

79332-8  
NO. 33323-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KHA DANH MAGERS,

Appellant.

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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FILED  
COURT OF APPEALS  
DIVISION II

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

The Honorable Stephanie A. Arend, Judge

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OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the defense motion to exclude evidence of Mr. Magers' prior arrest for domestic violence.

2. The evidence by police officers in their reports of the prior domestic violence was testimonial hearsay and the introduction of the evidence denied Mr. Magers his state and federal constitutional rights to confront the witnesses against him.

3. The trial court erred in denying the defense motion to exclude evidence that the complaining witness, Carissa Ray, said that Mr. Magers had just been released from prison for domestic violence and had been coming and going from the residence since that time.

4. The trial court erred in allowing the state to elicit testimony that Mr. Magers had been convicted of violent crimes in his past.

5. The trial court in erred instructing the jurors to consider Mr. Magers' prior bad acts in determining the credibility of Ms. Ray; this was an unconstitutional comment on the evidence. Instruction 5 (attached)

6. The trial court erred in admitting the out-of-court statements of Ms. Ray to the police, as excited utterances.

7. The trial court's decision to prohibit Mr. Magers from eliciting testimony that Ms. Ray knew he was facing a third strike

conviction and life without the possibility of parole and to prohibit taht testimony denied Mr. Magers his state and federal constitutional rights to due process, compulsory process, and confrontation of witnesses.

8. The police witness's testimony was improper opinion testimony as to guilt; this denied Mr. Magers his state and federal constitutional rights to a jury determination of guilt or innocence based on evidence presented at trial.

9. The prosecutor committed misconduct in opening argument by instructing the jury on the elements of the crimes and in inadequately instructing the jury on the definition of assault and in presenting hearsay statements of Ms. Ray before they had been found admissible.

10. The prosecutor's misconduct in closing argument, in asking the jurors to convict based on facts they were aware of about domestic violence from their own experiences and the experiences of friends and relatives, denied Mr. Magers a fair trial.

11. Cumulative error denied Mr. Magers a fair trial.

12. Mr. Magers' sentence of life without the possibility of parole is unconstitutional under Blakely v. Washington.

13. Mr. Magers' sentence of life without the possibility of parole constitutes cruel and unusual punishment.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in admitting evidence of Mr. Magers' prior bad acts to show Ms. Ray's state of mind at the time of the alleged assault, where the evidence was unnecessary to establish the reasonableness of her fear and only impeached her testimony that she did not fear Mr. Magers, and where the unfair prejudice of the evidence substantially outweighed any probative value?

2. Did the trial court err in admitting prior bad acts of Mr. Magers to establish the credibility of Ms. Ray, where the only relevance of the prior bad acts was to establish the character of Mr. Magers to show that he was the type of person to have committed the charged crimes and therefore Ms. Ray must have been untruthful when she denied that he committed the charged crime?

3. Did the trial court comment on the evidence in instructing the jury that Mr. Magers' prior bad acts could be considered in determining Ms. Ray's credibility where the instruction conveyed to the jurors the court's opinion that Ms. Ray was not truthful in testifying that Mr. Magers did not assault or unlawfully imprison her because his prior bad acts showed that he was the type of person to have committed the crimes?

4. Did the trial court's admission of statements by police officers who did not testify at trial and who were not shown to be unavailable violate Mr. Magers' rights under the Sixth Amendment to confront the witnesses against him?

5. Did the trial court err in admitting Ms. Ray's alleged out-of-court statements as excited utterances where the state's theory of the case was that she was able to consider and weigh her circumstances and deny that Mr. Magers was in the house when she believed it would be best for her to do so and to give a different answer once she felt safe to do so?

6. Did the trial court deny Mr. Magers his state and federal rights to present testimony and defend against the charges by allowing the state to introduce evidence to try to show that Ms. Ray was afraid to testify against Mr. Magers because she feared he would harm her when he was released from jail, and not let Mr. Magers question Ms. Ray about her knowledge that all she had to do was help convict Mr. Magers and he would never be released from prison and could never harm her?

7. Does due process require that evidentiary rules be a "two-way street" such that if one party gets to introduce evidence on an issue the other party must be allowed to introduce evidence on that issue?

8. Did Officer Lang give impermissible testimony as to guilt by testifying that Ms. Ray was "obviously traumatized" and that when he spoke to her he "knew something was terribly wrong"?

9. Did the prosecutor commit misconduct in opening statement, by disclosing evidence which the trial court had reserved ruling on, and by instructing the jury, in violation of court rule and Article 4, § 16, on the elements of the crime and an erroneous definition of assault?

10. Did the prosecutor's misconduct in closing argument in asking the jurors to rely on facts not in evidence and evidence actually excluded by the trial court, deny Mr. Magers a fair trial?

11. Did cumulative error deny Mr. Magers a fair trial?

12. Does Mr. Magers' sentence of life without the possibility of parole violate Blakely v. Washington because it is a sentence beyond the sentence authorized by the jury verdict and because it required further fact finding to impose, where the trial court did not require that necessary facts be found by a jury or by proof beyond a reasonable doubt?

13. Under the Sixth Amendment, must even the fact of a prior conviction be proven to a jury by proof beyond a reasonable doubt before it can be used to justify an sentence beyond the sentence authorized by the jury verdict?

14. Does Mr. Magers' sentence of life without the possibility of parole violate the 8th Amendment because it is grossly disproportional to the conduct he was convicted of committing and violate the cruel punishment clause of the Washington constitution because his convictions have been deemed by the Legislature, in seriousness level, as less serious than most other felonies?

**C. STATEMENT OF THE CASE**

**1. Procedural facts**

On January 20, 2004, the Pierce County Prosecutor's office charged Kha Danh Magers with second degree assault of Carissa Ray (Count I), and unlawful imprisonment of Ms. Ray (Count II). CP 1-3. The state filed a persistent offender notice on the same date, informing Mr. Magers that he was charged with offenses which would be a third strikes. CP 4.

On February 25, 2004, Ms. Ray filed a statement indicating that Mr. Magers did not assault her as alleged in the information. CP 5-7. Ms. Ray stated that the incident which led to Mr. Magers' arrest and charge had started as a "fib" to her parents and that she had continued lying to the police because she feared that she would be taken to jail for encouraging Mr. Magers to violate a no contact order and that her children would be taken from her; in spite of the no contact order, she had called

Mr. Magers and asked him to watch their children while she went to a job interview. CP 5-7. On March 30, 2004, the state filed an amended information adding as a third count an allegation that Mr. Magers violated a no contact order when Ms. Ray visited him in jail. CP 8-10.

Mr. Magers was convicted as charged after a trial before the Honorable Stephanie A. Arend. CP 146-150. On June 1, 2005, Judge Arend imposed judgment and sentence, sentencing Mr. Magers to life without the possibility of parole. CP 163-167.

Mr. Magers timely appealed his conviction and sentence. RP 162.

