

FILED
COURT OF APPEALS
DIVISION III

06 JAN 19 PM 12:23

STATE OF WASHINGTON

BY 
DEPUTY

79332-8
NO. 33323-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KHA DANH MAGERS,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

REPLY BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

1305 N.E. 45th Street, #205
Seattle, WA 98105-45232
(206) 547-1742

TABLE OF CONTENTS

	Page
A. ARGUMENT IN REPLY	1
1. RESPONDENT'S STATEMENT OF FACTS RESTS ON TESTIMONIAL HEARSAY AND OMITTS CARISSA RAY'S EXPLANATION AT TRIAL OF WHAT HAPPENED ON THE DAY OF THE ALLEGED INCIDENT	1
2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR BAD ACTS	2
3. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER PRIOR BAD ACTS AS RELEVANT TO THE CREDIBILITY OF MS. RAY	5
4. THE TRIAL COURT ERRED IN ADMITTING MS. RAY'S OUT-OF-COURT STATEMENTS AS EXCITED UTTERANCES	8
5. THE DEFENSE WAS CONSTITUTIONALLY ENTITLED TO INTRODUCE EVIDENCE THAT MS. RAY KNEW MR. MAGERS FACED A THIRD STRIKE	10
6. OFFICER LANG'S TESTIMONY WAS IMPROPER OPINION TESTIMONY AS TO GUILT	11
7. THE PROSECUTOR COMMITTED MISCONDUCT	12

TABLE OF CONTENTS -- cont'd

	Page
8. CUMMULATIVE ERROR DENIED MR. MAGERS A FAIR TRIAL	15
9. MR. MAGERS' SENTENCE OF LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL	15
E. CONCLUSION	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Johnson v. Ohls</u> , 76 Wn.2d 398, 457 P.2d 194 (1969)	9
<u>State v. Ball</u> , 127 Wn. App. 956, 113 P.2d 520 (2005)	15
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000)	2, 4
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	11
<u>State v. Brown</u> , 127 Wn.2d 749, 903 P.2d 459 (1995)	9
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992)	9
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969)	11
<u>State v. Grant</u> , 83 Wn. App. 98, 920 P.2d 609 (1996)	2, 3
<u>State v. Painter</u> , 27 Wn. App. 708, 620 P.2d 1001(1980), <u>review denied</u> , 95 Wn.2d 1006 (1981)	8
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	4

TABLE OF AUTHORITIES

	Page
<u>FEDERAL CASES</u>	
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	15
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)	5
<u>Wardius v. Orgeon</u> , 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973)	10
<u>Washington v. Texas</u> , 388 U.S. 1, 18 L. Ed.2d 1019, 87 S. Ct. 1920 (1967)	10
<u>STATUTES, RULES AND OTHER</u>	
ER 404(b)	2, 3
ER 602	5

A. ARGUMENT IN REPLY

1. RESPONDENT'S STATEMENT OF FACTS RESTS ON TESTIMONIAL HEARSAY AND OMITTS CARISSA RAY'S EXPLANATION AT TRIAL OF WHAT HAPPENED ON THE DAY OF THE ALLEGED INCIDENT.

The state's presentation of facts about the day of Mr. Magers' arrest relies almost entirely on Carissa Ray's out-of-court statements to the police. See Brief of Respondent (BOR) 6-7. The state omits Ms. Ray's corroborated fear of her molesting stepfather and how this fear led to a series of events which resulted in her mother and stepfather calling the police on the day of the incident. See Opening Brief of Appellant (AOB) 9-13. Ms. Ray's trial testimony and the evidence corroborating it is essential to any fair determination of the merits. RAP 10.3(4); See AOB 9-18.

The reliance, by the state, on Ms. Ray's out of court statements to the police demonstrates the importance of the statements to the state's case and the prejudice of the error of admitting them as excited utterances. See section 4, below.

2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR BAD ACTS.

At trial, the court allowed the state to present, under ER 404(b), evidence of Mr. Magers' past criminal convictions for "violent" crimes, his prior time in custody and one alleged domestic violence *charge* and violation of a no contact order. RP 13-18, 20-21, 22-23, 263, 270, 279. On appeal, Mr. Magers is challenging the admission of this evidence.

The state's argument that the evidence of Mr. Mager's alleged prior acts of violence was properly admitted relies entirely on the decisions in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), and State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000). Neither of these decisions, however, support the admission of the evidence in Mr. Magers' case.

Grant simply does not hold that evidence of prior acts of violence is always admissible to support the credibility of the complaining witness in a domestic violence case. In Grant, the wife testified as a witness at trial and described the assault against her by her husband. Mr. Grant testified at trial that his wife did not tell him that she was afraid of being in a relationship with him. Grant, 83 Wn. App. at 104. Under these circumstances, where the defense attacked the credibility of the wife's testimony, the court held that the evidence of prior assaultive behavior was

relevant "to explain [the wife's] statement and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge." Grant, at 106.

This is a far cry from allowing testimony to *impeach* the credibility of the complaining witness. This is because ER 404(b) does not permit the introduction of evidence to establish that the defendant acted in conformity with his character, as could be inferred from his past conduct, in committing the charged crime. ER 404(b). The only way that Ms. Ray's credibility could be impeached by the prior acts is by the forbidden inference -- Mr. Maggers committed violent acts in the past and therefore Ms. Ray is not telling the truth when she says he did not commit an act of violence against her on this occasion.

Moreover, unlike the defendant in Grant, Mr. Maggers did not have a long history of prior domestic violence. There was one charge which was dismissed; the rest of the 404(b) evidence consisted of alleged assaultive behavior unrelated to Ms. Ray or any domestic relationship. Grant certainly does not hold that evidence of non-domestic violence is relevant in cases involving allegations of domestic abuse.

Unlike in Grant the evidence of prior bad acts was not limited to evidence of prior domestic incidents involving the complaining witness.

Unlike Grant the evidence was not admitted to support the credibility of the complaining witness after her credibility had been attacked by the defenses. The state's reliance on Grant is misplaced.

Similarly, the state's reliance on Barragan is misplaced. As the state admits, in Barrigan, the victim's knowledge of the defendant's prior violent acts was relevant to her fear that the defendant's threat would be carried out. BOR at 16. In Barragan, the defendant had bragged that he had assaulted others. Barragan, 106 Wn. App. at 759. Here, Ms. Ray denied that she was in fear and evidence of past acts could not show that she had reasonable fear or support a claim of reasonable fear. The gist of the evidence was to show that Ms. Ray was *unreasonable* if she said she did not fear Mr. Magers. Moreover, as held in State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), evidence of past quarrels and threats is not admissible where the act itself establishes the intent and the reasonableness of the victim's fear, as clearly is the case here.

Finally, the state asked Ms. Ray to review the police statement and then asked if she knew if the police saw her and Mr. Magers together, what the police saw and whether the police would arrest Mr. Magers just because he put his hand on her back. RP 275-279. In this way, the prosecutor elicited that the police said Mr. Magers was pushing her. RP 279. Ms.

Ray was not competent to testify about what someone else saw and their reasons for arresting Mr. Magers. ER 602. The only response Ms. Ray could make was what the police said they saw, based on their hearsay statements either in their reports or made to her. Either way the evidence was inadmissible, as these statements were testimonial because they were made under circumstances where they would reasonably be expected to be admissible as evidence at trial. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The evidence of prior bad acts was unfairly and overwhelmingly prejudicial and should result in the reversal of Mr. Magers' convictions. The prior bad acts were the type of evidence ER 404(b) is designed to exclude from trials because of the unfair prejudice engendered by telling the jury that the defendant has committed similar crimes in the past or that committing the charged crimes would be consistent with his character.

3. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER PRIOR BAD ACTS AS RELEVANT TO THE CREDIBILITY OF MS. RAY.

Respondent seeks to avoid the issue of the limiting instruction which comments on the evidence by arguing that it was invited error. BOR 21. The error, however, was clearly not invited by the defense counsel. Trial counsel explained that she prepared two limiting instructions, but was

asking for the limiting instruction which told the jury that evidence of prior bad acts was relevant only to state of mind. RP 553. The second instruction was just for convenience:

MS. KING (trial counsel): I would just like to make it clear, Your Honor, I'm not proposing the one I drafted. I drafted it for the convenience of everyone because it was my understanding that that's what the State's position would be. My actual proposed one is the one that was submitted in the supplemental packet that goes to the victim's state of mind. I want that clear for the record that I'm not conceding or waiving that. I did that just for the convenience of the parties.

RP 554. Defense counsel soon reiterated: "I don't want to waive my objection to the court's submission of that; I don't think I have, I think I've perfected the record" and that the acts were not relevant to "her credibility." RP 555.

While, after discussion, trial counsel temporarily proposed taking out state of mind and referring only to credibility, counsel continued, "I just want to make it clear on the record that I'm not waiving my objection to the--by submitting a proposed instruction, that I'm not waiving my objection to that in the first place." RP 561-562.

