

Table of Contents

A. IDENTITY OF PETITIONER..... 1

Petitioner is the State of Washington, represented by P. Grace Kingman, Pierce County Deputy Prosecuting Attorney. 1

B. COURT OF APPEALS DECISION..... 1

The State seeks review of the Unpublished Opinion of the Court of Appeals, Division II, filed on September 12, 2006. (See Appendix A.) 1

C. ISSUE PRESENTED FOR REVIEW 1

Should this Court review the decision of the Court of Appeals, Division Two, which is in conflict with State v. Ragin, State v. Barragan, and State v. Grant, in holding that the trial court abused its discretion for admitting ER 404(b) evidence to (1) show the victim’s state of mind, and (2) assess the victim’s credibility?.....1

D. STATEMENT OF THE CASE..... 1

1. Procedure 1

2. Facts 3

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 7

1. THE COURT OF APPEALS DECISION HOLDING THAT 404(B) EVIDENCE IS INADMISSIBLE TO PROVE STATE OF MIND IS IN CONFLICT WITH STATE V. RAGIN AND STATE V. BARRAGAN AND RESTS ON A FACTUAL BASIS WHICH IS CONTRADICTED BY THE RECORD..... 7

2. THE COURT OF APPEALS DECISION HOLDING THAT ER 404(B) EVIDENCE IS INADMISSIBLE TO ASSESS THE VICTIM'S CREDIBILITY CONFLICTS WITH STATE V. GRANT AND THE WELL-SETTLED PRINCIPLE THAT JURIES ARE PRESUMED TO FOLLOW THE INSTRUCTIONS..... 14

F. CONCLUSION..... 20

Table of Authorities

State Cases

<u>State v. Anderson</u> , 31 Wn. App. 352, 357, 641 P.2d 728 (1982)	18, 19
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000)	1, 7, 10
<u>State v. Brown</u> , 113 Wn.2d 520, 529, 782 P.2d 1013 (1989)	19
<u>State v. Cook</u> , 131 Wn.App. 845, 851, 129 P.3d 834 (2006)	16, 17
<u>State v. Davenport</u> , 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984).....	16
<u>State v. Grant</u> , 83 Wn.App. 98, 920 P.2d 609 (1996)1, 3, 14, 15, 16, 17, 20	
<u>State v. Grisby</u> , 97 Wn.2d 493, 509, 647 P.2d 6 (1982)	11, 16
<u>State v. Holmes</u> , 43 Wn. App. 397, 400, 717 P.2d 766, <u>review denied</u> , 106 Wn.2d 1003 (1986)	8
<u>State v. Jones</u> , 101 Wn.2d 113, 120, 677 P.2d 131 (1984)	18
<u>State v. Kidd</u> , 36 Wn. App. 503, 505, 674 P.2d 674 (1983)	8
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	13
<u>State v. Nelson</u> , 131 Wn. App. 108, 125 P.3d 1008 (2006).....	17
<u>State v. Newton</u> , 109 Wn.2d 69, 73, 743 P.2d 254 (1987)	18
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	8, 11, 13, 14
<u>State v. Ragin</u> , 94 Wn. App. 407, 972 P.2d 519 (1999)	1, 7, 8, 9, 13, 14
<u>State v. Summers</u> , 73 Wn.2d 244, 246-47, 437 P.2d 907 (1968)	19
<u>State v. Trout</u> , 125 Wn.App. 403, 420, 105 P.3d 69, <u>review denied</u> , 155 Wn.2d 1005 (2005)	16
<u>State v. Turner</u> , 29 Wn. App. 282, 289, 627 P.2d 1324 (1981), <u>review denied</u> , 95 Wn.2d 1030 (1981).....	8

<u>State v. Wilson</u> , 60 Wn.App. 887, 808, P.2d 754, <u>review denied</u> , 117 Wn.2d 1010, 816 P.2d 1224 (1991).....	15
---	----

Constitutional Provisions

U.S.C.A. Const. Amend. 14.....	13
West's RCWA Const.Art.1 §22	13

Statutes

RCW 9A.36.021(1)(c)	9
RCW 9A.46.020.....	9

Rules and Regulations

ER 404(b).....	1, 2, 7, 8, 9, 13, 14, 15, 17
ER 609	18, 19
ER 609(a).....	18
RAP 13.4.....	3
RAP 13.4(b)(2)	8, 16

Other Authorities

WPIC 35.50.....	9, 10
WPIC 5.05.....	18, 19

A. IDENTITY OF PETITIONER.

Petitioner is the State of Washington, represented by P. Grace Kingman, Pierce County Deputy Prosecuting Attorney.

B. COURT OF APPEALS DECISION.

The State seeks review of the Unpublished Opinion of the Court of Appeals, Division II, filed on September 12, 2006. (See Appendix A.)

C. ISSUE PRESENTED FOR REVIEW.

Should this Court review the decision of the Court of Appeals, Division Two, which is in conflict with State v. Ragin,¹ State v. Barragan,² and State v. Grant,³ in holding that the trial court abused its discretion for admitting ER 404(b) evidence to (1) show the victim's state of mind, and (2) assess the victim's credibility?

D. STATEMENT OF THE CASE.

1. Procedure

On January 20, 2004, the State charged defendant with second degree assault with a deadly weapon enhancement in Count I, and unlawful imprisonment with a deadly weapon enhancement in Count II. CP 1-3.

On March 30, 2004, the State filed the First Amended Information adding Count III, violation of a pre-sentence no contact order. CP 8-10.