## **2. Motions in limine**

The defense moved pretrial to exclude: (a) evidence of a prior dismissed domestic violence charge and the facts underlying the charge; (b) testimony by a police officer that Ms. Ray said that Mr. Magers had been released from prison for domestic violence and had been coming and going from Ms. Ray's residence since his release; and (c) evidence of Mr. Magers' prior convictions for violent offenses. RP 13-18, 20-21, 22-33.<sup>1</sup>

The state argued that the prior bad acts evidence was relevant to the credibility of Ms. Ray, whom the state expected to testify favorably

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<sup>1</sup> The verbatim report of proceedings is in consecutively-numbered volumes designated RP. One pretrial hearing which is not included in these volumes is designated 1RP; it is the hearing of March 30, 2004.

to the defense, and to her state of mind at the time of the alleged assault. RP 24, 28, 170. The state also sought to introduce Ms. Ray's statements to the police as substantive evidence under the excited utterance exception to the rule excluding hearsay. RP 11, 38-41, 188-191.

The trial court ruled, after Ms. Ray testified at an evidentiary hearing, that the prior acts had been proven by a preponderance of the evidence and would be admissible at trial under ER 404(b). RP 97-153, 174-177. Defense counsel took exception to the court's rulings. RP 224-228. The court reserved ruling on the admissibility of Ms. Ray's statements as excited utterances. RP 41-42, 188-191, 231, 236, 236-241.

Defense counsel requested to be allowed to inquire if Ms. Ray knew that Mr. Magers faced a third strike conviction if the state were permitted to argue that Ms. Ray recanted because she was afraid of Mr. Magers; a third strike conviction would put Mr. Magers in prison for life with no further possibility of contacting her. RP 154, 174, 194, 219. The trial court ruled that defense counsel could examine Ms. Ray about whether she knew that Mr. Magers was facing a lengthy sentence but could not use the term "three strikes" or life without parole. RP 221-224.

### **3. Prosecutor's opening statement**

Over defense objection, the court permitted the prosecutor to inform the jury of the elements of the charged crimes during opening statement, and to give an erroneous and incomplete definition of assault: "You will be furnished with the definition of assault, and the State will be arguing in the end that an assault can also be an intention to create fear and apprehension of bodily harm." RP 248-250.

The prosecutor also outlined for the jury the allegations and details of the December 2003 alleged incident of domestic violence and also reported the hearsay statements that Ms. Ray allegedly made to the police at the time of the charged incident, even though the trial court had not ruled that the statements were admissible as excited utterances and even though Ms. Ray had obviously not yet testified or been impeached with her statements. RP 251-253.

### **4. Trial evidence**

Twenty-three-year old Carissa Ray explained at trial that she grew up in Olympia, Washington in a sad and non-functional home with her mother Tammy McCullough, her stepfather Mike McCullough and her stepsister. RP 258-261. Her stepfather started molesting Ms. Ray when she was eleven years old, and her mother would not believe her when Ms.

Ray reported his abuse. RP 345-3486. She ran away from home repeatedly when she was a teenager as a result of her stepfather's abuse. RP 345-348.

Ms. Ray met Mr. Magers through his brother during the period in which she was a runaway; they started dating when Ms. Ray was 18 years old; he was the father of her two children. RP 262-265, 350-351.

Ms. Ray explained that even though her family life was miserable, she wanted to maintain a relationship with her mother. RP 352. She had to tell numerous lies to maintain this relationship. RP 352. Ms. Ray did not want to be around her stepfather, who not only molested her repeatedly, but had pushed her and almost caused a miscarriage while she was pregnant with her first child. RP 352-353.

Defense investigator Bob Crow confirmed at trial that he found two cases in Thurston County in which Mike McCullough was listed as the suspect and Ms. Ray as the victim.<sup>2</sup> RP 544-546.

Ms. Ray insisted throughout her testimony that Mr. Magers was a good person who loved their children; she insisted that their arguments were normal family arguments and that he was not physical with her during

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<sup>2</sup> The trial court, however, would not allow the defense to introduce the police reports confirming Ms. Ray's testimony that she had reported the abuse to the police. Defense counsel argued that the statements were admissible as prior consistent statements made before a motive to fabricate had arisen. 181-185.

arguments. RP 266-269, 368. She denied that Mr. Magers hurt her, threatened her or kept her from leaving on the date of the charged incident, January 16, 2004. RP 368, 370, 376.

Ms. Ray had written a letter on January 21, 2004, stating that on January 16, Mr. Magers came to her house to watch their children while she went to a job interview. RP 356. She knew that there was a no contact order in place, but she had no one else to watch the children. RP 356. Ms. Ray stated in the letter that Mr. Magers fixed lunch for her when she returned. RP 357. She explained that she had gone to visit a friend to borrow money for food and diapers. RP 357-358. She intended to go shopping, but Mr. Magers asked her to stay because he had something special planned at 4:00 p.m. RP 358. After 4:00, her mother and stepfather called and wanted Ms. Ray to come to their house. RP 358. She lied to them about Mr. Magers not letting her leave her house because she did not want to be near her stepfather. RP 358-359.

At six o'clock, Ms. Ray wrote in the letter, she drove in her car to the store and phoned her mother from a pay phone. RP 359. During the call, she exaggerated her first lie. RP 359-360. She reported to her parents that Mr. Magers had a knife; she explained that she did not want them to be angry because she would not come to their house and she did

not want her stepfather to have a reason to keep her from seeing her mother. RP 385-386.

Ms. Ray reiterated at trial that she had told her parents that she and Mr. Magers were fighting because they wanted her to come and take her mother to the hospital. RP 286. When she called again from the store later, she said he had a knife to make up a further excuse. RP 287. She had gone to the store to call her parents because she did not want Mr. Magers to overhear the conversation. RP 289.

Ms. Ray testified that when the police came to her door on January 16 and asked her if Mr. Magers was there she said, "no," because she did not want to get him into trouble because of an outstanding no contact order. RP 292. Her son said that Mr. Magers was there. RP 293. Ms. Ray insisted that after her son alerted the police, she asked them to tell him that she told them he was there so that he would come out. RP 294-295.

Ms. Ray testified that she had been surprised when the police arrived. RP 360. She had not thought that her parents would call the police because her stepfather hit her mother and sister. RP 385. Several days after the incident, Ms. Ray had given her letter to the victim advocate explaining what had happened. RP 369-372. She had sent a second letter

to court in February hoping to stop the chain of events she started with her untruths. RP 374.

When asked about the details of the January 16 incident, after the police arrived, Ms. Ray testified that she could not recall anything other than Mr. Magers' getting arrested and her having to sit in a police car with her children for a very long time. RP 284-285.

Over defense objection that the question was leading, the state was allowed to ask Ms. Ray if she recalled telling the police that Mr. Magers held a knife to her neck. RP 297. The prosecutor asked Ms. Ray if she had told the police that Mr. Magers had just been released from prison for domestic violence and had been coming and going from the house since that time. RP 299. In response, Ms. Ray insisted that before she went inside to give a written statement, her children were screaming and yelling and the police did not ask her questions. RP 296-298. She felt a lot of pressure when giving her written statement because the police were saying that they hoped they had not gone through everything for nothing and because of pressure from her parents. RP 329-330. Her mother arrived just as she was walking back to her house. RP 317.

Ms. Ray testified that she could barely remember a time in December 2003 when the police said she and Mr. Magers were fighting.

