but the existence of a pattern does not depend upon the two women knowing each other. The evidence is, in fact, more credible because they had never spoke to each other. Rader’s approach to

marriage was to control, intimidate, and assault his spouse—in short, that was his scheme or plan. Such acts certainly do reflect on his character, but the evidence was not offered for that purpose, but rather a purpose permitted under ER 404(b).

The trial court heard testimony from both women and conducted a careful analysis on the record. The court articulated the standard for admission of evidence under ER 404(b), RP 88-91. Because the court correctly understood the rule, its application of the rule is reviewed for abuse of discretion. There was substantial evidence to support the ruling, and it cannot be said the ruling was manifestly unreasonable or relied on untenable reasons or grounds. The court weighed the probative value of the evidence against the prejudicial impact, and reasonably concluded that the first outweighed the second. RP 92-93. Finally, the court limited the evidence to the charges of unlawful imprisonment, witness tampering, harassment, and fourth degree assault, all domestic violence, because the evidence addressed elements of those offenses. It did not apply it the charges of first degree attempted murder or first degree arson, also both domestic violence. CP 27, RP 94. While it is quite possible another judge might have made a different decision, that is not the standard of review. When any

reasonable interpretation of the facts supports the court's ruling, it will not be disturbed on appeal. Baker, 89 Wn. App. at 732.

The court's decision here was soundly based upon the facts and the law. The appropriate limiting instructions were given, RP 338, 408. The trial court should be affirmed.

b. The evidence of a common scheme or plan is relevant to elements of the charged offenses identified by the court.

Rader argues that because Heather Rader and Ria Rader never met, Ria's testimony cannot speak to Heather's reasonable fear of Rader. Whether the two women ever met is irrelevant. Ria Rader's testimony showed that she was reasonably in fear of Rader, and failed to report any of his crimes because of that fear, which made it more likely that Heather Rader reasonably feared Rader, enough that she lied to many people over a long period of time rather than risk his punishment for telling.

Rader argues that Ria Rader's evidence of prior bad acts was used to prove the crimes against Heather, but it could do so only be showing propensity, that it was irrelevant to any of the elements of the charged crimes. Appellant's Opening Brief at 34-35. On the contrary, the State used the evidence to prove that the crimes occurred at all—in effect, the evidence was relevant to every

element of the crimes listed. Rader pled not guilty, which requires the State to prove every element of every offense. Magers, 164 Wn.2d at 183. Because Heather Rader had lied before, Ria Rader's testimony was necessary to bolster her credibility. Only if the jury believed that the crimes occurred would the elements be established. There was no evidence from Ria Rader of attempted murder or arson, and thus Rader's prior misconduct was not relevant to those charges.

c. The court properly found that the probative value of the evidence outweighed the prejudicial effect. It was not unfairly prejudicial.

As noted above, the trial court has great discretion when balancing the probative value of the evidence against the risk of prejudice to the defendant. Coe, 101 Wn.2d at 782. Unfair prejudice results when the trier of fact makes a decision on an improper basis. Rupe, 101 Wn.2d at 686. The trial court acknowledged that the evidence would be prejudicial to Rader, but found the probative value—that the evidence was necessary to prove the crimes—outweighed the prejudice. RP 92-93.

Rader argues that Ria Rader's testimony had little probative value because Heather Rader's testimony was so strong and was in part corroborated by medical evidence and Rader's calls from the

jail.² But the ER 404(b) evidence was not admitted for the purpose of proving the attempted murder or arson charges. CP 27 The strength of the medical evidence or the jail phone call would not go to establish unlawful imprisonment, witness tampering, or fourth degree assault. Further, Heather Rader's testimony was certain to be attacked, and in fact was, because she had consistently told people at the time of the fire that she accidentally started it. RP 471-486. Indeed, in closing argument, defense counsel argued extensively that she should not be believed. RP 580-85, 589-91. The medical evidence proved only that she was seriously burned, and, as counsel argued in closing, the jail phone calls didn't really amount to an admission of anything. RP 586. Ria Rader's testimony was very probative of Heather Rader's credibility.

Rader further argues that the testimony was highly prejudicial because it portrayed Rader as a verbally and physically abusive man. Appellant's Opening Brief at 36. The evidence did show him to be verbally and physically abusive to women who married him, not a generally abusive person. As noted above, there was no evidence whatsoever that he ever struck, pushed,

² In a later portion of his brief, Rader argues that his admission in the phone call from the jail was "nonspecific and could have referred to any of the incidents." Appellant's Opening Brief at 48.

threatened, or otherwise harmed anyone but Ria Rader and Heather Rader. That is not unfairly prejudicial. The fact that the evidence reflects unflatteringly on his character does not make the evidence inadmissible when it also establishes a common scheme or plan.

d. Because there was no error, the harmless error analysis does not apply.

