

NO. 43709-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON CHRISTOPHER SCHEIBEL,

Appellant.

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

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
1. Mr. Scheibel’s conviction for felony harassment infringed his Fourteenth Amendment right to due process because the court’s instructions relieved the State of its obligation to prove Mr. Buchan reasonably feared Mr. Scheibel’s threat to kill him.	1
2. The trial court erred in admitting ER 404(b) evidence offered to prove Mr. Buchan reasonably feared Mr. Scheibel’s threat to kill.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
1. A trial court’s instructions must inform the jury of the State’s burden to prove every essential element of the charged crime. Here, the court’s instructions relieved the State of its burden to show that Mr. Buchan reasonably feared Mr. Scheibel would kill him. Did the trial court’s instructions relieve the State of its burden of proof in violation of Mr. Scheibel’s Fourteenth Amendment right to due process?	1
2. Was the instructional error harmless when the evidence failed to establish that Mr. Buchan reasonably believed Mr. Scheibel would kill him?	1
3. The trial court abuses its discretion when it allows into evidence a defendant’s prior bad acts without adhering to the admission standards set forth in ER 404(b). Here, the trial court initially followed ER 404(b) standards by refusing to admit Mr. Scheibel’s criminal history as it was more prejudicial than probative in proving Mr. Buchan’s fear of Mr. Scheibel. But then the court changed course and allowed in a broad statement of Mr. Scheibel’s bad character as propensity evidence to support Mr. Buchan’s claimed fear with no regard for the ER 404(b) standards. In doing so, did the trial court abuse its discretion?	1

4. Was the trial court’s admission of improper propensity evidence harmless when it was the evidence admitted to prove the required element that Mr. Buchan reasonably feared Mr. Scheibel’s threats?	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	7
1. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT AND THE ERROR WAS NOT HARMLESS.....	7
a. Mr. Scheibel is entitled to object to the instructional error for the first time on appeal.....	8
b. Bifurcated harassment instructions are inadequate unless they distinguish between a threat to cause bodily injury and a threat to kill.	9
c. The bifurcated instructions used at Mr. Scheibel’s trial fail to distinguish between the threat to do bodily injury and the threat to kill.	9
d. The holding in <i>State v. Mills</i> controls. The bifurcated instructions are inherently flawed.....	11
e. The instructional error was not harmless.....	12
2. THE TRIAL COURT FAILED TO PERFORM AN ADEQUATE ER 404(B) ANALYSIS BEFORE ALLOWING MR. SCHEIBEL’S PRIOR BAD ACTS INTO EVIDENCE.	16
a. The trial court’s error in admitting the ER 404(b) evidence allowed the jury to use the evidence as proof of Mr. Scheibel’s bad character.....	17
b. The improperly admitted evidence was not harmless.	22
E. CONCLUSION	22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Page

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 13

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 12

State v. Alvarez, 74 Wn. App. 250, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1 (1995) 21

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995) 8

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000)..... 21

State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 8

State v. Briejer, __ Wn. App. __, 289 P.3d 698, 707 (2012)..... 22

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 12

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003)..... 9

State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002) 22

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 18

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) 17

State v. Harris, 122 Wn. App. 547, 90 P.3d 1133 (2004)..... 8

State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) 8

State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009)..... 18

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)..... 18

<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	8
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	17
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	9, 11, 12, 13, 16
<i>State v. Ragin</i> , 94 Wn. App. 407, 972 P.2d 519 (1999).....	20
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	8
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	22

Statutes

RCW 9A.46.020(1).....	20
RCW 9A.46.020(1)(a)(i).....	6, 9
RCW 9A.46.020(2)(b)(ii)	6 9
RCW 9A.48.080(1)(a)	6
RCW 9A.56.050.....	6

Other Authorities

ER 404(b).....	1, 2, 16, 17, 18, 20
ER 609.....	19
RAP 2.5(a)(3).....	9
U.S. Const. Amend XIV	8

A. ASSIGNMENTS OF ERROR

1. Mr. Scheibel's conviction for felony harassment infringed his Fourteenth Amendment right to due process because the court's instructions relieved the State of its obligation to prove Mr. Buchan reasonably feared Mr. Scheibel's threat to kill him.