RP 270-271. She had not called the police. RP 276. Over defense objection that there was nothing to impeach since Ms. Ray could not remember the occasion, the state was permitted to show Ms. Ray a copy of the police report from the December incident to refresh her memory. RP 271-274. When Ms. Ray responded that the police came to the house, but that Mr. Magers did not shove her, the prosecutor asked if she said he did, if the statement said he pushed her into the car, and if the police said in the report that they saw Mr. Magers pushing and shoving her. RP 274-277. Over defense objection, the state was permitted to ask her if she represented to the police in her statement that she phoned her mother during the incident and Mr. Magers didn't know. RP 396.

Because of the trial court's pretrial rulings, the prosecutor was permitted to elicit from Ms. Ray that Mr. Magers was in prison for fighting when their first child was born. RP 263. When the prosecutor pressed Ms. Ray for details of his "legal troubles," she responded that she had seen some papers indicating that he had been fighting. RP 265.

Ms. Ray testified that she was feeling under pressure during her testimony because she had spent three days in jail for failing to appear in court, because she had been forced to post cash bond for her release and because she was required to call the prosecutor every Friday. RP 343-344.

Ms. Ray testified that she had been afraid that she would be put in jail and her children taken from her. RP 374, 377.

Ms. Ray's testimony that she had no injuries from the December incident and that she had only a bruise after the January incident because she bruised easily was unrebutted; there was nothing to indicate that a knife had been held to her neck. RP 375-376.

Seattle Police Officer Jim Lang testified that he responded to the 911 call on January 16, 2004, at 6:53 p.m. RP 401, 405-407. According to Lang, when Ms. Ray finally answered the door, she had her child at her side and said that Mr. Magers was not there. RP 408-409. He testified that from her demeanor he "knew something was terribly wrong." RP 409. He testified further, over defense hearsay objection, that as soon as he had Ms. Ray and the child step outside, he could see she was relieved and said that Mr. Magers was inside. RP 409-410.

Outside the presence of the jury, Lang testified that Ms. Ray was terrified; she was not hysterical, but she was crying and acting as if "her brain was overloaded." RP 413. He described her as like a dog cowering in the corner. RP 416. Based on this testimony, the court ruled that Ms. Ray's hearsay statements were admissible as excited utterances. RP 419.

After this ruling, the state elicited from Lang that Ms. Ray said that Mr. Magers was going to hurt her and that he was violent. RP 430. Lang testified that she rambled about how violent he was. RP 430, 435. He testified that she said Mr. Mager put a sword to the back of her head and threatened to cut it off. RP 435. Lang testified that Ms. Ray did not know her right from her left because she was "obviously traumatized." RP 436.

Over further objection that the state was eliciting double hearsay, Lang was permitted to testify that Ms. Ray said that Mr. Magers told her that if she listened to him and did what he said, they would be happy, but if she did not he was going to be mean and cut her head off. RP 442-443. Lang continued that Ms. Ray was afraid that Mr. Magers would get out of jail and hurt her and that she was crying and repeating that he was violent and had just gotten out of jail. RP 443, 447.

On cross examination, Lang agreed that he heard information over the radio as it was sent from the dispatcher. RP 456.

In contrast to Officer Lang's testimony, veteran Tacoma Police Officers David Alred and Alan Morris described Ms. Ray as acting "peculiar" and "a little distraught." RP 493, 583. On cross examination, Officer Alred explained that earlier on January 16, 2004, there had been a call based on allegations that Mr. Magers was refusing

to leave. RP 500-504. The caller, Mike McCullough, told the 911 operator that there were three swords in the house. RP 505.

The knife was one of three decorative swords purchased from a store where Ms. Ray worked. RP 318-320. Alred and Morris described it as dull and as if it had never been honed to sharpness. RP 514-542.

Corrections Sargeant Mark Ferko testified that Ms. Ray had been approved to visit Mr. Magers and did visit him on two and possibly more occasions. RP 520-521, 527-528, 533.

**5. Limiting instruction**

Over defense objection, the court instructed the jury that it could consider Mr. Magers's prior bad acts as relevant to Ms. Ray's state of mind *and* credibility. RP 224, 553-562. Defense counsel asked that consideration be limited to Ms. Ray's state of mind. RP 553-562, 569.

**6. Prosecutor's closing argument**

In closing, the prosecutor argued that the issue for the jury to decide was Ms. Ray's credibility. RP 572. The prosecutor reiterated throughout the argument Ms. Ray's alleged statements that Mr. Magers was violent, going to kill her, and threatened her. RP 573-575, 583, 610, 613. The prosecutor said that Ms. Ray could not remember Mr. Magers' prior history although she knew he had been in and out of jail. RP 579. The

prosecutor told the jurors they could consider Mr. Magers' prior history of domestic violence in considering Ms. Ray's credibility and the reasonableness of her apprehension and fear of bodily injury.<sup>3</sup> RP 583, 585. The prosecutor argued that Ms. Ray did what she needed to do to stay safe. RP 583.

The prosecutor asked the jurors to consider the dynamics of domestic violence relationships, as had been discussed during voir dire. RP 581. When the prosecutor asked the jurors to rely on their experiences of domestic violence with friends, family and themselves, defense counsel's objection that this argument was based on facts not in evidence was sustained. RP 581. The court, however, allowed the prosecutor to argue that jurors could decide "knowing what you know about domestic violence," and that they could "ask yourself if the case is an example of domestic violence relationships and dynamics within them." RP 581.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR BAD ACTS.**

The trial court erred in allowing the state to present evidence to the jury of Mr. Magers' past criminal convictions for "violent" crimes, his

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<sup>3</sup> The prosecutor also argued that Mr. Magers' allegedly saying "I'm going to kill you" would meet the definition of assault. RP 613.

prior jail and prison sentences, and an alleged prior domestic violence *charge* and violation of a prior no contact order. The trial court erroneously ruled that this evidence was relevant to the issue of Ms. Ray's credibility in general and to her state of mind at the time of the charged incident. RP 24, 28, 170. Even assuming without admitting that the evidence had some probative value, that probative value was vastly outweighed by the unfair prejudice of the evidence.

Ms. Ray's state of mind was relevant to two aspects of the assault charge. In addition to proving that Mr. Magers intended to create in Ms. Ray an apprehension and fear of bodily injury, the state had to prove (1) that Ms. Ray actually felt apprehension and imminent fear of bodily injury and (2) that her fear of bodily injury was reasonable. CP 128 (Instruction 9). The ER 404(b) evidence, however, was not admissible to establish Ms. Ray's state of mind with regard to either aspect of the assault charge.

First, proof that Mr. Magers committed the charged act -- that he threatened to kill Ms. Ray while holding a sword to her neck -- would sufficiently establish the reasonableness of her fear of bodily injury. Any person could reasonably fear bodily injury if threatened with a weapon in this way. Evidence of prior bad acts was therefore not necessary or

admissible to establish anything about the reasonableness of Ms. Ray's state of mind.

Second, since Ms. Ray denied that there was a prior domestic violence assault, denied that she was concerned about Mr. Magers' criminal history, and denied that she was actually afraid at the time of the charged incident, the evidence of prior bad acts did not support a claim that she was actually in fear of Mr. Magers. The prior bad acts evidence was at odds with Ms. Ray's state of mind at the time of the incident, as she described it. Proof that a person might be justified in being afraid, or even that they should be afraid, cannot establish that they are or were afraid.

