No. 32461-3-III

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Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER SORIA-NANAMKIN,

Appellant.

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

The Honorable Judge Ruth Reukauf

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A jury found Francisco Javier Soria-Nanamkin guilty of one count of first degree burglary, one count of unlawful imprisonment, one count of theft of a motor vehicle, and one count of second degree assault against Tanya Abrego.

Mr. Soria-Nanamkin testified in his own defense and admitted assaulting Ms. Abrego. The trial court ruled Mr. Soria-Nanamkin's post-arrest statement to law enforcement admissible at trial, following a CrR 3.5 hearing. In the statement, Mr. Soria-Nanamkin denied touching Ms. Abrego. The State offered this statement in its case-in-chief, and defense counsel did not object. Mr. Soria-Nanamkin was denied effective assistance of counsel based on the failure to object to the admission of this statement.

The trial court admitted evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b), over Mr. Soria-Nanamkin's objection. The trial court initially ruled the evidence was admissible for the purpose of assessing Ms. Abrego's credibility, then later clarified the evidence was admissible to show Ms. Abrego's state of mind. The trial court abused its discretion in admitting this evidence, and the error was not harmless.

There was insufficient evidence to support Mr. Soria-Nanamkin's conviction for unlawful imprisonment, because there was no evidence that he restrained Ms. Abrego in a manner that substantially interfered with her liberty. The only evidence to support such a finding was the testimony of Ms. Abrego that Mr. Soria-Nanamkin verbally ordered her to get into her car on two occasions. Mr. Soria-Nanamkin did not grab Ms. Abrego or otherwise physically force her into the car.

At sentencing, the trial court imposed a community custody condition requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment. Because neither the jury nor the trial court made a finding of domestic violence, the trial court lacked authority to impose this condition.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Soria-Nanamkin guilty of unlawful imprisonment, where the evidence was insufficient that Mr. Soria-Nanamkin restrained Ms. Abrego in a manner that substantially interfered with her liberty.
2. The trial court erred in admitting evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b), and the error was not harmless.
3. Mr. Soria-Nanamkin was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of his statement to law enforcement on evidentiary grounds.
4. The trial court erred in imposing a condition of community custody requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: The trial court erred in finding Mr. Soria-Nanamkin guilty of unlawful imprisonment, where the evidence was insufficient that Mr. Soria-Nanamkin restrained Ms. Abrego in a manner that substantially interfered with her liberty.

Issue 2: The trial court abused its discretion in admitting evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b), and the error was not harmless.

Issue 3: Mr. Soria-Nanamkin was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of his statement to law enforcement on evidentiary grounds.

Issue 4: The trial court erred in imposing a condition of community custody requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment.

D. STATEMENT OF THE CASE

Francisco Javier Soria-Nanamkin and Tanya Abrego were in a relationship. (RP[1] 218, 455). In the early morning hours of September 6, 2012, Mr. Soria-Nanamkin called Ms. Abrego and asked her to come pick him up. (RP 224-225, 457, 465). Ms. Abrego went and picked up Mr. Soria-Nanamkin, drove him to a location he requested, and returned home. (RP 226-230, 457-458, 466, 468-469).

According to Ms. Abrego, she then went back to sleep, but was awoken by loud banging at the back door of her house. (RP 230-231).

[1] The Report of Proceedings consists of seven separate volumes. The five consecutively paginated volumes, beginning on April 23, 2014 and ending on May 1, 2014, contain the jury trial, and are referred to herein collectively as "RP." References to the other two volumes include the date.

She ran into her roommate's room, told him to call the police, and then felt somebody hit the back of her head. (RP 231). According to Ms. Abrego, this person was Mr. Soria-Nanamkin, and he did not have permission to come into her home. (RP 232). Mr. Soria-Nanamkin proceeded to physically assault Ms. Abrego. (RP 231-232, 237-240, 314, 378, 380-383, 423-424, 459-460, 472-474).

According to Ms. Abrego, following the assault, Mr. Soria-Nanamkin told her to get in her car, and he drove her to his girlfriend's house and told her to throw rocks at his girlfriend's car. (RP 242-245). Mr. Soria-Nanamkin then told Ms. Abrego to get back in her car, and he took her home. (RP 245-246, 283, 462). According to Ms. Abrego, Ms. Soria-Nanamkin left her residence in her car, without her permission, and he did not bring the car back. (RP 247-249, 283-284, 293, 339).

Mr. Soria-Nanamkin was arrested later that day, and interviewed by Yakima Police Department Detective Chad Janis. (RP 351, 356-358). Detective Janis took a recorded statement from Mr. Soria-Nanamkin. (RP (Apr. 22, 2014) 24-43; RP 356).

The State charged Mr. Soria-Nanamkin with one count of first degree burglary – domestic violence, one count of second degree kidnapping – domestic violence, one count of theft of a motor vehicle – domestic violence, and one count of second degree assault – domestic

violence. (CP 11-12). The case proceeded to a jury trial. (RP 182-563). Prior to trial, the trial court held a CrR 3.5 hearing and ruled that Mr. Soria-Nanamkin's statement made to Detective Janis was admissible at trial. (RP (Apr. 22, 2014) 11-102).

On the first day of trial, the State sought to admit evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b), through the testimony of Ms. Abrego. (RP 190-208). The evidence included prior assaults of Ms. Abrego by Mr. Soria-Nanamkin, threats against her and her son by Mr. Soria-Nanamkin, and a specific incident where Mr. Soria-Nanamkin drove her to a location where he said he would abandon her. (RP 192-196, 199-200). The State argued the evidence should be admitted at trial for the following reasons:

> First of all, with regard to 2nd Degree Assault and also assault which is the underpinning or the premise of the 1st Degree Burglary. Need to show that a person is placed in fear as part of the general definition of assault.
> . . .
> And would also indicate with regard to 2nd Degree Kidnapping . . . [m]y understanding of the testimony that would be provided in this area is that she was ordered into her vehicle by the defendant. That she was threatened that she could be hurt worse. I would anticipate that the history as she's provided is part of the reason for the level of fear that she had. Part of the offer of proof had to do with threats by the defendant to take her some---to some remote area to abandon her . . . On the night in question with the allegations of the 2nd Degree Kidnapping she's ordered into her car. . . [i]t's believed that the history as provided in the relationship heightened the concern that she had for the potential use of life threatening force.

> . . . .
> And specifically with the assault and with the kidnapping it also helps explain her reaction and her understanding of the danger that she was in.

(RP 200-202, 204).

Mr. Soria-Nanamkin objected to the admission of this evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego, arguing that these prior interactions were similar to the charged incidents, uncorroborated, and extremely prejudicial with the prejudice outweighing the probative value. (RP 202-204).

The trial court ruled the evidence admissible under ER 404(b), for the purpose of assessing Ms. Abrego's credibility:

> Here what we have is very similar to what's being discussed in the Division I case [*State v. Baker*, 162 Wn. App. 468, 259 P.3d 270 (2011)]. That the Court did find in *Baker* that the jury was entitled to evaluate the victim's credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has had on the victim. I'm compelled in this case that it does---it would go to the extent that the state is arguing to give an explanation. So I am going to note the defendant's objection. I am going to allow the limited inquiry into this are [sic].

(RP 206-207).

The trial court then found "the probative value of it would outweigh the prejudicial to understand in this regard the victim's level of fear, and

actions that she took during the incident in question that there is a nexus with the prior domestic violence that had occurred." (RP 207-208).

Ms. Abrego testified consistent with the facts stated above. (RP 215-293). She also testified that Mr. Soria-Nanamkin did not live with her during their relationship, but that he did occasionally stay at her house. (RP 222). She testified the following events occurred after the assault:

> [The State]: Alright. And then what happens after that?
> [Ms. Abrego]: [Mr. Soria-Nanamkin] tells me to go with him.
> [The State]: Alright. Does he---what---does he tell you where you're to go?
> [Ms. Abrego]: No. He just told me, "Bitch, get in the car. We're going somewhere."
> . . . .
> [The State]: Alright. And did you want to get in the car and go with him?
> [Ms. Abrego]: No.

(RP 242).

Ms. Abrego testified that the following events occurred after Mr. Soria-Nanamkin drove her to his girlfriend's house and told her to throw rocks at his girlfriend's car:

> [Ms. Abrego]: . . . But the neighbor came out and started yelling at us. What we were doing. And that's when he told me to, "Get f---in the fucking car again. And let's go."
> [The State]: Alright. Are those words that you're using for us?
> [Ms. Abrego]: Yes.
> [The State]: So what did you do?
> [Ms. Abrego]: I got in---and I got in the car.
> [The State]: How come you got back in the car?
> [Ms. Abrego]: Because he was gonna drive me back home.

> [The State]: Alright. And did he do that?
> [Ms. Abrego]: Yes.

(RP 245).

Ms. Abrego testified to several prior interactions with Mr. Soria-Nanamkin: that Mr. Soria-Nanamkin physically abused her, and that he would threaten to hurt her and her son, telling her he would "[m]ake us disappear" which she took to mean "I felt he would kill me at one point." (RP 218-221). She also testified to the following prior interaction with Mr. Soria-Nanamkin:

> There was a point where he would drive out in Wiley/Sealy. Out where the native land. Because he is native and he knew about the lands. I didn't know if it [sic]. He would take me there. Um, threaten me to leave me there with no transportation, no cell phone, and naked in the middle of the night. The anticipation happened and I tried jumping out of the car and scraped my knees. So he pulled me from the hair, punched me in the face, and threw me back in the car.

(RP 221).

Ms. Abrego testified she did not report any of these prior interactions with Mr. Soria-Nanamkin to law enforcement because she was "embarrassed and scared." (RP 221, 279).

Detective Janis testified that in his statement made after his arrest, Mr. Soria-Nanamkin denied touching Ms. Abrego. (RP 363, 366). Defense counsel did not object. (RP 363, 366).

Mr. Soria-Nanamkin testified in his own defense. (RP 455-479). He testified that in September 2012, he was staying with Ms. Abrego. (RP 455-456, 469). He testified that on the night in question, he went to the house in order to get his things, and that he did not break in. (RP 459, 467-469). Mr. Soria-Nanamkin testified that he and Ms. Abrego got into an argument, and he assaulted her. (RP 459-460, 472-474).

Mr. Soria-Nanamkin testified it was Ms. Abrego's idea to go to his girlfriend's house, and that Ms. Abrego drove them there. (RP 460-462, 475-476). He testified he did not force Ms. Abrego to go with him to his girlfriend's house, and that he did not steal Ms. Abrego's car. (RP 462-463, 476-478). Mr. Soria-Nanamkin testified "she was the operator of the vehicle the entire time." (RP 478).

During the jury instructions conference, Mr. Soria-Nanamkin requested a limiting instruction regarding the previously admitted ER 404(b) evidence. (RP 508-511). The State told the trial court, "[y]our Honor's ruling was essentially that it was admissible for the victim's state of mind[,]" and the trial court agreed. (RP 509). The trial court clarified its basis for admitting the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b): "[i]t was to---solely from the victim's perspective as why the actions the defendant was perpetrating on her

would've had the impact that they . . . [t]hat they had." (RP 509-510).

The trial court gave the jury the following limiting instruction:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony of prior acts of domestic violence and may be considered by you only for the purpose of the victim's state of mind.

(CP 331; RP 517).

With respect to the charge of second degree kidnapping – domestic violence, the jury was instructed on the lesser-included offense of unlawful imprisonment. (CP 341; RP 519). The jury was instructed that in order to convict Mr. Soria-Nanamkin of unlawful imprisonment, it had find the following elements beyond a reasonable doubt:

> (1) That on or about September 6, 2012, the defendant restrained the movements of [Ms.] Abrego in a manner that substantially interfered with her liberty;
> (2) That such restraint was
> (a) without [Ms.] Abrego's consent; or
> (b) accomplished by physical force, intimidation, or deception;
> (3) That such restraint was without legal authority;
> (4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and
> (5) That any of these acts occurred in the State of Washington.

(CP 344; RP 520).

The jury was given a special verdict form for each count, asking the jury "[w]ere [Mr.] Soria-Nanamkin and [Ms.] Abrego members of the same family or household[.]" (CP 357-359, 365-368; RP 525-527). The

jury was given the following definitional instruction for purpose of the special verdict forms:

> For purposes of this case, "family or household members" means adult persons who are presently residing together or who have resided together in the past or persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship.
> "Dating relationship" means a social relationship of a romantic nature. In deciding whether two people had a "dating relationship," you may consider all relevant factors, including (a) the nature of any relationship between them; (b) the length of time that any relationship existed; and (c) the frequency of any interaction between them.

(CP 358; RP 526).

In its closing argument, the State outlined the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego admitted under ER 404(b), and argued "these acts contributed to the victim's state of mind and help explain the level of fear and the background that you are being brought into, ladies and gentlemen when we now turn to the date of September the 6th of 2012 . . . ." (RP 528-529). The State further argued "[i]t's the background that explains her state of mind and the level of fear that was exacerbated to an extreme degree by the conduct of Francisco Soria-Nanamkin." (RP 536). The State continued in this line of argument: "[h]aving replete---having a mind replete with fear from the past and from the present of the injuries that she was suffered, he ordered her into her own vehicle to go to a home where she was unlikely to be found." (RP

542). The State also mentioned the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego in its rebuttal closing argument, arguing that the interactions affected Ms. Abrego's state of mind. (RP 557, 560).

Also in its closing argument and rebuttal closing argument, the State mentioned that in his statement to Detective Janis, Mr. Soria-Nanamkin denied touching Ms. Abrego. (RP 532-533, 556).

The jury found Mr. Soria-Nanamkin guilty of first degree burglary, the lesser included offense of unlawful imprisonment, theft of a motor vehicle, and second degree assault. (CP 360-364; RP 567). The jury answered "no" to the special verdict form for each count. (CP 365-368; RP 567-570).

When sentencing Mr. Soria-Nanamkin, the trial court imposed the following condition of community custody:

> Report promptly to a Washington State Certified Domestic Violence Perpetrator Treatment Program for evaluation and promptly enter into and complete any recommended treatment by the end of supervision.

(CP 373; RP (May 5, 2014) 19).

The trial court did not make a finding of domestic violence. (CP 370-377; RP (May 5, 2014) 1-24. The State requested a harassment no-contact order while acknowledging that "[d]omestic violence was not a finding in this case." (CP 378; RP (May 5, 2014) 4).

Mr. Soria-Nanamkin timely appealed. (CP 379).

E. ARGUMENT

Issue 1: The trial court erred in finding Mr. Soria-Nanamkin guilty of unlawful imprisonment, where the evidence was insufficient that Mr. Soria-Nanamkin restrained Ms. Abrego in a manner that substantially interfered with her liberty.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

"A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1); *see also* CP 344; RP 520. "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). A substantial interference in this context means "a 'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 892 (1979). This Court has stated the following regarding the definition of restraint:

> The fact that the legislature chose to make the restraint a felony is indicative of the serious nature of the act it contemplated when it inserted the word "substantial" in the definition of restraint. It intended more serious conduct than stopping someone on the street in a mistaken belief as to the person's identity or facetiously pushing an elevator button so as to take another occupant beyond the floor which he or she intended to go. Yet, unlawful imprisonment was to be a lesser offense than kidnapping as that crime is now defined, I. e., by restraining someone in a secret place or use or threat of deadly force.

Id. at 884-85.

In *Robinson*, the defendant challenged his unlawful imprisonment conviction, arguing the State failed to establish he had substantially interfered with the victim's liberty. *Id*. at 884. The court disagreed, where "[t]he defendant stopped his car, asked [the victim] he didn't know if she

wanted a ride. She refused. He then drove around the block, stopped, chased and grabbed her, attempting to pull her toward his car." *Id*. at 885.

In *State v. Washington*, the defendant argued there was insufficient evidence to support his conviction of unlawful imprisonment based upon an incident where he physically forced the victim to get into a car. *State v. Washington*, 135 Wn. App. 42, 46, 49-51, 143 P.3d 606 (2006). The defendant argued he did not substantially interfere with the victim's freedom of movement. *Id*. at 50. The court disagreed and found sufficient evidence supported the unlawful imprisonment conviction, where the defendant ordered the victim into the car, and grabbed her by the clothes and pulled her back inside the car when she tried to leave. *Id*.

Here, there was insufficient evidence that Mr. Soria-Nanamkin restrained Ms. Abrego in a manner that substantially interfered with her liberty. The only evidence to support such a finding was the testimony of Ms. Abrego that Mr. Soria-Nanamkin verbally ordered her to get into her car on two occasions. (RP 242, 245). First, Ms. Abrego testified that when Mr. Soria-Nanamkin drove her to his girlfriend's house to throw rocks at his girlfriend's car, "[h]e just told me, 'Bitch, get in the car. We're going somewhere." (RP 242). Ms. Abrego stated she did not want to get in the car and go with him. (RP 242). Second, Ms. Abrego testified that after the rock throwing incident, Mr. Soria-Nanamkin "told me to,

'[g]et f---in the fucking car again. And let's go.'" (RP 245). Ms. Abrego stated she got back in the car because Mr. Soria-Nanamkin was going to drive her home, which he did. (RP 245).

Mr. Soria-Nanamkin's mere statements telling Ms. Abrego to get into her car do not show he restrained Ms. Abrego in a manner that substantially interfered with her liberty, as required to support a conviction for unlawful imprisonment. *See* RCW 9A.40.040(1); RCW 9A.40.010(6); *Robinson*, 20 Wn. App. at 884-85; *Washington*, 135 Wn. App. at 50. Unlike in *Robinson* and in *Washington*, Mr. Soria-Nanamkin did not physically force Ms. Abrego into the car or grab her. *See Robinson*, 20 Wn. App. at 885; *Washington*, 135 Wn. App. at 50.

In addition, evidence admitted at trial, under ER 404(b), of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego should not be considered when evaluating the sufficiency of the evidence for the unlawful imprisonment conviction, because this evidence was improperly admitted, as argued in Issue 2 below.

A rational trier of fact could not have found Mr. Soria-Nanamkin guilty, beyond a reasonable doubt, of unlawful imprisonment. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). Therefore, his conviction for unlawful imprisonment should be reversed and the

charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: The trial court abused its discretion in admitting evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER 404(b), and the error was not harmless.

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct:

> 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).

In order to admit evidence under ER 404(b), the trial court must follow four steps: "'(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Id.* (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). "In doubtful cases, the evidence should be excluded." *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776).

The trial court's interpretation of ER 404(b) is reviewed de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009) (citing *Foxhoven*, 161 Wn.2d at 174). If the trial court correctly interprets the rule, its decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id*. (citing *Foxhoven*, 161 Wn.2d at 174). "A trial court abuses its discretion where it fails to abide by the rule's requirements." *Id*. (citing *Foxhoven*, 161 Wn.2d at 174). In addition, "[d]iscretion is abused if it is exercised on untenable grounds or for untenable reasons." *Thang*, 145 Wn.2d at 642 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, the State moved to admit evidence, pursuant to ER 404(b), of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego. (RP 190-208). Mr. Soria-Nanamkin objected to the admission of this evidence, arguing that the prior interactions were similar to the charged incidents, uncorroborated, and extremely prejudicial with the prejudice outweighing the probative value. (RP 202-204). The trial court initially ruled the evidence admissible for the purpose of assessing Ms. Abrego's credibility. (RP 206-207). The trial court later clarified that it ruled the evidence admissible to show the victim's state of mind. (RP 509-510). In addition, in ruling that the probative value of the evidence outweighed the prejudicial value, the trial court stated the evidence would help the jury

understand Ms. Abrego's level of fear. (RP 207-208). The jury was given a limiting instruction stating that it may consider the prior interactions "for the purpose of the victim's state of mind." (CP 331; RP 517).

During trial, Ms. Abrego testified to several prior interactions with Mr. Soria-Nanamkin, including physical abuse and threats to hurt her and her son. (RP 218-221). She also testified to a specific incident where he drove her to native land and threatened to leave her there, and that when she tried to jump out of the car, he grabbed her, assaulted her, and threw her back in the car. (RP 221).

The trial court erred in its initial basis for admitting the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego, assessing Ms. Abrego's credibility. (RP 206-207). Division I has held "[e]vidence of a defendant's prior crimes, wrongs, or acts is . . . admissible . . . to assist the jury in assessing the credibility of a witness who is the victim of domestic violence at the hands of the defendant." *State v. Baker*, 162 Wn. App. 468, 470, 474-75, 259 P.3d (2011); *see also State v. Grant*, 83 Wn. App. 98, 106-08, 920 P.2d 609 (1996) (evidence of the defendant's prior assaults was admissible under ER 404(b) to assess the victim's credibility as a witness).

These Division I cases do not apply to support admission of the ER 404(b) evidence here, because this is not a domestic violence case; both

the jury and the trial court declined to make a domestic violence finding. (CP 365-368, 370-377; RP 567-570; RP (May 5, 2014) 1-24); s*ee also Baker*, 162 Wn. App. at 470, 474-75; *Grant*, 83 Wn. App. at 106-08.

Should this Court disagree, then Mr. Soria-Nanamkin asks this Court to decline to follow these Division I cases and rule the evidence was not admissible for the purpose of assessing Ms. Abrego's credibility. *See Baker*, 162 Wn. App. at 470, 474-75; *Grant*, 83 Wn. App. at 106-08; *see also State v. Gunderson*, 337 P.3d 1090, 1093-94, 1094 n.2 (Wash. 2014) (finding the trial court erred in admitting a prior domestic violence incident to impeach the victim's testimony, where the victim did not recant or contradict any of her prior statements).

Nonetheless, although the trial court initially found the evidence admissible to assess Ms. Abrego's credibility, it later clarified it admitted the evidence to show Ms. Abrego's state of mind, and the jury was instructed it could consider the evidence for this purpose alone. (CP 331; RP 509-510, 517). Therefore, the sole basis for admission of the evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego that this Court should consider is state of mind.

The trial court erred in admitting the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego to show Ms. Abrego's state of mind. Evidence of prior bad acts is admissible to show a victim's state of mind

when state of mind is a necessary element that the State is required to prove in the case. *See State v. Johnson*, 172 Wn. App. 112, 120-23, 297 P.3d 710 (2012), *aff'd in part, rev'd in part*, 180 Wn.2d 295, 325 P.3d 135 (2014) (state of mind was a necessary element for felony harassment charge and assault charges alleging fear of bodily injury); *see also State v. Barragan*, 102 Wn. App. 754, 758-60, 9 P.3d 942 (2000) (prior bad acts evidence was relevant to prove reasonable fear element of a harassment charge). Here, however, the victim's state of mind was not a necessary element the State was required to prove. (CP 337, 340, 344, 348, 354).

Further, the prejudicial effect of the evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego outweighs its probative value. *See Foxhoven*, 161 Wn.2d at 174 (quoting *Thang*, 145 Wn.2d at 642). Ms. Abrego's testimony of past physical abuse was similar to the assault charged here, and her testimony of the specific incident where Mr. Soria-Nanamkin drove her to native land and threatened to leave her was similar to the kidnapping/unlawful imprisonment charge. (RP 218-221). Any probative value is outweighed by the prejudice generated by the evidence that Mr. Soria-Nanamkin acted in conformity with these past interactions at the time of the offenses here. In addition, the error in admitting the evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego was exacerbated by the State's mention of the evidence in

its closing arguments. (RP 528-529, 536, 542, 557, 560); *see also Thang*, 145 Wn.2d at 645 (finding the potential prejudice of evidence admitted under ER 404(b) outweighed its probative value, based in part upon the mention of the evidence in the State's closing argument).

The error in admitting the ER 404(b) evidence was not harmless. "Evidentiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, such errors are not harmless when, "within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred." *Id*. (citing *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982)); *see also State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (stating this harmless error standard).

The error in admitting the ER 404(b) evidence was not harmless for the charges of first degree burglary, unlawful imprisonment, and theft of a motor vehicle. The evidence supporting these counts was not overwhelming, but rather hinged on credibility, whether the jury believed the testimony of Mr. Soria-Nanamkin or Ms. Abrego. Evidence of the prior interactions between Mr. Soria-Nanamkin and Ms. Abrego improperly bolstered Ms. Abrego's testimony and improperly showed Mr. Soria-Nanamkin had a propensity for the conduct charged. (RP 218-221). In addition, the error was heightened by the State's closing arguments

regarding the evidence. (RP 528-529, 536, 542, 557, 560). Mr. Soria-Nanamkin's convictions for first degree burglary, unlawful imprisonment, and theft of a motor vehicle should be reversed and the case remanded for a new trial.

Issue 3: Mr. Soria-Nanamkin was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of his statement to law enforcement on evidentiary grounds.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned decision-making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

The admission of a defendant's statement at trial that was ruled admissible under CrR 3.5 can still be challenged on evidentiary grounds:

> A determination that a statement was voluntarily obtained and admissible under CrR 3.5, is not the same as a determination that the statement is otherwise admissible under the Rules of Evidence. A CrR 3.5 hearing is a threshold determination of whether a custodial statement was obtained with proper regard for the defendant's rights. That is, the issue in a CrR 3.5 hearing is constitutional, not evidentiary. The trial court does not address the contents of a statement, but rather addresses the circumstances under which the statement is made. Further analysis at trial of admissibility under the Rules of Evidence is not foreclosed.

State v. Viney, 52 Wn. App. 507, 510, 761 P.2d 75 (1988).

Here, Detective Janis testified that in his statement made after his arrest, Mr. Soria-Nanamkin denied touching Ms. Abrego. (RP 363, 366). Defense counsel did not object. (RP 363, 366). An objection to this evidence based on relevancy would have been sustained. *See Sexsmith*, 138 Wn. App. at 509. The evidence was not relevant because it was a denial of criminal conduct and it did not pertain to the elements the State had to prove at trial. *See* ER 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). The State had to prove that Mr. Soria-Nanamkin committed the charged conduct, not that he denied it.

Furthermore, the evidence would have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice. . . ." ER 403. The evidence was highly prejudicial, because the issues at trial hinged on credibility, whether the jury believed the testimony of Mr. Soria-Nanamkin or Ms. Abrego. (RP 222, 232, 242-245, 247-249, 283-284, 455-456, 459, 462-463, 467-469, 476-478). Detective Janis' testimony that Mr. Soria-Nanamkin denied touching Ms. Abrego following his arrest affected his credibility. (RP 363, 366). Mr. Soria-Nanamkin took the stand and admitted assaulting Ms. Abrego. (RP 459-

460, 472-474). The only reason for the State to offer Detective Janis' testimony that Mr. Soria-Nanamkin denied touching Ms. Abrego was to support an inference that he was untruthful.

Detective Janis' testimony regarding Mr. Soria-Nanamkin's statement was offered in the State's case-in-chief as an admission of a party opponent, not as impeachment evidence following contradictory testimony by Mr. Soria-Nanamkin. *See* ER 801(d)(2); ER 607; ER 613(b). The statement was not properly admitted as an admission of a party opponent because, as argued above, the statement was not relevant and it was more prejudicial than probative. *See* ER 801(d)(2); ER 401; ER 403. Further, the statement was not properly admitted as impeachment evidence; it could only be used as impeachment evidence after Mr. Soria-Nanamkin testified and gave a contradictory statement. *See* ER 607; ER 613(b).

Defense counsel's deficient performance prejudiced Mr. Soria-Nanamkin. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial, for the charges of first degree burglary, unlawful imprisonment, and theft of a motor vehicle, would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also Sexsmith*, 138 Wn. App. at 509. The issues at trial hinged on

credibility, whether the jury believed the testimony of Mr. Soria-Nanamkin or Ms. Abrego. (RP 222, 232, 242-245, 247-249, 283-284, 455-456, 459, 462-463, 467-469, 476-478). The irrelevant and prejudicial evidence affected Mr. Soria-Nanamkin's credibility and supported an inference that he was untruthful. The State emphasized the irrelevant and prejudicial evidence in its closing argument and rebuttal closing argument, by mentioning that in his statement to Detective Janis, Mr. Soria-Nanamkin denied touching Ms. Abrego. (RP 532-533, 556). Without the irrelevant and prejudicial evidence the result of the trial, for the charges of first degree burglary, unlawful imprisonment, and theft of a motor vehicle, would have been different.

Moreover, defense counsel did not make a tactical decision by failing to object to Detective Janis' testimony that Mr. Soria-Nanamkin denied touching Ms. Abrego. *See Grier*, 171 Wn.2d at 33; *Sexsmith*, 138 Wn. App. at 509. Because the case hinged on credibility, defense counsel's failure to object to this irrelevant and prejudicial evidence was not based on reasonable decision-making. *In re Hubert*, 138 Wn. App. at 928.

Mr. Soria-Nanamkin has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to Detective Janis' testimony that Mr. Soria-Nanamkin denied touching Ms. Abrego

constituted deficient performance and Mr. Soria-Nanamkin was prejudiced by that deficient performance. Therefore, his convictions for first degree burglary, unlawful imprisonment, and theft of a motor vehicle should be reversed and the case remanded for a new trial.

Issue 4: The trial court erred in imposing a condition of community custody requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment.

The trial court imposed the following condition of community custody on Mr. Soria-Nanamkin:

> Report promptly to a Washington State Certified Domestic Violence Perpetrator Treatment Program for evaluation and promptly enter into and complete any recommended treatment by the end of supervision.

(CP 373; RP (May 5, 2014) 19).

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only

if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

The Sentencing Reform Act of 1981 (SRA) grants the trial court discretion to order a defendant convicted of a crime of domestic violence to participate in a domestic violence perpetrator program as a condition of community custody, under specified circumstances:

> In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

RCW 9.94A.703(4)(a).

RCW 10.99.020 defines "[d]omestic violence" as a crime "committed by one family or household member against another[.]" RCW 10.99.020(5). The statute also defines the term "family or household members." *See* RCW 10.99.020(3).

Here, the jury was given special verdict forms, asking "[w]ere [Mr.] Soria-Nanamkin and [Ms.] Abrego members of the same family or household[.]" (CP 357-359, 365-368; RP 525-527). The jury was also given an instruction defining the term "family or household members." (CP 358; RP 526). The jury answered "no" to each of the special verdict forms, finding that Mr. Soria-Nanamkin and Ms. Abrego were not family or household members. (CP 365-368; RP 567-570). In addition, the trial

court did not make a finding of domestic violence. (CP 370-377; RP (May 5, 2014) 1-24). The State also acknowledged that "[d]omestic violence was not a finding in this case." (CP 378; RP (May 5, 2014) 4).

Mr. Soria-Nanamkin was not convicted of a crime of domestic violence; neither the jury nor the trial court made a finding of domestic violence. (CP 365-368, 370-377; RP 567-570; RP (May 5, 2014) 1-24). Therefore, the trial court erred in imposing a condition of community custody requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment. *See* RCW 9.94A.703(4)(a) (authorizing this condition under specified circumstances, for an offender convicted of a crime of domestic violence).

The SRA also grants the trial court discretion to order a defendant to "[p]articipate in crime-related treatment or counseling services" and to"[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community" as conditions of community custody. RCW 9.94A.703(3)(c), (d). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). "A trial

court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]" *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). The court further found that "alcohol counseling 'reasonably relates' to the offender's risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." *Id*. at 208.

Here, because neither the jury nor the trial court made a finding of domestic violence, there is no evidence in the record that domestic violence contributed to Mr. Soria-Nanamkin's crimes, or that the requirement to participate in a domestic violence perpetrator treatment evaluation and complete any recommended treatment was crime-related. (CP 365-368, 370-377; RP 567-570; RP (May 5, 2014) 1-24).
The trial court erred by requiring Mr. Soria-Nanamkin to participate in a domestic violence perpetrator treatment evaluation and complete any recommended treatment as a condition of community custody, because it

was not crime-related. *See Jones*, 118 Wn. App. at 207-08; *see also* RCW 9.94A.703(3)(c). In addition, obtaining a domestic violence perpetrator treatment evaluation and completing any recommended treatment does not "reasonably relate" to Mr. Soria-Nanamkin's risk of reoffending or the safety of the community, because there is no evidence that domestic violence contributed to the offense. *Jones*, 118 Wn. App. at 208; *see also* RCW 9.94A.703(3)(d).

Accordingly, this court should remand this case with an order that the trial court strike the community custody condition requiring Mr. Soria-Nanamkin to "[r]eport promptly to a Washington State Certified Domestic Violence Perpetrator Treatment Program for evaluation and promptly enter into and complete any recommended treatment by the end of supervision." (CP 373); *see State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (stating the remedy for an erroneous community custody condition was to strike it on remand).

F. CONCLUSION

There was insufficient evidence to support Mr. Soria-Nanamkin's conviction for unlawful imprisonment. The conviction should be reversed and the charge dismissed with prejudice.

The trial court abused its discretion in admitting evidence of prior interactions between Mr. Soria-Nanamkin and Ms. Abrego under ER

404(b). Mr. Soria-Nanamkin was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of his statement to Detective Janis on evidentiary grounds. For these two reasons, Mr. Soria-Nanamkin's convictions for first degree burglary, unlawful imprisonment, and theft of a motor vehicle should be reversed and the case remanded for a new trial.

At a minimum, this court should remand this case with an order that the trial court strike the community custody condition requiring Mr. Soria-Nanamkin to report for a domestic violence perpetrator treatment evaluation and complete any recommended treatment.

Respectfully submitted this 5th day of January, 2015.

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