The State moved under ER 404(b) to admit evidence that (1) Ms. Ray knew defendant had prior violent convictions, (2) had spent time in

¹ 94 Wn.App. 407, 972 P.2d 519 (1999).

² 102 Wn.App. 754, 9 P.3d 942 (2000).

³ 83 Wn.App. 98, 920 P.2d 609 (1996).

prison, (3) had been recently arrested and released from jail for assaulting her six weeks before the day in question, and (4) there was a no contact order in effect on the day in question. RP 168. After hearing testimony from Ms. Ray, the trial court found by a preponderance of evidence that the 404(b) incidents occurred, and that the probative value of the evidence outweighed any unfair prejudice. RP 174-182. The trial court ruled that the evidence was admissible to show the victim's state of mind and to assess her credibility, but that the State would not be allowed to go into any specifics regarding the charges or facts of underlying convictions. RP 179, 562.

Not all of this evidence was admitted at trial, however. Ms. Ray did not testify to a single prior conviction, or specifics as to any prior charges or sentences, except to say that defendant was in jail for "fighting" at the time their first child was born. RP 263. She also testified that defendant had been arrested in December of 2003 because the police said she and defendant were fighting. RP 270. Ms. Ray denied any memory of what happened on that day, but later admitted she told police that defendant shoved her. RP 276. She testified that defendant was released from jail the next day. RP 279. Ms. Ray testified that a no contact order had been issued as a result of the incident in December. RP 279.

The jury found defendant guilty as charged and found that he was armed with a deadly weapon at the time of the offenses. RP 618.

Defendant filed a timely notice of appeal. The Court of Appeals addressed defendant's claim that hearsay was inappropriately admitted and found no error by the trial court in admitting such evidence. Opinion at 9-11. However, the Court of Appeals reversed defendant's conviction, holding (1) that the trial court erred in admitting evidence of defendant's prior misconduct to show Ms. Ray's state of mind, and (2) that the trial court erred in relying on State v. Grant, to admit evidence of defendant's prior misconduct to show Ms. Ray's credibility Opinion at 4-9.⁴

The State seeks Discretionary Review of this decision. RAP 13.4.

2. Facts

On the day in question, defendant argued with his fiancée, Carissa Ray, with whom he has two children in common. RP 438. Ms. Ray went into the bathroom and defendant grabbed her by her right arm and drug her out. Id. Defendant forcefully set Ms. Ray on the couch. Id. He held her head down and put a sword to the back of her neck. Id. While holding

⁴ There remain several unresolved claims: (1) the trial court's exclusion of third strike evidence; (2) defendant's claim of impermissible opinion evidence; (3) defendant's claim of prosecutorial misconduct in opening statement and (4) in closing argument; (5) applicability of cumulative error doctrine; (6) applicability of Blakely to persistent offender accountability act; and (7) whether defendant's sentence amounts to cruel and unusual punishment.

her in this position, defendant told Ms. Ray, "If you listen to me and do what I say, we'll be happy. But if you do not, I'm going to be mean and I will cut your head off." RP 442-43. Defendant kept Ms. Ray there and continued to threaten to cut her head off and to hurt her. RP 443. He would not let her leave. Id. These threats continued throughout several hours while Ms. Ray was confined. Id. Ms. Ray eventually convinced defendant to let her go to the store. RP 447. He kept the children hostage to ensure her return. Id. Ms. Ray called her mother and step-father from a store down the street. RP 286. They in turn called police. RP 289.

Tacoma police officers responded to Ms. Ray's residence. RP 407. After about twelve minutes, Ms. Ray answered the door. RP 408. One of her children was at the door with her. RP 409. Ms. Ray told police defendant was not there. Id. She looked scared. Id. Her eyes were huge and she kept looking behind her. RP 409. Officer Lang noticed Ms. Ray and the child were both uneasy and he could tell something was terribly wrong. RP 409. He got Ms. Ray and the child out of the house and again asked if defendant was inside. RP 410. This time Ms. Ray admitted defendant was inside the house. Id. Ms. Ray was crying and unfocused. RP 430. She begged the officer not to tell defendant that she had said that defendant was in the house. RP 430. Ms. Ray said, "He's going to hurt me. He's violent." RP 430. She kept saying that; she was unfocused and

appeared to be in shock. RP 432. Officer Lang put Ms. Ray and the child in the police car and backed up to take cover behind a garage while he tried to figure out what happened and if a crime had been committed. RP 432.⁵

Speaking in a monotone with tears running down her face, Ms. Ray told Officer Lang how defendant had grabbed her by the arm, forcing her to the couch, held her head down, held a sword to her neck, and threatened to cut her head off. RP 434-435, 438. Officer Lang observed a mark on Ms. Ray's arm. RP 438. She kept saying how defendant was going to hurt her and how violent he was. RP 435. Defendant had just been released from jail for domestic violence. RP 432. Ms. Ray wrote a statement about the incident while she was in the back of the patrol car. RP 448. At the time of the incident, there was a no contact order in effect prohibiting contact between defendant and Ms. Ray. RP 292.