Thus, the evidence of prior bad acts was not admissible because proof of the charged crime established that a victim would be reasonable in fearing bodily injury and because proof that a person might reasonably be in fear cannot establish that they actually are in fear. Further, since Ms. Ray denied that Mr. Magers committed any domestic violence against her or that she feared him, the ER 404(b) evidence could simply not establish *her* state of mind.

The ER 404(b) evidence was not admissible to establish Ms. Ray's credibility. Prior bad acts which are relevant only if they prove that the defendant acted in conformity with his character in committing the charged

crimes are not admissible under ER 404(b). Here, although the prosecutor argued and the trial court agreed that the evidence was relevant to Ms. Ray's credibility, under the facts of the case, that was just another way of saying that the ER 404(b) evidence was admissible to establish Mr. Magers' character for violence. The evidence was relevant to Ms. Ray's truthfulness only insofar as it established Mr. Magers's character as a violent person who was the type to commit the charged crime. This is what ER 404(b) precludes.

Evidence Rules 401, 402, and 403 are the general rules of admissibility of evidence at trial. ER 401 provides that "relevant evidence" is "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." ER 402 restricts evidence at trial to "relevant evidence." ER 403 further restricts the admissibility of evidence. Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

"Unfair prejudice" is evidence that is more likely to arouse an emotional response than a rational decision by the jurors. Lackwood v. A.C.&C., Inc., 109 Wn.2d 235, 744 P.2d 605 (1987); State v. Cameron,

100 Wn.2d 520, 674 P.2d 650 (1983). Unfair evidence is evidence with "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States v. McRae, 593 F.2d 700 (5th Cir. 1979)).

Here, the evidence of prior bad acts was overwhelmingly prejudicial. As recognized by the court in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), where the court reversed a conviction for second degree assault with a deadly weapon based on an inadvertent statement indicating that the defendant had been convicted of a prior crime involving a stabbing, a prior conviction for having "stabbed someone" was inherently prejudicial and of the type likely to impress. It was likely to impress because it was logically if not legally relevant to the issue of whether the defendant committed a similar crime. Escalona, at 256. The court reversed even though the trial court struck the statement and instructed the jury to disregard it. The Escalona court noted that:

While it is presumed that juries follow instructions, see [State v.] Weber [99 Wn.2d 158, 659 P.2d 1102 (1983)], no instruction can "remove the prejudicial impression [created by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

State v. Escalona, at 256. Similarly, in State v. Wilburn, 51 Wn. App. 832, 755 P.2d 842 (1988), the court reversed a conviction based on a reference to the defendant's prior criminal act, in violation of a motion in limine. The court held that such an error cannot be cured by an instruction where the defendant's credibility is a central issue in the case.

This is the rationale underlying ER 404(b) which expressly prohibits admission of "other crimes, wrongs, or acts" to show an accused person's propensity to commit the crime; *i.e.*, to prove a person's character and that the person acted in conformity with that character in committing the charged crime. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) excludes prior criminal conduct, regardless of whether it resulted in conviction, as well as acts which are merely unpopular or disgraceful. Saltarelli, *supra*; United States v. Reed, 647 F.2d 678 (6th Cir. 1981). Such evidence may be admissible for purposes other than to show propensity, but only if proven by a preponderance of the evidence, logically relevant to a material issue, and of greater probative value than its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362.

Here, the unfair prejudice of admitting the evidence was the unfair prejudice identified in Escalona and Wilburn and in ER 404(b), the likelihood that the jurors would convict based on their belief that Mr.

Magers was the type of person to have committed the crimes rather than on the evidence. The evidence had no probative value and certainly no probative value which was not substantially outweighed by its prejudicial impact.

**a. Ms. Ray's state of mind**

The Washington Supreme Court, in State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), provided the analysis for when evidence of prior misconduct may be relevant in cases involving allegations of spousal misconduct. The Powell court held that evidence of quarrels and threats may be relevant to show the defendant's intent, but only where proof that the charged act was done by the defendant does not in itself establish intent. Powell, at 261-262 (citing Saltarelli, 98 Wn.2d at 365-66). Because the strangulation of the victim in Powell established the intent of the perpetrator, evidence of prior assaults and threats was held to be not relevant in that case. Powell, at 262.

Obviously, here, if Mr. Magers held a knife against Ms. Ray's neck and threatened to kill her with it, his intent to either inflict bodily injury or to place Ms. Ray in apprehension and fear of death of bodily injury was established. If he did this, the reasonableness of her fear was also established. The prosecutor recognized this and argued in closing that Mr.

Magers' saying "I'm going to kill you" established the assault. RP 613. No evidence of prior bad acts was necessary or admissible to establish either Mr. Magers' intent *or* the reasonableness of Ms. Ray's fear of bodily injury. The reasonableness of her fear was not a matter of material dispute at trial if Mr. Magers engaged in the conduct the state alleged against him.

Moreover, if proof of prior bad acts is offered in the form of an out-of-court statement, it must fall within an exception to the rules of evidence excluding hearsay. Powell, at 264. The usual exception is state of mind, one of the exceptions relied on by the trial court in this case. The victim's state of mind may be relevant in a homicide case where there are defenses of accident or self-defense interposed by the defense. Powell, at 266; State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). In those instances, the state of mind of the victim is relevant to prove that the declarant spouse would not likely have done the acts claimed by the defense. Parr, 93 Wn.2d at 103. In this case, the state argued that Ms. Ray's state of mind was relevant to the reasonableness of her fear of bodily injury. This, however, would be established by proof of the conduct; a person's fear of bodily injury is reasonable whenever that person is threatened with a sword. No evidence of prior bad acts was necessary or admissible to establish the reasonableness of her fear. Moreover, since Ms. Ray denied that the prior

alleged incident of domestic violence occurred, evidence of it did nothing to establish her actual state of mind; the evidence contradicted her actual state of mind, as she described it.

The introduction of Mr. Magers' alleged prior bad acts to establish Ms. Ray's state of mind, under the facts of this case, turns the logic of the state of mind exception on its head. It was not introduced to establish that her fear was reasonable or her actual state of mind; it was introduced to establish that her refusing to say she was afraid was unreasonable. It was introduced not to show her state of mind and establish an element of assault; it was introduced to impeach her.

Further, evidence of prior bad acts in the form of the reports that the police saw Mr. Magers pushing or shoving Ms. Ray were hearsay for which there was no exception. RP 276-278. Not only were statements by police officers in their reports hearsay, they were testimonial hearsay. They were written with the expectation that they might be used at trial. The officers were not subject to cross examination, nor were the police shown to be unavailable. Admitting their statements was constitutional error under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The trial court erred in allowing the evidence of prior bad acts to establish Ms. Ray's state of mind. By admitting evidence of the prior bad acts through statements by police officers in police reports, the court committed error that was constitutional and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The admission of the evidence and the admission of the testimonial hearsay should require reversal of Mr. Magers' convictions.