As Rader explains in his opening brief, a harmless error analysis would apply if the court's admission of Ria Rader's testimony had been error. The State does not dispute that the outcome of the trial may well have been different without Ria Rader's evidence; that is why the State sought to put it before the jury. But, as argued above, the court did not err, and thus there was no error at all, harmless or otherwise.

2. The trial court acted within its discretion when it admitted the testimony of Peg Cain, an expert in domestic violence issues, regarding general characteristics of domestic violence as they pertain to both offenders and victims.

The trial court permitted Peg Cain, the owner of, and a therapist with, a domestic violence treatment agency to testify about general characteristics common to domestic violence victims and offenders. CP 29, RP 362, 369-385. Cain never met Heather

Rader, saw Ria Rader only once as she was waiting to testify, and never spoke to the defendant. RP 378, 386.

At a hearing before jury selection, the court considered the State's motion to admit Cain's testimony. CP 135-146, RP 80-88. Rader objected in his written reply to the State's motion on the grounds that the State relied substantially on State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), arguing that a case nearly 25 years old was not a sufficient authority. He also objected that because Cain had not interviewed Heather Rader, her general testimony would have little probative value. CP 16. He made a similar argument at the hearing. RP 82. He maintained the State must prove that the evidence Cain would present was still accepted in the scientific community. RP 83.

The trial court found that, providing the State laid the appropriate foundation, Cain's testimony would be admissible. It further noted that such evidence was permitted by ER 702 through 705, would be helpful to the jury, and was generally accepted in the relevant scientific community. RP 87-88.

On appeal, Rader does not challenge Cain's qualifications as an expert, but maintains that her testimony was largely irrelevant, too broad, and in particular the statement made by Cain

that victims typically leave their abusers an average of seven times before making a permanent break, although some may make 14 attempts “if they are not dead,” was unfairly prejudicial.

A trial court’s decision to admit or exclude expert testimony is reviewed for abuse of discretion. The court will be reversed only if the trial court bases its decision on unreasonable or untenable grounds. State v. Aguirre, 168 Wn.2d 350, 359, 229 P.3d 669 (2010); Ciskie, 110 Wn.2d at 280. No witness, including an expert, may offer an opinion as to the veracity of the defendant. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Where testimony addresses the demeanor of a witness, “the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” Aguirre, 168 Wn.2d at 359, citing to Kirkman, 159 Wn.2d at 928.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 703 requires that the basis of the expert's testimony be accepted by experts in the relevant field, and ER 704 permits an expert to offer an opinion that includes the ultimate issue before the trier of fact.

In State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), the court recognized that expert testimony can be of value to explain apparently inconsistent or illogical behavior on the part of the victim of domestic violence. Id. at 109. In Ciskie, the court permitted expert testimony about the battered woman syndrome, which is virtually the same as the domestic violence evidence offered in Rader's case. In its discussion of the usefulness of the information to the trier of fact, the court said:

Domestic violence is a widely prevalent and underreported phenomenon. "The general public is unaware of the extent and seriousness of the problem of domestic violence."

.....

Battering victims respond to the violence they experience with overwhelming terror, shame, and guilt, as well as condemnation due to their inability to leave the situation.

.....

We find that the trial judge could reasonably conclude the jury probably had little awareness of the topic of [the expert's] testimony.

Ciskie, 110 Wn.2d at 272-73 (internal cites omitted). This holding reaffirmed a similar holding in State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984):

We join with those courts which hold expert testimony on the battered woman syndrome admissible. . . .We find that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of the ordinary lay person.

Allery, 101 Wn.2d at 597 (internal cites omitted).

A similar result was reached in United States v. Winters, 729 F.2d 602 (9th Cir. 1984). The language of Fed. R. Evid. 702, which the court was interpreting, was identical to the language of the Washington rule. Id. at 605.

The testimony of Peg Cain was entirely relevant to the issues before the jury. Rader makes much of the fact that Cain never even met either of the witnesses, or himself. But that in fact makes the testimony less prejudicial to Rader, since there was no chance that Cain would express an opinion that Heather was telling the truth or that Rader was guilty. See *e.g.*, Ciskie, 110 Wn.2d at 280. Cain explained in general terms what a typical domestic violence relationship looks like and how the victim and the offender

function within that relationship, with no reference to either party. The State then presented the evidence of the dynamics of the Raders' marriage and the manner in which Heather Rader responded. The jury could compare Heather Rader's testimony to Cain's, which aided them in deciding whether or not Rader had committed the acts charged. Where Heather Rader's testimony matched that of Cain, Heather Rader's credibility was bolstered; had it differed, it would have undermined her credibility.