While Officer Lang met with Ms. Ray, other officers attempted to get defendant to come out of the house. He did not comply. RP 495. A K-9 officer arrived with his dog. Defendant was warned that a dog was present

⁵ Although the Court of Appeals found the trial court acted within its discretion in admitting evidence of excited utterances, the court misstated the record by asserting that only two conclusory statements were made in the presence of the jury. Opinion at 3. This is incorrect. All of the statements above, cited from the record, were in the presence of the jury. The statements outside the presence of the jury occur at RP 413-429.

and would be released into the house. RP 499. The dog barked at the closed bedroom door. RP 499. The officer opened the door and saw defendant in bed with his hands up, saying, "I give up. I give up." RP 499. Police collected the sword as evidence. RP 320, 452, 540.

Five days later, Ms. Ray wrote the first of two letters recanting the statements she made to police on January 16, 2004, the night of the incident. RP 326, 329. In the first letter, dated January 21, 2004, Ms. Ray claimed that "she lied about everything". RP 326. In the second letter, dated February 18, 2004, Ms. Ray states that she was under pressure by the police and her parents to make the statements she made on the night of the incident. RP 329. During trial testimony, Ms. Ray stated that the police intimidated her, but she was completely unable to explain how she was intimidated. RP 330. She later said they did not intimidate her into making the first statement, but intimidated her if she changed her story. RP 331.

In spite of a no contact order, defendant arranged for Ms. Ray to visit him while he was in jail. RP 519, 524-525. Defendant and another inmate signed up each other's visitors to try to get around the no contact order between defendant and Ms. Ray. RP 527.

At trial, Ms. Ray recanted her statements to police. RP 269, 286, 309. She told the jury that she loves defendant, that it has been very

difficult for her with him in jail, and that she still wants to marry him. RP 341, 343. She testified that defendant never assaulted her and never threatened her with a weapon. RP 354. She said she is not afraid of defendant. RP 366. When asked about her state of mind on the night in question, Ms. Ray testified that she did not know. RP 398. She stated she did not know if she was crying or if she was scared. Id.

The jury found defendant guilty as charged. RP 618.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS DECISION HOLDING THAT 404(B) EVIDENCE IS INADMISSIBLE TO PROVE STATE OF MIND IS IN CONFLICT WITH STATE V. RAGIN AND STATE V. BARRAGAN AND RESTS ON A FACTUAL BASIS WHICH IS CONTRADICTED BY THE RECORD.

The decision below is in conflict with a Division One case, State v. Ragin, 94 Wn.App. 407, 972 P.2d 519 (1999) (ER 404(b) evidence is admissible when used to prove the victim's state of mind where necessary to prove an essential element of the charged crime); and a Division Three case, State v. Barragan, 102 Wn.App. 754, 9 P.3d 942 (2000) (probative value of defendant's prior violent acts outweighed prejudicial effect where such evidence was relevant to determine whether victim's fear was reasonable and victim's state of mind was an essential element of the

crime charged). This conflict provides grounds for acceptance of review by this Court. RAP 13.4(b)(2).

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, ("once a thief always a thief" is not a valid basis to admit evidence), review denied, 106 Wn.2d 1003 (1986). But evidence of prior acts may be admitted for other limited purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The permitted purposes listed in ER 404(b) are not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

The admission or refusal of ER 404(b) evidence lies largely within the sound discretion of the trial court. State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981), review denied, 95 Wn.2d 1030 (1981). The trial court's decision will not be reversed absent an abuse of discretion. State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. Id.

In State v. Ragin, the defendant and victim were acquaintances. Ragin, 94 Wn.App. at 409. Ragin called the victim from jail wanting the victim to post bail for him. Id. When the victim refused, Ragin threatened

the victim by telling him he would murder him and “take care of” his family. Id. Ragin was charged with felony harassment under RCW 9A.46.020. The trial court admitted evidence of prior bad acts that Ragin had told the victim about to prove the reasonableness of the victim’s fear. The Court of Appeals, Division I, affirmed the conviction. Id. at 413.

In Ragin, the court was mindful that a jury may not objectively believe that a victim was placed in reasonable fear and apprehension unless the entire context of the relationship is disclosed. Id. at 412. The court also recognized that the evidence was prejudicial to Ragin, and noted: “Although [it] may have put Ragin in a bad light before the jury, the evidence was necessary to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect.” Id.

Ragin is applicable to the instant case and demonstrates how the 404(b) evidence was properly admitted because it is highly probative and relevant to Ms. Ray’s state-of-mind, which is an essential element of the charged crime of assault. RCW 9A.36.021(1)(c). WPIC 35.50. The jury was instructed that there are three common law definitions of “assault”. CP 128 (Instruction #9). The text of the instruction provides:

An assault is an intentional touching or striking ...

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing ...

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and **which in fact creates in another a reasonable apprehension and imminent fear of bodily injury** even though the actor did not actually intend to inflict bodily injury.

CP 128, WPIC 35.50 [emphasis added].

Under the third definition, the State is burdened with proving the victim's state of mind using both a subjective and an objective standard. In the case at bar, evidence that Ms. Ray knew that defendant had previously been in jail for fighting, that he had assaulted her in the past, was recently released from jail, and that fact that he had been staying with her despite a no contact order, all tend to prove that her apprehension was objectively reasonable. Ms. Ray testified at trial that while she did not know her state of mind on the night in question, she is not afraid of defendant. Therefore, this evidence provides critical proof necessary to show an objective reasonable fear.

The same result was reached in State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000), where the court ruled that the victim's knowledge of the defendant's prior violent acts was relevant to determining whether the victim had a reasonable fear that the threat would be carried out. Because the victim's state of mind was an essential element of the crime charged, the probative value of the evidence outweighed the prejudicial effect. Id.