**b. Ms. Ray's credibility**

The prior bad acts evidence was not admissible because it was introduced for the sole purpose of establishing that Mr. Magers was the type of person to have committed the charged crime. The claim that the evidence was introduced as relevant to Ms. Ray's credibility should not obscure that purpose. She, under the state's theory, was testifying untruthfully because Mr. Magers was a violent person who committed violence against her in the past and who committed violence against others; it was his character to be violent, and so he must have committed the charged crime.

If the evidence was not introduced to establish Mr. Magers' character for violence, it did not support the state's theory of the case --

that Ms. Ray was testifying untruthfully at trial. This shows the tremendous unfair prejudice of admitting the prior domestic violence evidence and, in particular, the evidence of the "violent" criminal history.

Even where evidence is arguably relevant, there must be a theory besides propensity to justify admission of the evidence. State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999). Where the only link between the acts and the charged act is the defendant, the evidence is merely propensity evidence. State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) (evidence of prior drug convictions not relevant except as inadmissible propensity evidence even where the defendant's theory was unwitting possession of drugs); State v. Trickler, 106 Wn. App. 727, 25 P.2d 445 (2001) (possession of other stolen goods at the same time as possession of credit cards is inadmissible propensity evidence).

The trial court erred in admitting the prior bad acts evidence as relevant to Ms. Ray's credibility. The claim of "credibility" should not obscure the fact that the purpose was to establish that Ms. Ray was not truthful because it was part and parcel of Mr. Magers' character to commit the charged crime. This is forbidden by ER 404(b) and not an independent purpose. In fact, if "credibility" can be grounds for admitting ER 404(b) evidence, where the relevance of the evidence is to establish character, then

in every case where a defendant denies the charged crime by going to trial, the "credibility" of that denial could be put at issue by introducing any available prior bad acts evidence. Credibility, as used at trial, simply meant that Mr. Magers was the type of person who would have committed the crime and any witness who did not agree was not credible. The trial court erred in admitting the prior bad acts evidence to establish credibility.

**c. Inapplicability of state's authority**

The court relied on the decisions in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), and State v. Thach, 126 Wn. App. 297, 106 P.3d 782 (2005). These decisions should not govern this case.

In Grant, the defendant testified at trial that his wife did not tell him she was afraid of being in a relationship with him. Grant, 83 Wn. App. at 104. Under those circumstances, the appellate court held that evidence of prior assaultive behavior was relevant "to explain [Ms. Grant's] statements and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge." Grant, at 106. In other words, the testimony was relevant to bolster the wife's credibility after it was put at issue by the defense; not, as in this case, to impeach the wife's credibility. Moreover, in Grant, there was a significant history of

domestic violence, witnessed by others. This contrasts with the absence of a significant history of domestic violence in this case, the absence of witnesses to such alleged prior domestic violence, and the absence of documented or claimed injury.

Had Mr. Magers attacked the credibility of Ms. Ray in testifying against him at trial, then the evidence of the prior claim of abuse might have been fair rebuttal, even though it was not of the type described in Grant. The defense did not, however, attack her credibility. Ms. Ray denied the abuse and denied the prior abuse.

In Barragan, the evidence of prior assaultive behavior was relevant to the reasonableness of the victim's claimed fear that the defendant would carry out his threat of injury, where the defendant had specifically bragged to the victim about his assaults against others. Barragan, 102 Wn. App. at 759. Here, the threats and actions alleged to be part of the charged crime, if proven, clearly established the reasonableness of any fear felt by Ms. Ray. Further, the prior incidents could not establish that she did in fact experience fear on the charged occasion. Barragan is inapposite.

In Thach, the appellate court held that it was harmless error to admit evidence of prior bad acts in a domestic violence case where the victim testified at trial that the defendant committed the assault and the state did

not use the evidence solely to argue propensity. Here, the victim denied the charged act and the prior act, and the prosecutor's theme in closing argument was that Mr. Magers was violent.

None of the authority relied on by the state and the court held that prior bad acts of the defendant could be used to impeach the credibility of an alleged victim who denied the charged conduct and denied the prior conduct. The trial court erred in admitting the evidence of prior bad acts. The evidence was improperly introduced to establish Mr. Magers' character for violence and the prejudice of the evidence was overwhelming. The jury very likely convicted Mr. Magers because they believed he was a violent person. That was the state's theory.

**d. Summary**

In this case there was no justification for introducing evidence of Mr. Magers' prior incarcerations, prior convictions for "violent" offenses, or prior allegations of domestic violence. The prior bad acts evidence was unnecessary to establish Ms. Ray's state of mind since reasonable fear would be established by proof that Mr. Magers threatened to kill her with a knife. Whether she actually did fear Mr. Magers could not be established by the prior incident where she testified that she did not fear him and the prior incident did not occur.

Further, Ms. Ray's credibility was not established by the prior bad acts. The inference to be drawn was that Mr. Magers was acting in conformity with his character when he committed the charged crime and if Ms. Ray did not agree she must not be considered credible. This is the inference forbidden by ER 404(b). Nothing makes this clearer than the state's insistence that it be permitted to introduce evidence that Mr. Magers had been "violent" and in jail and prison in the past for matters entirely unrelated to domestic violence or Ms. Ray. The admission of this evidence alone should result in the reversal of Mr. Magers' convictions.

**2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS THAT THEY COULD CONSIDER PRIOR BAD ACTS AS RELEVANT TO THE CREDIBILITY OF MS. RAY, THE COMPLAINING WITNESS.**

The court erred in instructing the jury that they could consider the prior bad acts as relevant to Ms. Ray's credibility as well as evidence of her state of mind: "Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind *and her credibility*. You must not consider this evidence for any other purpose." Instruction No. 5 (emphasis added); CP 124.

As argued above, the only way in which Mr. Magers' prior bad acts could be relevant to Ms. Ray's credibility would be if she were untruthful

in denying that he committed the crime. To instruct the jury that they could consider his prior bad acts as relevant to her credibility therefore constituted a comment by the trial court that these bad acts established Mr. Magers' guilt. This was contrary to the basic instruction to the jurors that they are "the sole judges of the credibility of the witnesses and of what weight to be given the testimony of each," and an unconstitutional comment on the evidence by the trial court under Article 1, § 16.<sup>3</sup> CP 119 (Instruction No. 1).

A statement by the judge is a comment on the evidence "if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial." State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981). A comment is constitutional error when "the court's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement." State v. Hansen, 46 Wn. App. at 300 (emphasis in original). Because a comment on the evidence is constitutional error,

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<sup>3</sup> Article 4, § 16 provides:

Judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law.

it may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); State v. Hansen, 46 Wn. App. 272, 300, 730 P.2d 706 (1986).

To instruct the jury that Mr. Magers' prior bad acts are relevant to Ms. Ray's credibility is to instruct the jury that, in the court's opinion, this evidence undermines her testimony that he did not assault her. This is an instruction on the credibility of her testimony and a comment on the evidence. It should require reversal of Mr. Magers' convictions.

**3. THE TRIAL COURT ERRED IN ADMITTING THE STATEMENTS OF MS. RAY AS EXCITED UTTERANCES.**

The trial court erred in admitting as excited utterances statements allegedly made by Ms. Ray to the police. Ms. Ray's statements were not excited utterances because, under the state's theory of the case, she had the capacity to consider her situation and decide to respond untruthfully. Under the state's theory, Ms. Ray was not under the stress of the moment to the degree that she could not consider the consequences to her of her answer to the police.