In Aguirre, the trial court had admitted the testimony of a police officer who had extensive experience investigating both physical and sexual abuse cases. She testified about the general demeanor of victims of both sexual assault and domestic violence. Because she had also interviewed the victim, she testified about the victim's demeanor but "did not give her opinion on whether the victim's demeanor indicated that the victim was a sexual assault victim." Aguirre, 168 Wn.2d at 356. The court approved this testimony, finding it likely to assist the jury in deciding whether the victim had been assaulted and raped as she claimed. It was not a direct comment on the veracity of the victim or the guilt of the defendant. Id. at 360.

Rader argues that Cain's testimony was overbroad, in that it covered not only typical characteristics of victims, but offenders as well, and the general dynamics of domestic violence. But the characteristics of a victim of domestic violence cannot be adequately explained without also describing the actions of the offender and the usual manner in which the relationship proceeds. The mental state of the victim in a domestic violence situation is caused by the actions of the offender, and to exclude any testimony except the thought processes of the victim would leave the jury with no basis to judge the reasonableness of Heather Rader's mental state, and thus her actions.

Rader especially takes exception to Cain's statements that victims only feel safe when their abuser is in jail and that they leave their abusers an average of seven times, and as many as 14 times, before making the final break, "if they're not dead." He claims this was not relevant to Heather's state of mind. Appellant's Opening Brief at 41. But Cain was explaining that domestic violence tends to escalate over time, and she merely acknowledged that sometimes victims do end up dead. It is not clear how the remark about the victim feeling safe only when the abuser was in jail was unfairly prejudicial. Cain was on the stand to explain the

characteristics of domestic violence, and that is one of them. Heather Rader was crystal clear that she did not feel safe until several months after she moved to Bellingham. The purpose of Cain's testimony was to educate the jury.

Even if it were error to allow the words "if they aren't dead," in the overall context of the trial, it was harmless error. The jury had to decide if Rader committed the acts about which Heather Rader testified. She obviously was not dead. Given the decision before the jury, it cannot be said that those four words had a significant impact on the jury. There is no reasonable likelihood that the outcome of the trial would have been different had she not said them.

The trial court found that Cain's testimony would be helpful to the jury and that the subject was accepted in the scientific community. RP 86-87. The evidence was important to the State because the victim had behaved in a manner typical of domestic violence victims, but contrary to the way the average juror might expect. CP 29. It cannot be said that the court based its decision on unreasonable or untenable grounds. Aguirre, 168 Wn.2d at 359.

3. The trial court acted within its discretion in finding that the public interest outweighed the physician-

patient privilege and admitting statements Rader made to his treating physician's assistant.

Rader argues that the trial court misapplied the balancing test between a criminal defendant's right to claim the physician-patient privilege and the public's interest in disclosure of his statements to the physician's assistant who treated the burns on his hands and feet. The State sought to admit three statements Rader made to the physician's assistant: that he was burned, that he started the fire, and that he had not sought treatment sooner because his wife was hospitalized with more severe burns, thus implying that his burns resulted from the same fire. RP 116. Rader had appeared for work a couple of days after the fire wearing non-issue footwear, and after a discussion with a commanding officer, he was apparently ordered by another supervising officer to seek medical treatment. RP 276-77. The treating physician's assistant, Captain Rebecca Bean, testified that Rader told her he had been drunk when he started the fire, that his wife had also been burned, and he had been with her in the hospital without taking time to care for his own injuries. RP 262.

The physician-patient privilege is included in a list of other privileges contained in RCW 5.60.060. Subsection (4) of that statute reads:

Subject to the limitations under RCW 70.96A.140³ or 71.05.360(8) and (9),⁴ a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows[.]

RCW 5.60.060(4). The exceptions which follow the above language are irrelevant to criminal cases.

The statute does not make the privilege applicable in criminal cases, but Washington courts have so extended it “only so far as practicable” by referring to RCW 10.58.010: “The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions.” State v. Mark, 23 Wn. App. 392, 396-97, 597 P.2d 406 (1979). Only those communications that are confidential in nature are protected by the privilege. State v. Broussard, 12 Wn. App. 355, 358-59, 529 P.2d 1128 (1974).

The physician-patient privilege has been characterized as a procedural safeguard, not a rule of substantive or constitutional law.

³ This statute addresses involuntary commitments as a result of chemical dependency.

⁴ This statute addresses involuntary detentions because of mental illness.

State v. Smith, 84 Wn. App. 813, 820, 929 P.2d 1191 (1997). Because the common law did not provide for the privilege, the statute is to be strictly construed and limited to its purposes, “which are ‘to promote proper treatment by facilitating full disclosure of information[,]’ and to protect the patient from embarrassment or scandal that might result if the intimate details of medical treatment were revealed.” Id., citing to Carson v. Fine, 123 Wn.2d 206, 212, 867 P.2d 610 (1994).

The courts have not, therefore, given the privilege the same weight in criminal cases as in civil. In criminal cases, the privilege is available only after the court does a balancing of the benefits of the privilege against the public’s interest in disclosing the complete truth. Smith, 84 Wn. App. at 820; *see also* State v. Stark, 66 Wn. App. 423, 438, 832 P.2d 109 (1992).

Policy considerations are important to the application of the privilege. For example, in In re Welfare of Dodge, 29 Wn. App. 486, 628 P.2d 1343 (1981), the court said:

“[T]here are fundamental policy considerations which dictate the need for flexibility in applying the technical rules of evidence in an effort to reach the proper result where the issue involves the custody and welfare of infant children.”

Id., citing to D. v. D., 108 N.J. Super 149, 260 A.2d 255 (1969). In Dodge, the proceeding at issue was to terminate a mother's parental rights. Policy considerations must also be important in prosecuting crimes and protecting victims of domestic violence.

Rader argues that the privilege applies unless some unusual circumstance removes it from the general run of cases. Appellant's Opening Brief at 43. He cites to State v. Boehme, 71 Wn.2d 621, 635-37, 430 P.2d 527 (1967) for support of this argument. The State maintains that Boehme articulates no such principle. In that case, the defendant was attempting to assert his wife's physician-patient privilege to prevent her doctor from providing evidence that Boehme had tried to poison her. The court refused to permit him to do so, on the grounds that the privilege is (1) personal to the patient and (2) his wife would not benefit from either of the purposes underlying the privilege. Id. at 636-37. Here Rader is attempting to assert his own privilege. Further, it does not appear from the few appellate cases addressing the issue, that there is a "general run of cases."

Rader distinguishes Smith, 84 Wn. App. 813, a case in which the court held the privilege did not apply to a blood sample taken from the defendant after he crashed a car, severely injuring a

passenger, but before he was arrested. It is true that there are many differences between Smith and Rader's case. But before even getting into the specifics of Smith's situation, the court in that case reiterated the principle that in deciding whether or not the privilege applied, the court is to balance the patient's interests against the public's. Smith, 84 Wn. App. at 820-21. That case applied the same principles that apply to Rader. The outcome depends on the interests at issue.

The statements elicited from the physician's assistant were not confidential, were not necessary for treatment, and were not what could be considered embarrassing or scandalous. His interest in applying the privilege was minimal. The public's interest was much greater, that of prosecuting and punishing serious crimes. Rader argues that the State had other evidence and did not need these statements, and therefore they carried small probative value. Appellant's Opening Brief at 42. The other evidence included Rader's statements to Deputy Beall that he was smoking by the back door and the couch caught on fire. RP 220, 245. But, as Rader's counsel argued during closing argument, Rader was "drunk to the point of incoherence" at the time he made that statement and it couldn't be true because Heather Rader said

something different. RP 585-86. He also points out that the phone call from the jail, in which Rader said “it happened” was evidence in the State’s favor. However, in closing, defense counsel argued that the statement did not amount to an admission because he didn’t say what “it” was. RP 586. Rader cannot have it both ways. If the statements to Beall and Heather Rader did not prove anything, then the statements to the physician’s assistant were critical to the State’s case.

The trial court gave careful consideration to the defense motion to exclude the statements Rader made to the physician’s assistant. It read the applicable cases and conducted the necessary balancing test. RP 131-33. As with any evidentiary decision, this ruling is reviewed for abuse of discretion; the court correctly interpreted the rule. Even if another judge would have ruled differently, it cannot be said that the court based its decision on untenable grounds. Therefore it should not be reversed.

4. There is no cumulative error.

Rader argues that even if no individual error requires reversal, the combination does. The cumulative error doctrine “is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when

combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

As argued above, the only possible, albeit harmless, error was Peg Cain’s use of the phrase “if they aren’t dead.” One harmless error is not cumulative error.

5. The evidence presented to the jury was sufficient to allow a reasonable trier of fact to find that the unlawful imprisonment occurred within sight or sound of the victim’s minor child.

A court is permitted to impose an exceptional sentence when certain aggravating factors are present. RCW 9.94A.535. One of those factors, set forth in subsection (h), was charged in conjunction with the first degree arson and unlawful imprisonment charges. CP 9-11. That factor reads, in relevant part:

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

.....

(ii) The offense occurred within sight or sound of the victim’s or the offender’s minor children under the age of eighteen years[.]

RCW 9.94A.535(h). The jury found that factor existed on both of the charges. CP 75, 80.

Rader argues that there was no evidence that Heather Rader’s 11-year-old daughter saw or heard either crime. Heather

testified that the night those two crimes occurred, she and Rader were downstairs in the living room but she had gone upstairs to bed because he persisted in drinking alcohol against her wishes. RP 421. The daughter's room was apparently also upstairs. RP 432. Rader stayed downstairs but he was yelling and playing music very loudly. "He tends to yell a lot." RP 424. After Heather Rader had fallen asleep, Rader slammed open the door of her bedroom and told her she was evil and he was going to put a bullet in her head. RP 425-26. Rader then returned downstairs, and Heather Rader followed, wearing just a tank top and underwear, to get her purse and make sure she had her car keys so she could leave. RP 427-29, 431-32. Heather Rader heard her daughter moving around in her room. RP 432, 462-63. Rader walked over to her, grabbed her by the hair, hit her head on the counter, and threw her to the floor. RP 430. Her head was struck hard enough to leave a bruise. RP 432. This sequence of events was, as the State specified in closing argument, the basis of the unlawful imprisonment charge. RP 551-52.

While Heather Rader was still on the floor, Rader poured lighter fluid on her legs, lit a match, and threw it on her legs. RP 433-35. Heather Rader began to scream, took a blanket off the

couch, and wrapped it around her legs while Rader did nothing. RP 436-37. After accidentally setting the couch on fire and extinguishing that, Heather Rader ran upstairs to soak her legs in cold water. RP 437. That didn't work so she also applied aloe vera gel, but the pain was still intense, so she went downstairs to get her phone to call for help. RP 438. As Heather Rader started downstairs, her daughter poked her head out of her room and Heather told her to stay inside. "She was frantic. She was just terrified. She was crying and asking me what all the yelling was about and what was wrong, what happened. . . . [S]he had a very anxious, scared tone in her voice." RP 463. Rader objected to Heather calling 911 and she had to promise not to tell the truth before he would permit her to dial the phone. RP 438-39. She had to go upstairs to call 911 because Rader was screaming so loudly she couldn't hear; her daughter's voice could be heard on the recording of the call. RP 419, 440. While Heather Rader was on the phone with the 911 dispatcher, she went to get her daughter to take her along. She was still terrified. RP 463. The daughter was crying and yelling. RP 464. Her daughter went with her to the hospital. RP 441. The responding firefighter/EMT testified that

there was a child with Heather Rader and the child was crying and distraught. RP 163.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable, 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).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Rader argues that Heather Rader's daughter could not have seen the unlawful imprisonment, and that is likely the case.⁵ But Heather Rader's testimony, the truth of which Rader must admit, was that he constantly yelled and screamed. It is unlikely that he was silent during this incident, or that there was no sound when Heather Rader's head hit the counter or her body hit the floor. Unless this was a large, sound-proofed house, for which there is no evidence, it is a reasonable inference that the daughter heard the scuffle downstairs. Similarly, while she would not have seen the lighter fluid being poured on her mother's legs and the match being struck, she certainly heard her mother screaming. She would have heard Rader yelling. There is no other reasonable explanation for her extreme distress.

It takes a certain audacity to commit crimes which cause the victim to scream with pain, and then argue that even if a minor child heard the screaming she didn't see or hear the crime. The State maintains that the noise that accompanies a crime is part and parcel of the crime. The evidence, and the reasonable inferences from it, permitted the jury to find beyond a reasonable doubt that

⁵ The statute does not specifically require that the child actually see or hear the crime being committed, only that he or she be "within sight or sound." RCW 9.94A.535(h)(ii).

Heather Rader's daughter heard the crimes being committed. There was sufficient evidence to support the aggravating factor and the court was within its discretion to impose the exceptional sentence.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Rader's convictions, the aggravating sentencing factor, and the exceptional sentence.

Respectfully submitted this 1st day of December, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of State's Response to Personal Restraint Petition, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND VIA US MAIL TO--

JODI BACKLUND, ATTORNEY FOR APPELLANT
BACKLUNDMISTRY@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of December, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

December 06, 2012 - 2:16 PM

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