In the case at bar, the trial court held an evidentiary hearing and found the prior acts by a preponderance of the evidence. RP 97-156, 177. It also performed the requisite balancing test on the record. RP 178-180. The trial court also provided a limiting instruction for the jury:

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.

CP 124 (Instruction No. 5). Jurors are presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Any perceived prejudice to the defendant would have been eliminated by such an instruction.

In its opinion, the Court of Appeals, citing State v. Powell, reasoned that Ms. Ray's knowledge about defendant's violent history was unnecessary because: "[P]roof that Magers held a sword to the back of Ray's neck threatening to decapitate her is strong evidence that she reasonably feared bodily injury, but **Magers never disputed this element**. Thus, the victim's state of mind was not a proper basis for admitting the evidence." Opinion at 5 [emphasis added]. This is contrary to the record in this case. Not only did the defense dispute that her fear was reasonable, defendant asserted that the incident never happened. The theme of the defense closing argument was that Ms. Ray fabricated the entire incident.

RP 589-608. Defense counsel elicited testimony from two separate witnesses on cross-examination that the blade of the sword was dull. RP 514, 542. The jury could then infer that Ray would not be reasonably fearful if the sword was dull. Defense counsel again mentioned the dull blade to the jury in closing argument:

If in fact he held the sword to the back of her neck, don't you think it would have left some kind of a mark? This was just shortly after the incident. A red mark, a scratch? The police officer said it was dull, but they also said it could cause harm. Use your common sense.

RP 598. Here, defense counsel is clearly disputing that the incident occurred. Additionally, throughout closing argument, defense counsel, rather than agreeing that the sword would create fear, continuously argues that the evidence shows the victim was not afraid:

If she was really afraid, why would she return? RP 600. ... If she was so afraid of what he was going to do when he got out of jail, why didn't he do anything? RP 602. ... If theirs was a relationship so marked by violence and she was so afraid of him, why are the only two incidents that we know about that was in the evidence in December 2003 and January of 2004? RP 602 ... She [Ray] stayed consistent. She came to trial, consistent on the important thing, and that is that **nothing happened** on that date. RP 603 [emphasis added]. ... [I]f she was really afraid of him, she would just get up here on the stand and testify according to her police statement because then he would go to prison for a lengthy sentence. RP 604. ... If she's so afraid of [defendant], why would she visit him in jail... Id. ... That doesn't make sense, she's not afraid of him. RP 605.

Clearly, the record shows that defendant disputed the entire incident. Not only did defendant dispute this fact, but Ms. Ray's trial testimony was marked by recantation and memory lapses. When asked, "Were you scared?", she answered, "I don't know." RP 398. This is contrary to what she told police on the night of the incident and what the officers observed about her.

Even if defendant did not dispute this element, or is silent on the element, the State must still prove its case. Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. U.S.C.A. Const. Amend. 14; West's RCWA Const.Art.1 §22; State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In this case, the jury was instructed:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

CP 122 (Instruction #3).

Although Ragin is directly on point, the Court of Appeals found it "inapposite". Opinion at 5. Instead, the Court of Appeals relies on State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995). In that case, Powell was accused of murdering his wife. Id. This Court found that evidence of prior quarrels between the two, while admissible under 404(b) to show

motive and res gestae, it was not admissible to show Powell's intent because (1) Powell's intent was not in dispute, and (2) because intent was implicit in the act of manual strangulation. Id. at 262. Powell is distinguishable for several reasons. First, Powell did not dispute the intent and, as discussed above, defendant disputed every element of this charge. Second, the State was not attempting to prove defendant's intent, as in Powell, but rather the victim's state of mind, as in Ragin. Third, there was no injury in this case so the assault must rest on the victim's reasonable fear of injury where no such circumstance exists in a murder case where the victim is deceased, showing that the manual strangulation effected its purpose. The trial court correctly applied then-existing case law and admitted the prior bad acts for a narrow purpose and duly gave the jury an appropriate limiting instruction. The Court of Appeals decision not only conflicts with that case law, but is based on facts that are not supported by the record. The decision should be reviewed and reversed by this Court.

2. THE COURT OF APPEALS DECISION HOLDING THAT ER 404(B) EVIDENCE IS INADMISSIBLE TO ASSESS THE VICTIM'S CREDIBILITY CONFLICTS WITH STATE V. GRANT AND THE WELL-SETTLED PRINCIPLE THAT JURIES ARE PRESUMED TO FOLLOW THE INSTRUCTIONS.

In State v. Grant, 83 Wn.App. 98, 920 P. 2d 609 (1996), the victim of prior domestic violence was assaulted by her husband. Later she

minimized the assault in response to a question from her husband's lawyer. Grant, 83 Wn. App. at 106-07. Division I held that evidence of Grant's prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess Mrs. Grant's credibility as a witness and accordingly prove that the charged assault actually occurred. Grant at 106, citing State v. Wilson, 60 Wn.App. 887, 808, P.2d 754, review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991).

The Grants' history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no contact order, and why she minimized the degree of violence The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim. Grant, 83 Wn. App. at 107-08.

In the present case, the trial court meticulously followed the holding in Grant and admitted the evidence of prior bad acts pursuant to the analysis in Grant. RP 174, 176, 179-181. The limiting instruction provided to the jury was as cited above:

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.

CP 124 (Instruction No. 5).

In issuing its decision herein, Division Two disagreed with Grant that prior domestic violence evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility. Opinion at 7, citing State v. Cook, 131 Wn.App. 845, 851, 129 P.3d 834 (2006). This conflict provides grounds for acceptance of review by this Court. RAP 13.4(b)(2).