ER 803(a)(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" need not be excluded as hearsay. The

exception is based on the rationale that an event may be so startling that any statements made while still under the influence of the event are spontaneous, without reflection and truthful:

‘under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.’

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)). As a result, the "key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting Johnson v. Ohls, 76 Wn.2d 398, 405, 457 P.2d 194 (1969)); State v. Brown, 127 Wn.2d 749, 758-759, 903 P.2d 459 (1995).

Accordingly, three conditions must be met: "(1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was still under the stress of the startling event or condition; and (3) the statement must relate to the startling event or condition." State v. Lawrence, 108 Wn. App. 226, \_\_\_\_ P.3d \_\_\_\_ (2001) (citing State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)). "The second element ‘constitutes the essence of the rule’ and ‘[t]he key to the

second element is spontaneity.'" Lawrence 108 Wn. App. at 234 (quoting Chapin, 118 Wn.2d at 688).

In Brown, the Supreme Court held that the trial testimony of the victim that she decided not to tell the truth in a portion of her 911 call defeated a finding that her call was an excited utterance. Brown, 127 Wn.2d at 757-759. The victim testified that she had discussed with her boyfriend the fact that the police might not believe her because she had gone willingly with the defendant and because she was a prostitute and, for this reason, she decided to tell the police that the defendant had abducted her and threatened her with a knife and gun. Brown, 127 Wn.2d at 752. The court held that, by the victim's own testimony, "she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call." Brown, at 759.

Here, the state's theory of the case was that Ms. Ray had the capacity to consider her situation and fabricate a response -- that Mr. Magers was not present inside -- when the police knocked on the door of her house. Under the state's theory, it was only after she was outside the house that she could reconsider and weigh her situation and tell the police that he was in fact inside. In other words, under the state's theory, Ms. Ray's response was determined by her ability to judge her safety by the

circumstances in which she found herself and her ability to revise her response as those circumstances changed. Under Brown, this ability to reflect and respond accordingly precludes Ms. Ray's statements from being excited utterances.

The alleged statements reported by Officer Lang as excited utterances could not have been more inflammatory. It was his testimony that focused on Mr. Magers' alleged violence, Ms. Ray's fear of him, and his alleged threats of harm to her. RP RP 430, 436, 442-443, 443, 447. The erroneous introduction of Ms. Ray's alleged out-of-court statements through Officer Lang was overwhelmingly prejudicial and denied Mr. Magers a fair trial. Introduction of these statements should require reversal of his convictions.

**4. THE DEFENSE WAS CONSTITUTIONALLY ENTITLED TO INTRODUCE EVIDENCE THAT THE COMPLAINING WITNESS KNEW MR. MAGERS FACED A THIRD STRIKE CONVICTION.**

The exclusion of the evidence that Mr. Magers faced convictions for third strike offenses and a sentence of life without the possibility of parole denied him his federal and state constitutional rights under the Sixth Amendment and Const. art. 1, § 22 to present evidence in his own behalf. See Harris v. New York, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643, 645 (1971); Const. art. 1, § 22.

The state was permitted to introduce extremely and unfairly prejudicial evidence, prior bad acts of Mr. Magers, to establish its theory that Ms. Ray was recanting earlier statements to the police on January 16, 2003, because she was afraid of Mr. Magers and afraid that he would get out of jail and injure her if she testified against him at trial. RP 24-25,28, 40, 180. Given this theory and inferences from testimony elicited by the state, Mr. Magers was entitled to ask Ms. Ray if she knew that he was facing a third strike and a sentence of life without parole if convicted. If Ms. Ray were truly afraid of him, as the state argued, then she would be motivated to make sure that he was never out of prison again. Denying Mr. Magers the right to present this evidence denied him his fundamental right to present a defense at trial and elicit testimony from a witness at trial.

As held by the United States Supreme Court in Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the right to compulsory process and to present a defense are fundamental components of due process of law:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19; see also, State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

Indeed, the right to present a defense is so fundamental that it must take precedence over rules and procedures which in other instances would govern the admission or exclusion of evidence. See, e.g., Washington v. Texas, supra (a statute preventing defendants from testifying if tried jointly with others unconstitutionally denied those defendants their right to testify at trial); Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) (a state hearsay rule prohibiting a party from impeaching his or her own witness precluded the defendant from examining a witness who had confessed to the crime and unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime); Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) (an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally burdened the defendant's right to testify at trial).

Moreover, cross-examination on a topic introduced in direct examination may be essential to the jury's ability to find the truth. State

v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); K. Teglund, Wash. Prac., Evidence, section 11 (3rd ed. 1989). Where the state opens the door by presenting evidence, as a matter of fundamental fairness, the defense must be given the opportunity to inquire further on the subject. "The Washington Supreme Court has stated that it would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other parties from further inquiries about it." State v. Lougin, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (citing State v. Gefeller, 76 Wn.2d at 455).

The Gefeller court stated not only an evidentiary principle, but a constitutional principle of due process of law, the "two-way street" principle. For example, under this principle, if a statute requires a defendant to make discovery to the prosecution, then to meet due process requirements, the statute must require the prosecutor to provide discovery to the defendant. Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). If the prosecution can call co-defendants to testify against each other, the statute must allow co-defendants to testify for each other. Washington v. Texas, 388 U.S. at 25.

If Mr. Magers' past criminal history and incarceration were relevant to Ms. Ray's state of mind, then his potential future incarceration was

equally relevant. The trial court erred in denying Mr. Magers the right to present relevant evidence and the right to present a defense. The error was constitutional and not harmless beyond a reasonable doubt. Chapman, supra. Had the jury heard that Ms. Ray knew that Mr. Magers faced the rest of his life in prison and could not have been afraid to testify because he might get out and harm her, the jury might well have rejected the state's theory of the case. The trial court erred in denying him the right to cross examine Ms. Ray about her knowledge that he was facing a third strike conviction. The error was constitutional and certainly not harmless beyond a reasonable doubt.

**5. OFFICER LANG'S TESTIMONY WAS IMPROPER OPINION AS TO GUILT.**

Officer Lang gave his opinion, during his testimony, that constituted impermissible opinion testimony as to guilt. He did so in testifying that when he asked Ms. Ray if Mr. Magers was at the house that he could tell that "something was terribly wrong." RP 409. He did so in testifying that Ms. Ray was "obviously traumatized." This testimony constituted impermissible testimony as to guilt because it represented his opinion that she was traumatized as a result of Mr. Magers' having committed the assault and unlawful imprisonment of her.

"No witness, *lay or expert*, may testify to his opinion as to the guilt of a defendant, whether *by direct statement or inference*." (emphasis added) State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This rule is a limitation on ER 704, which otherwise permits opinions which embrace the ultimate issue to be decided by a trier of fact. See, e.g., State v. Sanders, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992) (noting that, in spite of ER 704, no witness may give an opinion as to the guilt of a criminal defendant).