2. The trial court erred in admitting ER 404(b) evidence offered to prove Mr. Buchan reasonably feared Mr. Scheibel's threat to kill.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's instructions must inform the jury of the State's burden to prove every essential element of the charged crime. Here, the court's instructions relieved the State of its burden to show that Mr. Buchan reasonably feared Mr. Scheibel would kill him. Did the trial court's instructions relieve the State of its burden of proof in violation of Mr. Scheibel's Fourteenth Amendment right to due process?

2. Was the instructional error harmless when the evidence failed to establish that Mr. Buchan reasonably believed Mr. Scheibel would kill him?

3. The trial court abuses its discretion when it allows into evidence a defendant's prior bad acts without adhering to the admission standards set forth in ER 404(b). Here, the trial court initially followed ER 404(b) standards by refusing to admit Mr. Scheibel's criminal history as it was

more prejudicial than probative in proving Mr. Buchan's fear of Mr. Scheibel. But then the court changed course and allowed in a broad statement of Mr. Scheibel's y bad character as propensity evidence to support Mr. Buchan's claimed fear with no regard for the ER 404(b) standards. In doing so, did the trial court abuse its discretion?

4. Was the trial court's admission of improper propensity evidence harmless when it was the evidence admitted to prove the required element that Mr. Buchan reasonably feared Mr. Scheibel's threats?

C. STATEMENT OF THE CASE

Jason Scheibel and Karen Gunter lived together for about six months. 1RP 8. When they broke up, Mr. Scheibel owed Ms. Gunter money for a cell phone bill. 1RP 37. Mr. Scheibel worked in Puyallup but spent some weekends in Longview. 1RP 10. On September 18, 2011, he was back in Longview and wanted to pay Ms. Gunter some of the money he owed her. 1RP 13, 17-18, 50. He tried to reach her numerous times by phone and text but she did not respond. 1RP 15-16.

Ms. Gunter was working that evening behind the bar at Scooter's Bar and Grill in Kelso. 1RP 6, 13. Her new friend, Lincoln "Doug" Buchan, was at Scooter's with her. Ms. Gunter and Mr. Buchan drove to Scooter's together in his car. They'd left her car parked on the street near her Longview apartment. 1RP 7, 14.

Mr. Buchan called Mr. Scheibel from Scooter's and told him to stop calling Ms. Gunter and that he now owed him, and not Ms. Gunter, money. Mr. Buchan thought the call made Mr. Scheibel mad because during the call Mr. Scheibel called him a punk and said he would "break him in half." Mr. Buchan hung up on Mr. Scheibel. 1RP 49. Mr. Buchan was unconcerned about any threats. He thought Mr. Scheibel was acting tough and blowing off steam. 1RP 47. That was the first time Mr. Buchan ever interacted with Mr. Scheibel. 1RP 48. Mr. Scheibel called Mr. Buchan back and left him voice mails. Mr. Buchan did not immediately listen to the voice mails. 1RP 49.

Mr. Scheibel continued to call and text Ms. Gunter and Mr. Buchan after Mr. Buchan called him. 1RP 17, 49, 51. Mr. Scheibel showed up at Scooter's. Ms. Gunter ignored Mr. Scheibel and called 911. 1RP 18. Mr. Scheibel left the bar without incident. Mr. Buchan followed him outside and watched him leave. 1RP 19, 49-50.

Before she closed up the bar, Ms. Gunter received a text from Mr. Scheibel that said he had taken the wheels and tires from her car and that the car was on blocks. 1RP 20. There was also a text from him that said her engine was "toast." 1RP 27.

Ms. Gunter characterized her breakup with Mr. Scheibel as difficult. She believed Mr. Scheibel had not come to terms with the end of their relationship. 1RP 8-9.

Ms. Gunter and Mr. Buchan returned to Ms. Gunter's apartment in the early morning hours. Her car was parked where she'd left it but the two wheels and tires on the driver's side were missing. 1RP 21, 52; 2RP 128. The driver's side was propped up with old grassy tires. 1RP 22. Mr. Scheibel had gifted Ms. Gunter with quality used tires during their relationship. 1RP 12. He had not asked her permission to take them back. 1RP 31.

Ms. Gunter went into her garage to see if anything was out of place. She noticed an empty bottle of antifreeze that hadn't been in the garage earlier. 1RP 25-26; 2RP 128-29.

Because of Mr. Scheibel's text about the car's engine being toast, Mr. Buchan put the key in the car's ignition and turned over the engine. The engine fired but there was a clicking noise that had not been there before. 1RP 27, 54; 2RP 131.

Before driving the car, Ms. Gunter had it trailered to a dealership. 1RP 30-31. The mechanic found some coolant in the engine that was not supposed to be there. The mechanic recommended that the engine be torn down to assess the level of coolant in the engine. He gave her an estimate

of \$1,700 to do the tear down. If coolant remained in the engine, it would corrode the engine over time and cause it to fail. The mechanic estimated the cost of a replacement engine at \$2,500 to \$4,000. 1RP 91-97; Exhibit 10 (Supplemental Designation of Clerk's Papers). Mr. Buchan tore down the engine for Ms. Gunter. 1RP 77. Ms. Gunter continued to drive the car. The clicking noise never went away. 1RP 76.

After Ms. Gunter's tires and wheels went missing, she sought a protection order against Mr. Scheibel. 1RP 30. Mr. Buchan went to Puyallup and served the protection order paperwork on Mr. Scheibel at his workplace. After receiving the paperwork, Mr. Scheibel followed Mr. Buchan outside. Mr. Scheibel recognized Mr. Buchan as having been at Scooter's the night he was trying to give Ms. Gunter money. Mr. Scheibel told Mr. Buchan he was not kidding about what he'd said in his messages. 1RP 55. The messages were two voice mail messages Mr. Scheibel left on Mr. Buchan's voice mail after Mr. Buchan called him from Scooter's. In the messages, Mr. Scheibel said he was going to kill Mr. Buchan, i.e., "break him in half." 1RP 55.

It wasn't until some unspecified time later that Mr. Buchan did consider these statements a threat to kill him and he became concerned that Mr. Scheibel would follow through on his threats. 1RP 55-56. In part that was due to Mr. Buchan feeling that Mr. Scheibel had "done his

homework” and “wanted to know who I was.” Mr. Buchan also did “a background check” on Mr. Scheibel. 1RP 56.

After serving the order on Mr. Scheibel, and in response to the voice mail messages, Mr. Buchan responded to the messages by sending Mr. Scheibel text messages calling him a “punk bitch” and a “freak.” He said he did this to keep Mr. Scheibel’s focus on him and away from Ms. Gunter. 1RP 69-71.

The State charged Mr. Scheibel with three crimes: Malicious Mischief in the Second Degree¹ (Count I); Felony Harassment – Threat to Kill² (Count II); and Theft in the Third Degree³ (Count III). CP 1-2.

At trial, the State wanted to introduce evidence of Mr. Buchan’s knowledge of Mr. Scheibel’s “numerous felony convictions specifically burglary.” 1RP 61. Mr. Buchan was particularly concerned that “Mr. Scheibel is the type of individual who would break into someone’s, uh, house.” 1RP 61.

Mr. Scheibel objected, arguing that the State was just trying to “backdoor” into evidence Mr. Scheibel’s criminal history. 1RP 62-63. The court found the admission of the burglary was more prejudicial than probative. 1RP 64. But over Mr. Scheibel’s continuing objections, the

¹ RCW 9A.48.080(1)(a)

² RCW 9A.46.020(1)(a)(i) and RCW 9A.46.020(2)(b)(ii)

³ RCW 9A.56.050

court allowed Mr. Buchan to testify more generally that he'd found out Mr. Scheibel was capable of "doing whatever he wanted to do," and that made him fearful. 1RP 67.

The jury instructions given by the court were those proposed by the State. Supplemental Designation of Clerk's Papers, State's Proposed Instructions (sub. nom 23). Mr. Scheibel did not propose any jury instructions and did not object to the instructions given. 2RP 164.

The court bifurcated the felony harassment instructions. The to-convict instruction listed only the elements for misdemeanor harassment. Supp. Designation of Clerk's Papers, Court's Instructions to the Jury (sub. nom. 24) (Instruction 17). By special verdict, the instructions asked if any threat was a threat to kill. CP 4.

The jury found Mr. Scheibel guilty of all charges. CP 5, 7, 8. He makes a timely appeal of all portions of his judgment and sentence. CP 24.

D. ARGUMENT

1. THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT AND THE ERROR WAS NOT HARMLESS.

The court's bifurcated felony harassment instructions relieved the State of its burden to prove Mr. Buchan reasonably feared Mr. Scheibel

would kill him. As instructed, the jury might believe that Mr. Scheibel placed Mr. Buchan in reasonable fear of bodily injury without considering whether Mr. Scheibel placed Mr. Buchan in reasonable fear of being killed.

The flawed instructions were not harmless. Although it is clear from the record that Mr. Scheibel made a threat to kill Mr. Buchan, under the facts the State cannot prove beyond a reasonable doubt that the jury would find Mr. Buchan was placed in reasonable fear of actually being killed.

- a. Mr. Scheibel is entitled to object to the instructional error for the first time on appeal.

Generally, a “to convict” instruction must contain all elements essential to the conviction. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). A trial court’s failure to instruct the jury as to every element of a crime charged violates due process. U.S. Const. Amend XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Jury instructions are reviewed de novo. *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory constructions. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004).

Even though Mr. Scheibel did not object to the jury instruction at trial, the omission of an element from an instruction is a constitutional error he can raise for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3).

- b. Bifurcated harassment instructions are inadequate unless they distinguish between a threat to cause bodily injury and a threat to kill.

A person is guilty of misdemeanor harassment if he knowingly threatens to cause bodily injury immediately or in the future to the person threatened and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i); RCW 9A.46.020(2)(b)(ii). When the threat to cause bodily injury is a threat to kill, the harassment constitutes a felony. RCW 9A.46.020(2)(b). The State must additionally prove that the victim reasonably feared the defendant would carry out the threat to kill. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). While bifurcated harassment instructions are constitutionally permissible, the instructions must clearly set forth this requirement. *Mills*, 154 Wn.2d at 10-11.

- c. The bifurcated instructions used at Mr. Scheibel's trial fail to distinguish between the threat to do bodily injury and the threat to kill.

The trial court issued four jury instructions relevant to this issue. Jury Instruction 15 defined misdemeanor harassment:

A person commits the crime of harassment when he, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Supp. Clerks' Papers, Court's Instructions to the Jury (sub. nom 24).

Jury Instruction 16 reinforced that the crime of harassment threatens bodily injury instead of death.

Bodily injury means physical pain or injury, illness or an impairment of physical condition.

Supp. Clerks' Papers, Court's Instructions to the Jury.

Jury Instruction 17, the "to convict" instruction, only mentions reasonable fear of bodily injury.

To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 19, 2011, the defendant knowingly threatened to cause bodily injury immediately or in the future to Lincoln Douglas Buchan;
- (2) That the words or conduct of the defendant placed Lincoln Douglas Buchan in reasonable fear that the threat 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.

If you find from the evidence that these have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Supp. Clerks' Papers, Court's Instructions to the Jury.

Finally, in Special Verdict Form A for Harassment, the jury is still not told that they have to find the required element that beyond a reasonable doubt Mr. Buchan reasonably believed Mr. Scheibel's threat was a threat to kill him.

USE THIS SPECIAL VERDICT FORM ONLY IF YOU FIND THE DEFENDANT GUILTY OF HARASSMENT. IF YOU FIND THE DEFENDANT NOT GUILTY OF HARASSMENT, DO NOT USE THIS SPECIAL VERDICT FORM.

We, the jury, return a special verdict by answering as follows:

Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person?

ANSWER: _____
(Write "yes", or "no" or "no unanimous decision")

The jury filled in "YES." CP 28.

d. The holding in *State v. Mills* controls. The bifurcated instructions are inherently flawed.

In *Mills*, our Supreme Court considered virtually identical bifurcated felony harassment jury instructions. *Mills*, 154 Wn.2d at 4 (reversing on the grounds that the jury instructions did not clearly set forth the requirement that the jury must find that the victim was placed in

reasonable fear that the threat to kill would be carried out). As in *Mills*, the “to convict” instruction here set forth the misdemeanor elements of harassment based on a threat to cause bodily injury. *Mills*, at 13.

And here, much like in *Mills*, the special verdict form asked, “Was the defendant's threat to cause bodily harm a threat to kill the person threatened?” *Mills*, 154 Wn.2d at 13. Nowhere was felony harassment separately defined. More importantly, nowhere was the jury instructed that it had to find beyond a reasonable doubt that Mr. Buchan reasonably feared Mr. Scheibel would carry out his threat to kill him. The jury might have believed it could convict Mr. Scheibel if he placed Mr. Buchan in reasonable fear of bodily injury without considering whether he placed him in fear of being killed. *Mills*, at 15. Under *Mills*, the jury was not instructed on all the elements required to convict Mr. Scheibel of felony harassment.

e. The instructional error was not harmless.

Instructional error is reviewed to determine if it is harmless. In *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), the court determined that an instructional error could be found harmless if, beyond a reasonable doubt, “ ‘the error complained of did not contribute to the verdict obtained.’ ” (quoting *Neder v. United States*, 527 U.S. 1, 15, 119

S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))).

The *Mills* court was unable to find the error harmless. *Mills*, 154 Wn.2d at 15 n. 7. There the defendant damaged the victim's car and left the victim phone messages, threatening to kill her and slit her neck. *Mills*, at 5. The victim testified that she was “very scared” after the phone call and, given the defendant's criminal history of having stabbed someone else, “thought all the more [the defendant] would carry out what she said she would do.” *Id.* Although it was clear from the record that Mills made a threat to kill, the court could not say beyond a reasonable doubt that the jury would find the victim was placed in reasonable fear of being killed.

Like *Mills*, the instructional error in Mr. Scheibel's case is not harmless. The night Ms. Gunter was working at Scooter's, Mr. Buchan called Mr. Scheibel and told him to leave Ms. Gunter alone. RP 47. In response, Mr. Scheibel told Mr. Buchan over that phone that he would “break him in half.” 1RP 47. Mr. Buchan did not believe the threat and understood it instead as “a guy blowing off steam.” 1RP 47.

Mr. Buchan did have some concerns about Mr. Scheibel's threats a couple of days later after he travelled to Mr. Scheibel's workplace in Puyallup and served Mr. Scheibel with a no contact order restraining him from contact with Ms. Gunter. After Mr. Buchan served Mr. Scheibel

with the order, Mr. Scheibel followed Mr. Buchan out to his car, told Mr. Buchan he recognized him as the guy from the bar, and said would follow through on his earlier threats. 1RP 56.

Those threats were contained in two voice mail messages Mr. Scheibel left on Mr. Buchan's voice mail shortly after Mr. Buchan had called Mr. Scheibel from Scooter's. Mr. Buchan had yet to listen to the voice mails. He ultimately did listen to the voice mails and later turned them over to the police. The voice mails were played for the jury. In the voice mails, Mr. Scheibel continued to threaten to "break Mr. Buchan in two" and said that he was a "fucking dead man." 2RP 140-41.

Mr. Buchan had no further contact with Mr. Scheibel within a day or two of the service of the no contact order. 1RP 86. At some point, Mr. Buchan looked into Mr. Scheibel's "background" and it "made me concerned that it was pretty much, he was capable of doing whatever he really wanted to do." 1RP at 68. His conclusion based on information he found on an unnamed website. 1RP 72-73, 77. The website purported to give Mr. Buchan information about Mr. Scheibel's criminal history, to include that Mr. Scheibel possibly had a conviction for assault of a public servant. 1RP 78-79. At trial, Mr. Buchan could not produce any documentation supporting the information he supposed found on-line. 1RP 80-86.

(It is notable that no assault convictions of any kind appear as convictions on either defense counsel's computer-based record of Mr. Scheibel's criminal history or on the Prosecutor's Statement of Defendant's Criminal History. Supp. Designation of Clerk's Papers, Prosecutor's Statement of Defendant's Criminal History, (sub. nom. 5) and Exhibit 13).⁴

During the time when he was theoretically afraid of Mr. Scheibel, Mr. Buchan sent Mr. Scheibel two taunting emails:

I asked her and she said yes, she would love to marry me. Thanks again, you punk bitch.

1RP 70.

Thanks, freak, for all the insane things you've done to Karen. You acting like the punk chubby you are. She told of (sic) yesterday, she has been waiting for me all her life.

1RP 71.

Mr. Buchan knew where Mr. Scheibel worked. But nothing suggested the reverse was true, that Mr. Scheibel knew where Mr. Buchan worked or lived. Nothing in the record suggests that Mr. Scheibel made any effort to find Mr. Buchan. The record only indicates these two adult men knew how to contact and taunt each other electronically via text and voice mail.

⁴ Neither the Prosecutor's Statement of Defendant's Criminal History nor Exhibit 13 were provided to the jury.

Like *Mills*, although it is clear from the record that Mr. Scheibel made threats to kill Mr. Buchan, it cannot be said beyond a reasonable doubt, based upon the evidence, that the jury would find that Mr. Buchan was placed in reasonable fear of being killed. Therefore, instructing the jury with flawed felony harassment jury instructions was not harmless. *Mills*, 154 Wn.2d at 15.

2. THE TRIAL COURT FAILED TO PERFORM AN ADEQUATE ER 404(B) ANALYSIS BEFORE ALLOWING MR. SCHEIBEL'S PRIOR BAD ACTS INTO EVIDENCE.

The trial court abused its discretion when it allowed Mr. Buchan to testify he'd learned Mr. Scheibel was generally a bad person. The evidence was admitted under ER 404(b)⁵ to explain to the jury why Mr. Buchan reasonably believed Mr. Scheibel's threat to kill him. But all the evidence did was allow the jury to view Mr. Scheibel as a person of a generally bad character who had a propensity to violate the rights of others. Such propensity evidence is not admissible. The trial court's error in admitting it was not harmless.

⁵ ER 404(b) Other Crimes, Wrongs, or Acts. 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.

- a. The trial court's error in admitting the ER 404(b) evidence allowed the jury to use the evidence as proof of Mr. Scheibel's bad character.

ER 404(b) is a categorical bar to admission of evidence of prior misconduct 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). The purpose of the rule is to prohibit the admission of such evidence to show that the defendant is a "criminal type" and thus likely guilty of committing the crime charged, while allowing its admission for other, legitimate purposes such as proof of motive or intent. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The analytical approach to determine the admissibility of a person's prior crimes, wrongs, or acts under ER 404(b) is thorough and well settled. When the State seeks admission of evidence under ER 404(b), that the defendant has committed bad acts that constitute crimes other than the acts charged, the trial court must: (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any

unfair prejudicial effect the evidence may have upon the fact-finder. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.* This standard is also violated when the trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Here, the trial court abused its discretion when it failed to abide by the ER 404(b) rules before admitting evidence of Mr. Scheibel's prior bad acts.

To prove Mr. Buchan's reasonable fear, the State sought to admit information that Mr. Buchan did his own "background search" of Mr. Scheibel. Specifically, the State argued, "my understanding is that Mr. Buchan did a, uh, criminal history background search on, uh, Mr. Scheibel and discovered, uh, numerous felony convictions specifically burglary. 1RP 61. Mr. Buchan's concern was that Mr. Scheibel was the type of individual who'd break into someone's home. 1RP 61. Mr. Scheibel objected to the State's effort to "back door" Mr. Scheibel's criminal

history into the case.⁶ 1RP 63. The court agreed with Mr. Scheibel and found the purported criminal history, including residential burglary and thefts, more prejudicial than probative. 1RP 64.

The State was frustrated with the court when the court found the offered evidence of Mr. Buchan to be more prejudicial than probative as it left the State with no reasonable basis for Mr. Buchan to fear Mr. Scheibel.

MR. BRITAIN:⁷ Well, Your Honor, um, the State would then request to allow, uh, Mr. Buchan to testify, um, simply that he researched, uh, Mr. Scheibel and based on what he discovered became fearful because Mr. Buchan has to be allowed to testify why he was afraid of Mr. Scheibel. Um, that is a necessary element of the case.

1RP 64-65.

Again Mr. Scheibel objected by pointing out the obvious. “I think that’s an even slippery (sic) slope to put that out there and then leave it in a jury’s mind to wonder if my client had killed somebody or what he had done. And to leave it open ended like this is – is actually more prejudicial and more damaging than, uh, the resolution that the court’s already reached.” 1RP 65.

The court subsequently allowed Mr. Buchan to testify that he “dug into [Mr. Scheibel’s] background history and, uh, what I seen is, made me

⁶ Mr. Scheibel did not testify. As such, his criminal history was not admissible. ER 609.

⁷ Mr. Britain is the prosecutor.

concerned that it was pretty much, he was capable of doing whatever he really wanted to do.” 1RP 67. The court stated its basis for allowing the evidence.

JUDGE HAAN: Oh. It – it is an element and it needs to be, uh, testimony needs to be allowed and regards to his state of mind and is, uh, you know, feelings in regard to it, so, uh, I am inclined to allow him to at least testify to that. Um --.

1RP 65.

However, allowing Mr. Buchan to testify to his “feelings” when his feelings are not based on facts supported by a preponderance of the evidence assessment means that the court had no way to weigh the offered evidence and to assess whether it actually occurred. Nothing occurred other than Mr. Buchan thought Mr. Scheibel was generally of a bad character. That sort of testimony is purely propensity evidence that is not allowed under ER 404(b).

Instances of prior bad acts are generally admissible in prosecutions for felony harassment. A defendant is guilty of felony harassment if he threatens to cause bodily injury to a person, and the person is placed in “reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). The fact-finder applies an objective standard to determine whether the victim's fear that the threat will be carried out is reasonable. *State v. Ragin*, 94 Wn. App. 407, 411-412, 972 P.2d 519 (1999). This requires the

jury to “consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.” *State v. Alvarez*, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1 (1995). To establish context, the victim can testify to his knowledge of prior violent acts relevant to the reasonable fear element. *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (prior act evidence that defendant bragged about his earlier assaults against fellow inmates admissible in prosecution against defendant for harassment of fellow inmate to prove that inmate reasonably feared defendant's threats of violence would be carried out); *Ragin*, 94 Wn. App. at 411-412 (trial court did not abuse its discretion in admitting victim testimony that defendant previously told him of a conviction for armed robbery and involvement in domestic violence as evidence of defendant's prior bad acts in prosecution for felony harassment).

What the court should have done in this instance was stick to its prior ruling and exclude the State's offered evidence because it was more prejudice than probative. A watered down, non-specific, propensity-laden version of the excluded evidence did not make it admissible. It is not the trial court's place to assist the State in inventing evidence to help the State's case.

- b. The improperly admitted evidence was not harmless.

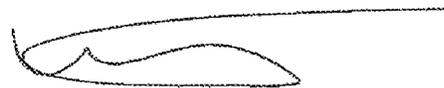
“ ‘An evidentiary error [that] is not of constitutional magnitude ... requires reversal only if the error, within reasonable probability, materially affected the outcome.’ ” *State v. Everybodytalksabout*, 145 Wn.2d 456, 468–69, 39 P.3d 294 (2002) (quoting *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997)). Conversely, “[t]he error is harmless if the evidence is of minor significance compared to the overall evidence as a whole.” *Everybodytalksabout*, 145 Wn.2d at 469; *State v. Briejer*, ___ Wn. App. ___, 289 P.3d 698, 707 (2012).

Here the error, within reasonable probability, materially affected the outcome of the case. Without the evidence, the jury had no yardstick by which to measure the reasonableness of Mr. Buchan’s fear.

E. CONCLUSION

Mr. Scheibel’s felony harassment conviction should be reversed and remanded to the trial court.

Respectfully submitted this 19th day of February 2013.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

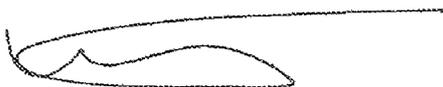
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Sean M. Brittain, Cowlitz County Prosecutor's Office, at SasserM@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Jason C. Scheibel, DOC#735995, Larch Corrections Center, 15314 NE Dole Valley Rd., Yacolt, WA 98675-9531

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed February 19, 2013, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Jason Christopher Scheibel

COWLITZ COUNTY ASSIGNED COUNSEL

February 19, 2013 - 8:59 AM

Transmittal Letter

Document Uploaded: 437091-Appellant's Brief.pdf

Case Name: State v. Jason Christopher Scheibel

Court of Appeals Case Number: 43709-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: lisa.tabbut@comcast.net

A copy of this document has been emailed to the following addresses:

SasserM@co.cowlitz.wa.us