Instead, Division Two held that the evidence can only be admissible "to [assess] the victim's state of mind at the time of the inconsistent act." Opinion at 8, citing Cook at 851. Although the trial court's limiting instruction specifically authorized the jury to only consider the evidence for the limited purpose of assessing state of mind and credibility **and for no other purpose**, the Court of Appeals stated:

[A]n instruction limiting consideration of the evidence to credibility invites the jury to find the victim's testimony not credible because the defendant's past violence against her makes it more likely that he committed violence against her at the time in question.

Opinion at 8, citing Cook at 853. This conclusion violates the well-settled law that juries are presumed to follow the court's instructions. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984), State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), State v. Trout, 125 Wn.App. 403, 420, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).

Until recently, Washington courts have routinely admitted evidence of a defendant's prior abuse against a recanting victim for the purpose of assessing the victim's credibility at trial. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006).

Divisions One and Three have repeatedly followed the Grant holding over the last ten years. Division Two, however, recently broke from the Grant holding, and concluded that evidence of prior abuse was inadmissible for purposes of assessing the victim's credibility. Cook, 131 Wn. App. at 851. The court reasoned that a jury's assessment of credibility would necessarily result in a propensity consideration, which is strictly prohibited under ER 404(b). Cook, 131 Wn. App. at 853. Division Two did not rely on any independent evidence that would support its claim, other than its own assumptions about how the jurors would analyze the evidence. See Cook, 131 Wn. App. at 853-54. But there is nothing to suggest that a jury would engage in an analysis like Division Two assumes, especially when the jury is also instructed that they are not to consider the evidence for any other purpose, as they were in this case. CP 124 (Instruction No. 5).

Moreover, jurors have been properly considering prior crime evidence for purposes of assessing a witness's credibility for years. ER

609 authorizes the admission of a witness's prior crimes for purposes of attacking the witness's credibility. When evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a defendant, the jury is instructed that the conviction is admissible only on the issue of the defendant's credibility and may not be considered for any other purpose, including the defendant's guilt. See WPIC 5.05. Division One believes that an instruction modeled after WPIC 5.05 is sufficient to prevent the jury from engaging in a propensity analysis and ultimately misusing the prior crime evidence:

If we are to continue in our belief that a trial by a jury of 12 peers offers the fairest determination of guilt or innocence, then we must credit the jury with the intelligence and conscience to consider evidence of prior convictions only to impeach the credibility of the defendant if it is so instructed.

State v. Anderson, 31 Wn. App. 352, 357, 641 P.2d 728 (1982).

This Court has recognized the potential hazards of admitting a defendant's prior conviction into evidence:

[t]he jury may assume, first, that the person with a criminal record has a "bad" general character, and deserves to be sent to prison whether or not they in fact committed the crime in question[, and second,] the jury may perceive the prior convictions as proof of the defendant's criminal propensities, making it more likely the defendant committed the crime charged.

State v. Newton, 109 Wn.2d 69, 73, 743 P.2d 254 (1987); see also, State v.

Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984)("[P]rior conviction

evidence is inherently prejudicial” when the defendant is the witness because it tends to shift the jury focus “from the merits of the charge to the defendant’s general propensity for criminality”). Even so, our courts have continuously held that an instruction which limits the jury’s consideration of the defendant’s prior crimes for purposes of assessing the defendant’s credibility is sufficient to prevent the potential misuse. State v. Summers, 73 Wn.2d 244, 246-47, 437 P.2d 907 (1968)(“Due to the potentially prejudicial nature of prior conviction evidence, these limiting instructions are of critical importance”); State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989)(“We agree with the trial court that the purpose and effect of the limiting instruction is to minimize the damaging effect of properly admitted evidence or prior convictions of a witness by explaining to the jury the limited use of that evidence”); Anderson, *supra*.

Evidence of prior abuse between a defendant and a victim should be admissible for purposes of assessing the victim’s credibility at trial. Division Two should trust that a jury will follow the court’s instructions that they are to consider the evidence for purposes of assessing the victim’s credibility and for no other purpose. If a limiting instruction modeled after WPIC 5.05 is sufficient to prevent a jury from using evidence of defendant’s prior crimes as propensity evidence (ER 609), then surely an instruction like the one given in this case is sufficient to

prevent the misuse of prior abuse evidence. There is simply no persuasive evidence to suggest that a jury will necessarily engage in a propensity analysis if presented with evidence of defendant's prior abuse.

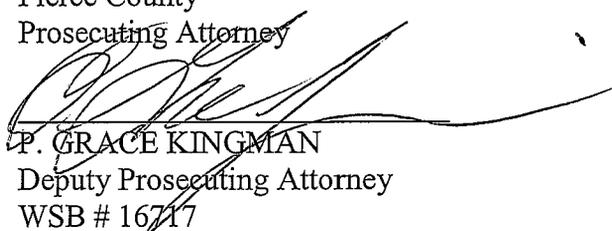
This Court should therefore review the decision of the Court of Appeals and uphold the trial court's rulings which were consistent with Grant.

F. CONCLUSION.

The State respectfully asks this Court to grant review of the decision of the Court of Appeals, and to (1) reverse the Court of Appeals insofar as it found error in the trial court; and (2) decide the remaining unresolved issues raised by appellant on direct appeal or remand this case to the Court of Appeals for decision on the remaining unresolved issues.

DATED: October 10, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

FILED
COURT OF APPEALS
DIVISION II

06 OCT 11 PM 4:11

STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

10-11-11 [Signature]
Date Signature

APPENDIX “A”

Unpublished Opinion

FILED
COURT OF APPEALS
DIVISION II

06 SEP 12 AM 11:22
STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

KHA DANH MAGERS,

Appellant.

No. 33323-6-II

UNPUBLISHED OPINION

ARMSTRONG, J. -- Kha Danh Magers appeals his convictions for second degree assault and unlawful imprisonment; he also appeals his life sentence without the possibility of parole. Magers argues that the trial court erred in various evidence rulings, including allowing evidence of his prior misconduct to show the victim's fear during the assault and to show that she recanted her original story of the assault because she feared Magers. He also contends that the State committed misconduct during opening and closing arguments. Finally, he maintains that his sentence is cruel and unusual punishment and violated his right to trial by jury. We agree that the trial court erred in admitting the prior misconduct evidence. And because the error was not harmless, we reverse and remand for a new trial.

FACTS

Kha Magers and Carissa Ray lived together occasionally for several years during which Magers and Ray had two children. The police arrested Magers in December 2003 for domestic violence. He was released the next day with a protective order prohibiting contact with Ray.

One evening in January 2004, Ray's stepfather called 911 to report that Magers was threatening Ray. When Officer Jim Lang arrived at Ray's home, Ray told him that Magers was not inside. But when he took her away from the house, she changed her story. She was crying, and saying repeatedly that Magers was violent and that he was going to hurt her. She said that Magers had held a sword to the back of her neck and said, "If you listen to me and do what I say, we'll be happy. But if you do not, I'm going to be mean, and I will cut off your head." Report of Proceedings (RP) at 442-43. The threats continued for several hours and although Magers allowed her to go to the store, he kept the children as hostages.

The State charged Magers with second degree assault, unlawful imprisonment, and violation of a no-contact order. He had previously been convicted of two counts of second degree assault, occurring on the same date, and one count of first degree burglary. He was advised that a conviction for the present incident would be his "third strike" under the Persistent Offender Accountability Act. Clerk's Papers (CP) at 4.

A few days after the incident, Ray wrote the prosecutor, recanting her statements to Officer Lang. She recanted again a month later, explaining that Magers had done nothing wrong and that the incident began as a fib to her parents.

Before trial, the defense moved to exclude Ray's statements to Officer Lang as hearsay, Magers's prior convictions, and his arrest for domestic violence as propensity evidence. The trial court admitted the prior misconduct, ruling that it was relevant to prove an element of the

assault charge--that Ray's fear of bodily injury was reasonable--and because it was relevant to Ray's credibility, demonstrating her fear of Magers as a motive to change her story.

On the witness stand, Ray explained that she had developed a pattern of lying to maintain her relationship with her mother while avoiding contact with the stepfather she said sexually molested her as a child. She had asked Magers to come to her house, despite the no-contact order, because she had a job interview and had no one else to watch the children. Then her parents called, asking her to visit them, and she claimed that Magers would not let her go. When she went to the store, she called her mother and embellished the story. Then, when the police arrived, she was afraid she would be in trouble for violating the no-contact order and possibly lose custody of her children, so she continued with the lie.

When the State asked Ray about Magers's December domestic violence arrest, Ray claimed that Magers had simply put his hand on her back. The State then used Ray's handwritten statement in the police report to refresh her recollection that she had claimed Magers had pushed her and that police officers had seen him push her. The officers who investigated the domestic violence incident did not testify.

After Ray's testimony, the State called Officer Lang. The trial court admitted Ray's statements to him as excited utterances. Although much of his description of Ray's demeanor occurred outside the jury's presence during this admissibility determination, the jury did hear Officer Lang say that from Ray's demeanor he knew "something was terribly wrong" and that Ray was "obviously traumatized." RP at 409, 436.

The jury convicted Magers on all three counts and the court sentenced him to life imprisonment without the possibility of parole.

ANALYSIS

I. PRIOR BAD ACTS

Magers argues that evidence of his prior bad acts was improperly admitted and that the jury was improperly instructed that it could consider these acts as relevant to Ray's credibility. Two acts of prior misconduct were admitted: First, Ray testified that Magers was in jail for "fighting" at the time their first child was born. RP at 263. Second, Ray testified about Magers's December arrest for domestic violence against her. The trial court offered two reasons for admitting evidence of Magers's violent history: (1) Ray's knowledge of the history was evidence that she reasonably feared bodily injury during the assault, a necessary element of second degree assault, and (2) Ray recanted her original statements because she was afraid of Magers; thus the history was relevant to her credibility.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). We may affirm on any ground the record adequately supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Magers bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

A. State of Mind

The State argues that evidence of Magers's past violent acts was admissible to show that Ray's fear of bodily harm was reasonable. Prior misconduct may be admitted to prove a mental element of a crime. See *State v. Powell*, 126 Wn.2d 244, 261-62, 893 P.2d 615 (1995); *State v.*

Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000); *State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999). But the evidence must be necessary to prove a material issue. *Powell*, 126 Wn.2d at 262. For example, in *Powell*, the defendant was accused of murdering his wife. The trial court admitted evidence of the couple's violent relationship, overruling the defense's ER 404(b) objection on the ground that the evidence was relevant to show the defendant's motive, intent, and opportunity. We reversed, holding that intent and opportunity were not disputed issues and that evidence of prior quarrels and abuse was not evidence of motive but only of a propensity to abuse. *Powell*, 126 Wn.2d at 255-56. Although the Supreme Court reversed on the ground that evidence of animosity between the two was relevant both to motive and to the res gestae, it agreed that intent and opportunity were improper grounds for admission. *Powell*, 126 Wn.2d at 262-63. Regarding intent, the court explained that the defendant's intent was not in dispute and that intent was implicit in the act of manual strangulation. *Powell*, 126 Wn.2d at 262.

Likewise, proof that Magers held a sword to the back of Ray's neck threatening to decapitate her is strong evidence that she reasonably feared bodily injury, but Magers never disputed this element. Thus, the victim's state of mind was not a proper basis for admitting the evidence.

The State relies on *Barragan* and *Ragin* to support the trial court's ruling admitting the evidence. *Ragin* is inapposite. That case involved a defendant charged with felony harassment for making threats over the phone from jail. *Ragin*, 94 Wn. App. at 410. Evidence that the victim was aware of the defendant's violent history was necessary for the jury to understand why it was reasonable for the victim to take this remote threat seriously. *Ragin*, 94 Wn. App. at 412.

The reasonableness of the fear was not implicit in the act of a threat over the phone while in law enforcement custody.

Barragan is closer to our case. While it was also a felony harassment case, the defendant and the victim were together in a jail cell at the time of the threats, and the threats were accompanied by physical altercations. *Barragan*, 102 Wn. App. at 757. In affirming the trial court's admission of the defendant's violent history, Division Three held that the jury was entitled to know what the victim knew about the defendant to assess whether it was reasonable for the victim to believe the defendant would carry out his threats. *Barragan*, 102 Wn. App. at 759. The court did not explain why, or even whether, the reasonableness of the victim's fear was in dispute. To the extent the opinion can be interpreted to mean there is no requirement that the element be in dispute, *Barragan* conflicts with *Powell*. We hold that the trial court erred in admitting evidence of Magers's prior misconduct to show Ray's state of mind at the time of the threat.

B. Credibility

The State also argues that the prior misconduct was admissible to cast doubt on Ray's credibility at trial under the theory that she recanted her initial statements because she was afraid of Magers's retaliation. Evidence of past domestic violence may be admissible when the victim changes her testimony. See *State v. Cook*, 131 Wn. App. 845, 851, 129 P.3d 834 (2006); *State v. Grant*, 83 Wn. App. 98, 106, 920 P.2d 609 (1996).

The State relies on *Grant*. There, the defendant threatened the victim that she "would regret it" if she identified him as her attacker. *Grant*, 83 Wn. App. at 102. Initially, she complied, but when police got her away from the defendant, she changed her story. *Grant*, 83 Wn. App. at 102. At his trial for domestic violence felony violation of a post-sentence court

order, the prosecution sought to introduce evidence of his prior assaults against the victim. The trial court ruled that ER 404(b) prohibited the evidence, but admitted it under ER 609(a) to impeach the defendant's credibility as a witness. *Grant*, 83 Wn. App. at 103. On appeal, Division One expressed skepticism as to whether the evidence was admissible for impeachment, but it held that any error was harmless because the evidence was admissible under ER 404(b). *Grant*, 83 Wn. App. at 105. The court explained that, because of the psychological effects of domestic violence, evidence of a violent relationship was admissible to explain the victim's seemingly inconsistent acts, such as changing her story to the police and seeing the defendant despite the no-contact order. *Grant*, 83 Wn. App. at 106-07.

Grant's applicability is limited by our recent decision in *Cook*. The victim there, O'Brien, initially reported to police that the defendant, Cook, had kicked her and broken her finger during an argument at home. Later, she recanted this testimony in a letter, claiming to have broken the finger accidentally; she testified to the broken finger at trial also. *Cook*, 131 Wn. App. at 848. Because O'Brien's credibility was central to the case, the trial court allowed evidence of the defendant's past violence toward the victim, with the following limiting instruction:

Evidence has been introduced in this case on the subject of prior incidents of domestic violence between Ms. O'Brien and Mr. Cook for the limited purpose of assessing the credibility of (witness) Cindy O'Brien. You must not consider this evidence for any other purpose.

Cook, 131 Wn. App. at 849. On appeal, we disagreed with *Grant* that prior domestic violence "evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility." *Cook*, 131 Wn. App. at 851. Instead, we held that such evidence may be admissible

“to [assess] the victim’s state of mind at the time of the inconsistent act.” *Cook*, 131 Wn. App. at 851.

We explained that an instruction limiting consideration of the evidence to credibility invites the jury to find the victim’s testimony not credible because the defendant’s past violence against her makes it more likely that he committed violence against her at the time in question. *Cook*, 131 Wn. App. at 853. Thus, admitting the evidence with this type of instruction was error. The appropriate limiting instruction would have admonished the jury to consider the evidence only to assess the victim’s state of mind at the time of an inconsistent act such as a trial recantation. *Cook*, 131 Wn. App. at 853-54.

Accordingly, although Magers’s past violence against Ray may have been admissible, the general instruction to consider prior bad acts to assess Ray’s credibility was error. And we are not persuaded by the State’s argument that the defense invited this error by proposing the instruction. Defense counsel repeatedly stated that she was neither proposing nor agreeing to the instruction but, rather, had drafted it for the convenience of the parties, based on the trial court’s ruling. The prosecutor acknowledged that the defense was not agreeing to including credibility in the instruction. The trial court entered this instruction after defense counsel extensively argued against it. The defense adequately preserved the error.

Moreover, the cases support admitting evidence of violence only against the victim. *Powell* allowed evidence of a violent relationship between the defendant and the victim to establish the *res gestae* and the defendant’s motive for murder. *Grant* and *Cook* allowed evidence of the defendants’ past violence against the victims to explain inconsistencies in the victims’ statements. Although *Barragan* and *Ragin* allowed evidence of violence against

persons other than the victims, as discussed, these cases do not apply here. Thus, there was no legal basis for eliciting from Ray that Magers had previously been in jail for fighting.

Finally, the error was prejudicial. An erroneous evidentiary ruling requires reversal if there is a reasonable probability that the evidence materially affected the trial result. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). In *Cook*, we found that the admission of prior violence against the victim with an inadequate limiting instruction required reversal. *Cook*, 131 Wn. App. at 854. Here, the error was compounded by erroneous admission of violent acts not against the victim. We reverse and remand with instructions that the “fighting” not be admitted and that the evidence of domestic violence against Ray be accompanied by an instruction consistent with *Cook*.

II. HEARSAY

Magers argues that the trial court erred in admitting the police reports of officers who had witnessed the prior act of domestic violence against Ray. In addition, Magers challenges the court ruling admitting Ray’s out-of-court statements to law enforcement officers as excited utterances.

A. The December Police Reports

The trial court allowed the State to use the police report from the December incident during Ray’s testimony. Because the officers who took the report did not testify, Magers claims his right to confrontation was violated. It is constitutional error to admit testimonial hearsay in a criminal trial unless the declarant is unavailable and the defense has had a prior opportunity to cross-examine the declarant regarding the statement. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). “A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence.” *State v.*

Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). But a party may raise a manifest constitutional error for the first time on review. RAP 2.5(a)(3); *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Contrary to Magers's assertion, the officers' statements in the report were not admitted. Rather, the report was handed to Ray on the stand to refresh her memory. The portion used was her handwritten statement. Because Ray testified at trial, *Crawford* does not prohibit admitting her own words. The only part of Ray's testimony that could be construed as using the arresting officers' hearsay is her statement that she remembered "them saying that he was pushing me and I explained to them that he wasn't." RP at 278-79. This statement does not warrant reversal for two reasons. First, the defense did not object. Because it is unclear whether Ray's memory of what the officers told her is "testimonial," any error is not manifestly constitutional. Second, because Ray's handwritten statement said that Magers had pushed her, any error in allowing her to say that the officers said he pushed her was harmless beyond a reasonable doubt.

B. Excited Utterance

Ray's testimony at trial that the incident never occurred was contradicted primarily by Officer Lang's testimony of what Ray told him at the scene. The court admitted Ray's statements under the excited utterance exception to the hearsay rule.

We review a trial court's determination that a hearsay exception applies for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). ER 803(a)(2) allows hearsay as an excited utterance if (1) a startling event has occurred, (2) the statement was made while the declarant was under the stress of the event, and (3) the statement related to the event.

State v. Lawrence, 108 Wn. App. 226, 234, 31 P.3d 1198 (2001). The rationale for this exception is that a spontaneous response to actual sensations is more likely to be sincere and not based on reflection or self-interest. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

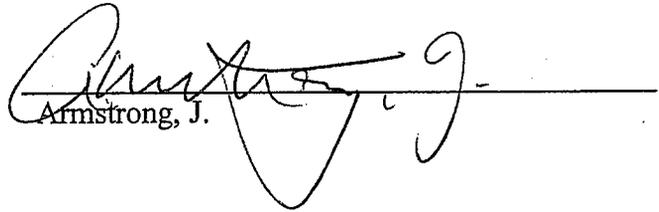
Magers relies on *Brown* for his argument that Ray's initial lie to the police, stating that Magers was not inside the house, dispels the notion that Ray had no time for fabrication and therefore could not have made excited utterances. In *Brown*, the Supreme Court found error in the trial court's excited utterance admission because the declarant admitted that she had deliberately fabricated a portion of the hearsay statement. *Brown*, 127 Wn.2d at 758-59. The Supreme Court has since explained, however, that a lack of honesty does not automatically preclude the excited utterance exception. *See, e.g., State v. Woods*, 143 Wn.2d 561, 600, 23 P.3d 1046 (2001) (deliberate omission of details does not mean a statement was not an excited utterance). Here, that Ray lied to police regarding Magers's presence does not mean her later statements were neither spontaneous nor sincere. Rather than a deliberate, planned fabrication as in *Brown*, the lie here could have been interpreted as a reaction to the stress and fear she was feeling at the moment. The trial judge heard Officer Lang's description of Ray's demeanor at the time she made the statements, and this testimony described trauma and shock. The trial court acted within its discretion in finding this testimony credible and admitting the statements as excited utterances.

In conclusion, we hold that the trial court erred in admitting Magers's prior incarceration for "fighting" and in instructing the jury that it could consider Magers's prior misconduct in

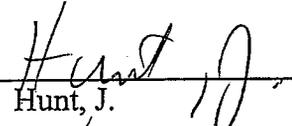
No. 33323-6-II

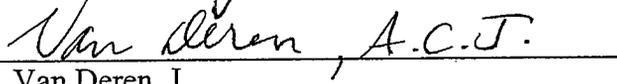
evaluating Ray's credibility. Because we cannot say the errors were harmless, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, J.

We concur:


Hunt, J.


Van Deren, J.