In State v. Jones, 71 Wn. App. at 812, the court held that the CPS worker's comment to the child, "I believe you," was not a sufficiently clear comment on the defendant's guilt because the CPS worker appeared to be reassuring the child, not making an explicit statement of belief in the victim's story. Jones, 71 Wn. App. at 812-813. In contrast, the CPS worker's further testimony that she felt that the child had been sexually molested by the defendant at a particular point in the child's story, was considered to be a constitutional error, a comment on the defendant's guilt and an invasion of the province of the jury. Jones, 71 Wn. App. at 813.

In State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), the court held that evidence that the child suffered from posttraumatic stress syndrome was not an impermissible comment on the defendant's guilt as

long as the witness did not indicate, directly or indirectly, that her behavior patterns demonstrated sexual abuse. However, the court held that constitutional error did occur when the witness gave her opinion that the posttraumatic stress was secondary to sexual abuse in the particular case. The witness's testimony invaded the province of the jury. Florczak, 76 Wn. App. at 74.

Such a direct opinion as to guilt can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. at 73-74 (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Here, Lang's testimony went beyond his opinion that Ms. Ray was upset; his testimony implied causation. As in Jones and Florczak, the testimony clearly implied a belief that Mr. Magers had committed acts which resulted in the traumatization. This went beyond a description of demeanor and violated Mr. Magers' state and federal constitutional right to a jury trial based on the evidence presented at trial. It should result in the reversal of his convictions.

**6. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.**

The prosecutor committed misconduct in closing argument by inviting the jurors to rely on evidence that was not presented to them at trial. The prosecutor invited the jurors to recall their own experiences or the experiences of friends and family involving domestic violence and to consider the dynamics of domestic violence which had been discussed during voir dire. RP 581. An objection was sustained when the prosecutor started to reiterate the specific dynamics which had been discussed in voir dire. RP 581. The prosecutor was nonetheless permitted to argue to the jurors, over further defense objection, that they could rely on their experiences from outside the courtroom to determine the dynamics of relationships involving domestic violence and apply this to Mr. Magers' case. RP 581. This was misconduct.

Not only was there no evidence about the dynamics of domestic violence relationship presented at trial, the trial court excluded expert testimony on the issue. RP 185-186. The trial court concluded that testimony on the "dynamics" of relationships involving domestic violence would constitute impermissible testimony as to credibility. RP 185-186.

By inviting the jurors to rely on evidence outside the evidence at trial, the prosecutor effectively told the jury that they could convict Mr.

Magers based on unreliable evidence which the defense had no opportunity to confront. This was misconduct and denied Mr. Magers his state and federal rights to confrontation of witnesses and to a fair trial.

Where there is a "substantial likelihood" that the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Even if defense counsel does not object to the misconduct, appellate review is not precluded (1) if the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt, State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997); or (2) "if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." Belgarde, 110 Wn.2d at 507. In this case, defense counsel *did* object. After one objection was sustained, the prosecutor asked essentially the same question again and further objection was overruled. RP 581. Thus, the error is preserved even without a showing that the misconduct was flagrant and ill-intentioned. The misconduct, however, would be established under any standard of

review. Under the facts in this case, the misconduct is constitutional and is not harmless beyond a reasonable doubt.

A prosecutor may not argue facts not in evidence. Belgarde, 110 Wn.2d at 507-509; State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). When a prosecutor does so, he or she essentially testifies in front of the jury and denies the defendant the Sixth and Fourteenth Amendment rights to confront and cross-examine "witnesses." Belgarde, 110 Wn.2d at 509.

In State v. Heaton, 149 Wash. 452, 460-461, 271 P. 89 (1928), the court held that the prosecutor committed misconduct in arguing that he had worked with police witnesses for a long time and knew their character. In so arguing the prosecutor presented facts not in evidence and essentially functioned as a witness at trial.

In Belgarde, the Washington Supreme Court reversed the defendant's convictions because of prosecutorial misconduct in closing argument. Two of the trial witnesses claimed that they waited several weeks before telling the police their stories because of the defendant's involvement in the American Indian Movement (AIM). Belgarde, 110 Wn.2d at 175. The prosecutor during closing argument went to great lengths to describe AIM as a violent, terrorist organization. Belgarde, at 175. The prosecutor

concluded, "Is AIM something to be frightened of when you are an Indian and you live on the reservation? Yes it is." Belgarde, at 175. In reversing Mr. Belgarde's convictions, the Supreme Court explained that the "prosecutor in effect took the witness stand and testified about reservation Indians' perception of the American Indian Movement," thereby supporting the witnesses' explanation for their delay in reporting the defendant's alleged confession, based on facts outside the record. Belgarde, at 176-177. By "testifying" about the American Indian Movement, the prosecutor denied the defendant the right to confront and cross-examine "witnesses." Belgarde at 177.

Here, although the prosecutor was prevented from directly testifying to the jury during closing argument, she made reference to prior discussions and invited the jurors to rely on beliefs and facts which took place outside the courtroom and that were discussed during voir dire. RP 581. This was not an invitation to rely on common sense, it was an invitation for jurors to extract theories about domestic violence from other factual situations and apply them to Mr. Magers' case. The defense had no means of confronting these juror witnesses or the prosecutor. This was misconduct and constitutional error and should result in reversal of Mr. Magers' convictions. It was flagrant misconduct because the prosecutor refused to

accept the trial court's ruling excluding evidence of the "dynamics" of domestic violence and decided to provide that evidence through impermissible means. The prosecutor decided that some outside principle was needed for the jury to discount Ms. Ray's sworn, in-court testimony, and that she would provide that one way or another. This misconduct denied Mr. Magers a fair trial.

**7. THE PROSECUTOR COMMITTED MISCONDUCT IN OPENING STATEMENT.**

The prosecutor committed misconduct at the outset of the trial as well as at the close of trial. The prosecutor committed two types of misconduct in opening statement. Over defense objection, the prosecutor was permitted to instruct the jury on the elements of the charged crimes and to provide an incomplete and erroneous definition of assault. This instruction by the prosecutor gave the jurors an incomplete view of the law applicable to the facts of the case, denied Mr. Magers the opportunity to take exception to instructions and usurped the authority of the judge to instruct on the law, as set out in Article 4, § 16. The prosecutor also committed misconduct by reporting statements which the trial court had reserved ruling on.

Article 1, § 16 reserves to trial judges the authority to "declare the law." By court rule this takes place at the close of the evidence, after the

defense has an opportunity to object to any proposed instruction. CrR 6.15. By instructing the jury on the elements of the crime prior to the court's instructions and before giving the defense an opportunity to object, the prosecutor violated the court rules and article 1, § 16. The prejudice is twofold. As in this case, the prosecutor provides an incomplete view of the law to the jurors and the prosecutor may give erroneous instructions.

Here, the prosecutor did not inform the jurors that they could consider lesser included offenses and did not inform the jury of the burden of proof and other essential matters which govern jury deliberations. The jurors necessarily had an incomplete view of the law from the outset of the case. Most importantly, the prosecutor erroneously instructed the jurors that Mr. Magers could be found guilty of an assault solely by intending to create fear and apprehension of bodily harm, an incomplete and inadequate definition of an assault. RP 250. This definition left out that the fear had to be reasonable and that the victim actually had to experience the fear.