When the trial court ruled that it would include both state of mind and credibility, defense counsel stated, "I'll just make an exception on the

record." RP 562. The trial court responded, "Sure" RP 562. The discussion ended.

Thus, it is clear from the record that defense counsel submitted a second limiting instruction for the convenience of the parties and that defense counsel indicated on the record that she was not waiving objection to the instruction *and* formally took exception to the instruction. The record does not support a claim of invited error, as asserted by the state. BOR 21.

Contrary to the argument of the state (BOR 20-21), the instruction telling the jurors that evidence of the prior bad acts was relevant to Ms. Ray's credibility was a comment on the evidence. The only way that the evidence of Mr. Magers' prior acts of violence could be relevant to Ms. Ray's denying he was violent to her would be if it proved that she was untruthful in her denials. The inference from the prior bad acts -- that Mr. Magers is a violent person -- directly contradicted Mr. Ray's testimony about the charged incident. The limiting instruction necessarily conveyed to the jury that the evidence showed her to not be credible. As such the instruction constituted a comment on the evidence and conveyed the court's view that Ms. Ray was not credible in denying that Mr. Magers committed the crime.

The instruction was in conflict with the basic instruction to the jury that they were the "sole judges of the credibility of the witnesses and of what weight to be given the testimony of each." CP 119. The instruction conveyed to the jurors the court's view that the prior bad acts evidence showed that Ms. Ray was not credible and Mr. Magers was guilty of assaulting her.

A statement by the judge is, by definition, 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), review denied, 95 Wn.2d 1006 (1981). The comment on the evidence should require reversal of Mr. Magers' convictions.

4. THE TRIAL COURT ERRED IN ADMITTING MS. RAY'S OUT-OF-COURT STATEMENTS AS EXCITED UTTERANCES.

Ms. Ray's statements to the police were not excited utterances because, under the state's theory of the case, she necessarily had time to reflect and consider the consequences of her statements and did so. It is undisputed that, in fact, Ms. Ray was untruthful to the officers when she initially told them that Mr. Magers was not in the house.

The entire rationale for the excited utterance exception to the hearsay rule is that the declarant is so much under the stress of an event that the statement could "not be the result of fabrication" Johnson v. Ohls, 76 Wn.2d 398, 405, 457 P.2d 194 (1969). Further, the statement "must relate to the startling event or condition." State v. Chapin, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). Ms. Ray, under the state's theory, had the capacity to fabricate, and her initial statement that Mr. Magers was not present did not relate to a startling event.

Evidence of the declarant's emotional state may be relevant where there is no affirmative evidence that the declarant was able to be untruthful and to consider whether or not to be truthful, but it cannot override proof that the external event did *not* overcome the ability to consider and fabricate. State v. Brown, 127 Wn.2d 749, 757-759, 903 P.2d 459 (1995)("she had the opportunity to, and did in fact, decide to fabricate a portion of her story").

Ms. Ray's statements were not admissible as excited utterances and introduction of these statements should require reversal of Mr. Magers' convictions.

5. THE DEFENSE WAS CONSTITUTIONALLY ENTITLED TO INTRODUCE EVIDENCE THAT MS. RAY KNEW MR. MAGERS FACED A THIRD STRIKE.

The state was permitted to introduce overwhelmingly prejudicial evidence which the state claimed showed that Mr. Ray was recanting her statements to the police because she was afraid Mr. Magers would get out of jail and injure her if she testified against him. RP 24-25, 28, 40, 180. The trial court accepted the argument that the purpose of the testimony was not to convince the jurors that Mr. Magers was the type of person to have committed the crime.

As a matter of fundamental fairness, Mr. Magers was entitled to introduce evidence that, in fact, if Ms. Ray testified against him and he was convicted, he would never get out of jail and could never be a threat to her in the future. Evidence that he faced a "lengthy sentence" was not a substitute for the truth. While ordinarily punishment is not relevant to the jury's determination of guilt or innocence, here it was -- just as prior bad acts were found to be relevant to some purpose other than propensity.

Denial of the right to present evidence on the very issue introduced by the state was a denial of due process and compulsory process and the right to present a defense. Washington v. Texas, 388 U.S. 1, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967). Trials must be two-way streets. Wardius

v. Orgeon, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973);

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The trial court's refusal to let the trial go forward on a level playing field should require reversal of Mr. Magers' convictions.

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

In State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), the Washington Supreme Court set out the rule, "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). This is the controlling statement of the law.

The state was entitled to elicit from Officer Lang a description of Ms. Ray's demeanor. The state was not entitled to elicit from Lang his opinion that when he asked Ms. Ray if Mr. Magers was at the house, he could tell that "something was terribly wrong" and that she was "obviously traumatized," opinions which conveyed to the jury that Mr. Magers had done something terrible to traumatize Ms. Ray. This was impermissible opinion that Mr. Magers had committed the criminal acts with which he had been charged. As such it could be raised for the first time on appeal and should result in reversal of Mr. Magers' convictions.

The state's case at trial was that Ms. Ray's trial testimony should be disregarded and the jury should find, contrary to her testimony, that Mr. Magers had hurt and imprisoned her. Officer Lang's testimony invaded the province of the jury and told the jurors that, in his opinion, the crimes had been committed.

7. THE PROSECUTOR COMMITTED MISCONDUCT.

The prosecutor committed misconduct in both opening and closing arguments. In particular, in opening, the prosecutor gave the jurors an incomplete view of the law by instructing the jurors on the elements of the crimes. Choosing to instruct only on the elements of the crimes conflicts with the standard instruction, given in this case, that jurors "should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof." CP 119. As stated in the Opening Brief of Appellant, providing instructions piecemeal did not inform the jurors of the burden of proof, lesser included offenses or other essential components of the instructions as a whole. RP 49; CP 118-145. As stated in the Opening Brief of Appellant, instructing the jury on the elements of the crime in opening statement violates Const. art 1, § 16, which charges the trial court with instructing the jury on the law.

Although respondent asserts that it cannot respond to the "bald" assertion that the prosecutor's definition of assault was improper (BOR 35), Mr. Magers properly set out that the prosecutor, in opening, told jurors that "the State will be arguing in the end that an assault can also be an intention to create fear and apprehension of bodily harm. . . .So in a nutshell, those are the elements of the offense that the defendant has been charged with . . . " RP 250. As Mr. Magers further set out, "This definition left out that the fear had to be reasonable and that the victim actually had to experience the fear." AOB 49. This argument is neither vague, bald nor unsupported. The instruction actually given by the court provided the correct definition:

An assault is also an act 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 (emphasis added). See also, State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993). Defense counsel objected and the trial court erred in permitting the prosecutor to instruct the jury, erroneously and incompletely, in opening statement.

The prosecutor committed misconduct in closing argument by inviting the jurors to rely on unreliable, second-hand information which

the defense had no opportunity to confront. See AOB 44-45. The error was not, as respondent suggests, that the prosecutor presented evidence (BOR 36-37); a defense objection prevented this. RP 580-581. The error was that the prosecutor asked the jurors to rely on things they had heard in voir dire, from their friends and family, or elsewhere outside the courtroom, as evidence of whether the trial evidence was as an example of "domestic violence relationships and the dynamics within them." RP 581.

The error was preserved by objection; no curative instruction could have been requested since the court overruled the objections to the questions which allowed the prosecutor to invite the jurors to consider unreliable information outside the record. RP 581.

The state made as much as it could of one prior domestic charge. It asked the jury to believe in a stereotypical domestic violence relationship that was never established in the record and find Mr. Magers guilty based on it. This was misconduct and the misconduct denied Mr. Magers a fair trial and should require reversal of his convictions.

8. CUMMULATIVE ERROR DENIED MR. MAGERS A FAIR TRIAL.

The numerous and serious trial errors, collectively, should require reversal of Mr. Magers' convictions, even if the errors would not require reversal individually.

9. MR. MAGERS' SENTENCE OF LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL.

For the reason set out in his opening brief (pages 51-55, Mr. Magers asserts that his sentence of life without parole, under the POAA, 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.2d 520 (2005), review pending, is wrongly decided.¹

He further asserts that his sentence of life without parole for convictions of assault two and unlawful imprisonment constitutes cruel and unusual punishment. See AOb 55-56. A sentence of life without parole is grossly disproportionate to the crimes of conviction.

¹ The Supreme Court is scheduled to decide whether or not to grant review in late March 2006.

E. CONCLUSION

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

DATED this 18th day of January, 2006.

Respectfully submitted,


Rita J. Griffith
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 18th day of January, 2006, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:
P. Grace Kingman
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2102

Kha Danh Magers
783959
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

 1/18/06
Rita J. Griffith DATE at Seattle, WA

FILED
COURT OF APPEALS
DIVISION III
06 JAN 19 PM 12:24
STATE OF WASHINGTON
BY  DEPUTY