Further, it was clearly improper to tell the jurors that they would hear that Mr. Magers said, "If you listen to me and do what I say, we will be happy. If not, I'm going to be mean and cut your head off." RP 252. That statement was double hearsay and the trial court had expressly

reserved ruling on whether Ms. Ray's statements would be admissible as excited utterances.

As in closing argument, the prosecutor refused to honor the rulings of the trial court and proceeded instead to act in violation of those rulings. This creates a situation where the prosecutor acts outside the rules and effectively places the burden on the defendant, if convicted, to establish prejudice on appeal. A defendant, particularly a defendant facing a third strike conviction, should not be placed in this position. Here, there was prejudice in that the jury did not understand that they could be considering lesser included offenses as they heard the evidence; and prejudice in that the jurors heard the evidence with an incorrect understanding of an assault. Since Ms. Ray testified at trial that she did not fear Mr. Magers and her reasonable and *actual* fear had to be established, the error cannot be harmless. The prosecutor's misconduct in opening argument as well as in closing argument should require reversal of Mr. Magers' convictions.

**8. CUMULATIVE ERROR DENIED MR. MAGERS A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required

where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

Here, the numerous errors at trial individually and cumulatively combined to deny Kha Magers a fair trial. The wholesale introduction of ER 404(b) evidence, including evidence that Mr. Magers had been convicted of violent crimes in the past; the introduction of testimonial hearsay statements made by police officers; the improper admission of unfairly prejudicial statements as excited utterances; the denial of the right to compulsory process and to present a defense; the improper opinion testimony as to guilt and the prosecutor's misconduct in opening and closing arguments individually and cumulatively denied Mr. Magers a fair trial.

Mr. Magers faced a third strike conviction and the remainder of his life in prison. He was denied a fair trial. His convictions should be reversed.

**9. MR. MAGERS' SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNCONSTITUTIONAL UNDER BLAKELY V. WASHINGTON.**

Mr. Magers asserts that his sentence of life without the possibility of parole is unconstitutional under Blakely v. Washington, 542 U.S. 296,

124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and that State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review pending, is wrongly decided.

In Blakely, the United States Supreme Court held that any fact, other than a prior conviction, which must be established before a sentence greater than the sentence authorized by the jury verdict can be imposed must be proven to a jury by proof beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536-2537. In Blakely, the court further held that the applicable sentence authorized by jury verdict is the top of the standard range. Blakely, 124 S. Ct. at 2537-2538.

The Supreme Court, in Blakely, and in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), did not limit its holdings to specific types of statutes; Blakely and Apprendi apply to any situation in which the jury verdict authorizes one sentence and the trial court imposes a longer sentence based on additional findings, not submitted to a jury. The legal principle underlying both decisions, and the decision in Ring v. Arizona, 536 U.S. 317, 609, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (2004) (aggravating factors in capital cases function as elements of the greater crime), is that it violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury. Essentially, the Supreme Court has held unconstitutional

statutes, whether enhancements statutes, exceptional sentences statutes, or or death penalty statutes, in which judicial fact finding is more critical to the sentence imposed than the charged crime. In those cases the defendant is denied his right to a jury trial.

In Ring, the Supreme Court, in fact, expressly rejected the argument that form can prevail over matter. The Court held that "the dispositive question . . . 'is not one of form, but of effect.' If the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439-2440.

The inquiry is: (1) What sentence does the jury verdict alone authorize? (2) Is the sentence imposed by the trial court longer than the sentence the jury verdict alone authorizes? (3) Does the statute authorizing the longer sentence require any fact-finding beyond the mere fact of a prior conviction? (4) Does the statute permit the facts to support the longer sentence be established by proof less than beyond a reasonable doubt? (5) Does the statute permit the facts to be decided by a judge rather than a jury? If the answer to all of these questions is yes, the statute is unconstitutional under Blakely; it violates the defendant's rights under the Sixth Amendment.

Here, clearly the jury's verdict alone did not authorize sentences greater than the top of the standard range. Life without the possibility of parole is longer than the top of the standard ranges for Mr. Magers' convictions. The statute requires fact finding beyond the mere fact of a prior conviction. Under the Persistent Offender Accountability Act (POAA), before a sentence of life without parole can be imposed, the trial court has to find that the defendant has prior convictions which qualify as strike offenses. Specifically, the trial court has to find that (a) on two separate occasions, (b) the defendant has been convicted of felonies that meet the definition of most serious offenses, (c) the defendant's prior conviction counts as offender score, and (d) at least one conviction for a most serious offense occurred before any of the other most serious offenses was committed. RCW 9.94A.030(32)(a)(ii). The statute does not require that the facts be found beyond a reasonable doubt or by a jury. Therefore the POAA violates the Sixth Amendment.

Blakely applies to Mr. Magers' sentence of life without the possibility of parole and, since the further fact finding was not submitted to the jury, Blakely requires reversal of Mr. Magers' sentence.

Additionally, Mr. Magers believes that the United States Supreme Court will hold, at its next opportunity, that even the fact of prior

convictions must be submitted to a jury and proven by proof beyond a reasonable doubt. He wishes to preserve this issue by raising it on appeal and by asking this Court to hold that, in order to impose a sentence of life without parole under the POAA, prior convictions must be proven beyond a reasonable doubt to a jury.

**10. MR. MAGERS' SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS CRUEL AND UNUSUAL PUNISHMENT.**

Mr. Magers submits that his sentence of life without the possibility of parole constitutes cruel and unusual punishment because it is grossly disproportional to the crimes he was convicted of committing. Mr. Magers was convicted of a crime in which there was no physical injury and where the victim clearly did not wish to see him punished.

Assault in the second degree has a seriousness level, under Washington law, of four, out of sixteen levels; unlawful imprisonment has a seriousness level of only three. RCW 9.94A.515. Most felonies in Washington are considered more serious. Therefore, imposing the most serious sentence outside of a death sentence for conviction of these crimes is cruel punishment.

The Eighth Amendment's prohibition against cruel and unusual punishment is applicable to state action through the Fourteenth Amendment

and proscribes disproportionate punishment. Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed 2d 758 (1962). Article 1, § 14, has been held to be even more protective than the Eighth Amendment. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

The Eighth Amendment analysis is an "as applied" proportionality analysis; the cruel and unusual punishment clause proscribes punishment that is grossly disproportionate to the severity of the crime. Harmelin v. Michigan, 501 U.S. 957, 997, 111 S. Ct. 2680, 115 L. Ed. 836 (1991) (Kennedy, J., O'Connor, J., and Souter, J., concurring) (applying proportionality test in the context of a felony recidivist statute).

The factors relevant to the determination that a sentence is cruel punishment under Article 1, §14 are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397.

Under both the Eighth Amendment and Article 1, § 14, the sentence of life without parole was cruel punishment. It is grossly disproportional to the crimes of conviction. In Washington those crimes of conviction are not ranked as serious as most other felonies. Therefore, the imposition of the longest possible sentence constitutes cruel punishment.

**E. CONCLUSION**

Appellant respectfully submits that his judgment and sentence should be reversed and his case remanded for resentencing.

DATED this 6<sup>th</sup> day of September 2005.

Respectfully submitted,

  
Rita J. Griffith  
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CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> day of Sept, 2005, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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INSTRUCTION NO. 5

Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose.