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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 45173-5-II

STATE OF WASHINGTON, Respondent

v.

BARON DEL ASHLEY JR, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00992-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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ISSUE FOR WHICH REVIEW WAS GRANTED

- I. **Whether in a prosecution for unlawful imprisonment in connection with domestic violence, the defendant's history of domestic violence against the complaining witness was admissible under ER 404(b) as evidence the witness was [restrained] without consent even though the witness did not recant her allegations against the defendant.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Baron Ashley, Jr. (hereafter 'Ashley') was charged by information with Unlawful Imprisonment Domestic Violence pursuant to RCW 9A.40.040 and RCW 10.99.020 for an incident that occurred against Makayla Gamble on May 27, 2013. CP 5, 50. Prior to trial, the trial court heard the State's motion to admit evidence pursuant to ER 404(b) of the prior abuse against Ms. Gamble perpetrated by Ashley in order to show whether she was restrained without consent and for the jury to assess her credibility. RP 84-97. The trial court allowed admission of this evidence for those purposes. RP 96-97. The jury returned a verdict of guilty on the Unlawful Imprisonment charge and returned a special verdict finding that Ashley and Ms. Gamble were family or household members. CP 74-75.

Ashley timely appealed and following supplemental briefing on the legal financial obligations (LFO) issue, as part of a motion for

consideration, Division II of the Court of Appeals ultimately affirmed his conviction, affirmed his sentence, and remanded the case to the trial court on the LFO issue. Appendix A (Court of Appeals decision). In affirming Ashley's conviction, the Court of Appeals also found that the trial court properly admitted the evidence of Ashley's prior abuse under ER 404(b) because the evidence "was material and relevant to both Gamble's lack of consent and to whether Ashley accomplished the restraint by intimidation." App. A at 11-12.

Ashley petitioned this Court for review only on the 404(b) issue, which this court granted. This Court framed the issue for which review was granted as: Whether in a prosecution for unlawful imprisonment in connection with domestic violence, the defendant's history of domestic violence against the complaining witness was admissible under ER 404(b) as evidence the witness was constrained [sic] without consent even though the witness did not recant her allegations against the defendant. Further this Court ordered supplemental briefing and indicated such briefing "should at least in part address the impact, if any, of *State v Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014) on this case. App. B (Nov. 5, 2015 Supreme Court Order).

B. STATEMENT OF FACTS

Ms. Gamble had previously been in a relationship with Ashley for five years and had two children with him. RP 185-86. That relationship, however, was marred by domestic violence. RP 74-78, 83, 195-98, 216-17. Ashley strangled Ms. Gamble in 2000, slapped her around a couple times in 2001 while she was pregnant with one of their children, which caused a couple of black eyes, popped her eardrum and gave her a black eye in 2004 by slapping her over and over, pushed her down the stairs one time, in 2005 he spilled beer in her face, slapped her, and spit in her face as she lay in bed, and, finally, he pushed or hit her in 2008. RP 74-78, 83, 195-98, 216-17. Accordingly, Ms. Gamble had only very infrequent contact with Ashley since 2008, the year of the last time he abused her. RP 186, 216-17.

Nonetheless, Ms. Gamble had contact with Ashley over the Memorial Day weekend in 2013 as she, along with her three children, was visiting the home of Ashley's sister and Ashley was present. RP 186-88, 191. The police visited the residence on May 27 of that weekend looking for Ashley while Ms. Gamble, Ashley, and the children were all present. RP 192.

When the police knocked on the door, Ashley got angry and put everybody (Ms. Gamble and the children) into a bedroom, but then he told

them all to go upstairs because they were being too loud. RP 192. Ms. Gamble had her two-year-old with her and Ashley felt the toddler was too loud so he put Ms. Gamble and her young child in the upstairs bathroom and closed the door, only to return to take the toys the toddler was playing with because he still felt the child was too loud. RP 193-94. Ms. Gamble told Ashley twice that she wanted to leave the bathroom and to go home; Ashley did not respond. RP 195. She also attempted to open the bathroom door three or four times, but each time Ashley would pull the door shut to close it. RP 194. Once when she opened the door, Ashley was in the hallway, and when he saw her open the door, "his face was different," and "he looked pissed off." RP 195. Consequently, Ms. Gamble remained shut in the bathroom for approximately 45 minutes while the police pounded on the door and called for Ashley. RP 193, 199-200, 212.

Ms. Gamble testified that when Ashley ordered her into the bathroom on that Memorial Day weekend she complied because she knew his history and his temper and feared what he would do. RP 199, 225. In fact, she did not even contemplate saying no to him because she could tell based on the look in his eyes that he was mad. RP 199. She did not leave the bathroom for the same reasons and explained that but for her history with Ashley she "would have tried to get out." RP 198, 225. Ms. Gamble did not feel free to leave the bathroom, let alone the home. RP 200, 225.

Ms. Gamble admitted that during the incident Ashley did not threaten her or physically force her into the bathroom. RP 202, 209, 225. And she agreed that she “remained in the bathroom under [her] own power.” RP 203. Nonetheless, she reiterated that Ashley did not have to threaten to harm her to keep her in the bathroom because she was still afraid of him given their past history and because all he had to do was to look at her a certain way and she would comply. RP 225. When police finally made entry into the residence, Ashley told Ms. Gamble to go downstairs and tell police that he was not there. RP 200. Ms. Gamble, however, told police that Ashley was indeed in the residence. RP 200. Ashley was then arrested.

Importantly, during the cross-examination of Ms. Gamble Ashley continuously implied, and presented the idea to the jury, that Ms. Gamble fabricated her allegations against Ashley because she was afraid that she would get in trouble with the police for obstructing or delaying their attempts to enter the home and arrest Ashley. RP 209-11, 216, 218. Ashley also challenged Ms. Gamble’s reactions to the situation and the decisions she made by painting them as unreasonable or not credible. RP 213, 218-19. For example he asked:

[ASHLEY:] So tell me about when you said to Baron, “Please, Baron, we better go let the cops in. They’re coming with the dogs.”

[MS. GAMBLE:] Did I -- did I talk to him about that?

[ASHLEY:] You never said that, did you?

[MS. GAMBLE:] No. I didn't say it.

RP 213.

Ashley returned to these themes during his closing argument, which itself was a fusillade of attacks on Ms. Gamble's credibility. RP 267-87. In fact, Ashley proffered that "the one witness whose credibility you have to scrutinize is Ms. Gamble." RP 272. Ashley repeatedly told the jury that Ms. Gamble's behavior during the situation was not reasonable and, therefore, she lacked credibility:

Never once did she say, "As we were going up the stairs, I protested. I didn't want to go hide. Cops were at the front door."

RP 282.

Then she goes and peeks. Oh, he's still there. Close the door. Oh, let's go and peek. Oh, he's still there. Let's go and peek. He's still there. There was nothing that prevented her.

RP 283.

Mr. Ashley says, "Oh, we've got to go hide." There is *nothing* that stopped her from making a decision at that point to say, "No. We're sitting right here. The cops are on the other side of that door."

RP 283-84 (emphasis added).

But the cops are right there. They're right on the other side of that door. And, she didn't say, "No, I'm not going." Is that reasonable?

RP 284.

I never heard her say, and I asked her, I never heard her say, "I told Baron to go downstairs and unlock the door and let the cops in." *Common sense, reasonable, isn't that what a person would do?* She's in the bathroom. The bathroom -- she said she'd pull the door open and look outside and Baron would shut the door. It's a bathroom. It has a lock on the door. *Why didn't she just shut the door, and turn the lock and then say, "Baron, go downstairs and let the cops in. I'm tired of being in the bathroom."* And then, what's he going to do bust the door down? (Inaudible). Not with the cops right outside the door, a few feet away. Is that a reasonable action to take? I submit to you it is. Did it happen? No

RP 286 (emphasis added). Similarly, Ashley returned over and over to the idea that Ms. Gamble fabricated the story of being restrained in the bathroom to avoid the ire of the police. For instance, Ashley postulated that Ms. Gamble thought "Oh, my god! They can take my kids and they can take me and they can put me in jail and I better have a story" and he explained "That's why. And, she did [what] she did." RP 273-74. He continued:

Her survivor instinct kicks in and she starts to think, "Oh my god! I'm up here in the bathroom. I'm going to get charged with a crime. I better have a story. I better start thinking." And guess what? She's got that 40 or 45 or 47 or 52 minutes, whatever it is, to survive, to cover her butt and do what she needs to do to survive.

RP 283.

And, she has to explain to them [(the police)] and she has to have a darn good reason. And, she has to somehow assuage what she perceived to be their anger against her so she might not get charged and (inaudible) the kids.

RP 286.

Again, her survival instincts kicked in at that point. It's all about her not getting arrested. It is all about her protecting the kids. That's reasonable. That's normal. Any of us would do it. It's what she did because it is what she had to do. This is not a case of unlawful imprisonment. It is her changing her mind in the middle of it or later so she wouldn't get arrested.

RP 287.

The State, in its rebuttal closing necessarily invoked the admitted ER 404(b) evidence to explain the reasonableness of Ms. Gamble's actions, why she was afraid to leave the bathroom, and to rebut the claim of fabrication. RP 294-96. The jury then resolved the credibility contest by finding Ashley guilty.

ARGUMENT

- I. **The trial court properly admitted Ashley's history of domestic violence against the victim under ER 404(b) because the evidence was relevant to (1) establish an element of Unlawful Imprisonment, i.e., that he restrained her "without consent;" and (2) assess the victim's credibility which Ashley attacked from start to finish accusing her of fabricating the story to evade trouble and acting contrary to how a reasonable person would act in the same situation.**

Appellate courts review evidence admitted under ER 404(b) for abuse of discretion. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). That said, a reviewing court can affirm the trial court's evidentiary rulings "on any grounds the record and the law support." *State v. Grier*, 168 Wn.App. 635, 644, 278 P.3d 225 (2012) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)).

ER 404(b) provides that: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Basically, so long as the evidence is not admitted to prove character or propensity it "may . . . be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *State v. Gunderson*, 181 Wn.2d 916, 922, 377 P.3d 1090 (2014) (citation and internal quotation omitted).

It is well-settled that ER 404(b) evidence is admissible to explain the victim's state of mind when the victim's state of mind is an element of the crime for which the defendant is charged or when the victim's state of

mind is otherwise highly relevant. *See infra*. Thus, for example, ER 404(b) evidence can be admissible in sex abuse cases to “explain why the victim submitted to the sexual abuse and failed to report or escape it, to rebut the implication that the molestation did not occur. . . .” *State v. Wilson*, 60 Wn.App. 887, 890, 808 P.2d 754 (1991); *State v. Fisher*, 165 Wn.2d 727, 745-746, 202 P.3d 937 (2009); *United States v. Powers*, 59 F.3d 1460, 1464-1466 (4th Cir. 1995) (citing *Wilson* and holding that “evidence of [defendant’s] violence against [the victim] and her family members was admissible to explain [the victim’s] submission to the acts and her delay in reporting the sexual abuse.”). Similarly, in the context of domestic violence crimes our courts have held that evidence of past abuse or bad acts can be admitted to explain a victim’s reasonable fear of the defendant when that fear is an element of the charged crime, which includes the crimes of harassment and assault, to assist the jury in judging the credibility of a recanting victim, and to explain why a victim may not report the crime. *State v. Magers*, 164 Wn.2d 174, 182-83, 185-86, 189 P.3d 126 (2008); *State v. Baker*, 162 Wn.App. 468, 472-75, 259 P.3d 270 (2011); *State v. Johnson*, 172 Wn.App. 112, 121, 297 P.3d 710 (2012), *review granted in part on other grounds*, 178 Wn.2d 1001, 308 P.3d 642 (2013); *See also State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996). Simply put, “Washington courts have recognized that evidence of

misconduct is admissible to prove the alleged victim's state of mind.”

Fisher, 165 Wn.2d at 744 (citations omitted).

The test for admitting evidence under ER 404(b) “is well established. To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Hartzell*, 156 Wn.App. 918, 930, 237 P.3d 928 (2010).

When a trial court’s ruling on ER 404(b) evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010) (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

Here, following an evidentiary hearing, the trial court, relying on *Magers* and its progeny, correctly concluded that the ER 404(b) evidence consisting of Ashley’s abuse of Ms. Gamble was relevant because “one of the elements [the State is] required to prove is that the restraint is without Makayla Gamble’s consent, an element of the crime.” RP 96-98. The trial court concluded that the “probative value – on the *facts of this case* outweigh the prejudicial” effect and that evidence could only be

considered by the jury for its effect on Ms. Gamble's "credibility and consent." RP 98 (emphasis added).

In addressing the relevance of the ER 404(b) evidence, the Court of Appeals first looked to the statutes defining the crime and its terms. App. A at 11. A person commits unlawful imprisonment if he "knowingly restrains another person." RCW 9A.40.040(1). Further, RCW 9A.40.010(6) provides:

"Restrain" means to restrict a person's movements *without consent* and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, *intimidation*, or deception. . . .
(emphasis added).

The Court of Appeals held that the trial court "essentially . . . found that the domestic violence evidence was material and relevant to both Gamble's lack of consent and to whether Ashley accomplished the restraint by intimidation." App. A at 11. Notably, the Court of Appeals "agree[d] that personal history with a violent person can certainly be relevant to whether a particular action or behavior amounts to intimidation from the victim's perspective" and properly rejected Ashley's relevance argument. App. A at 11-12.

The Court of Appeals also correctly rejected Ashley's argument that the domestic violence incidents were too remote to be probative. App.

A at 12. Instead, it held that the evidence was “highly probative in this instance because the State claimed that Ashley had restrained Gamble through the use of a subtle form of intimidation that the jury could fully understand if it was aware only of the violent nature of Gamble and Ashley’s relationship. Although the prior incidents had taken place several years earlier, this history was still highly relevant to how Gamble perceived the situation, and Gamble’s testimony about her relative lack of contact with Ashley in recent years explained why these incidents were so dated.” App. A at 12.

Gunderson, and its analysis of the admissibility of prior bad acts in domestic violence cases, does not change the conclusion that the trial court admitted the evidence in this case for proper reasons and that the probative value of the evidence in this case outweighed its prejudicial effect. In *Gunderson*, this Court addressed whether the trial court abused its discretion in allowing evidence of the defendant’s two prior domestic violence convictions to impeach testimony from the alleged victim where the victim never gave a statement to the police or implicated the defendant in the crime and then testified at trial that she was not assaulted by the defendant. 181 Wn.2d at 920-921. Specifically, the State sought to admit the defendant’s prior bad acts to challenge the victim’s credibility. *Id.* at 921.

In holding that the trial court abused its discretion in finding the evidence's probative value to outweigh its prejudicial effect *Gunderson* stated "[t]hat other evidence from a different source contradicted the witness's testimony does not, by itself, make the history of domestic violence especially probative of the witness's credibility. There are a variety of reasons why one witness's testimony may deviate from the other evidence in a given case." *Id.* at 924. *Gunderson* then, after explaining that the risk of unfair prejudice is very high when admitting prior bad acts in domestic violence cases, held that it was:

confin[ing] the admissibility of prior acts of domestic violence to cases where *the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events. . . . Accordingly, [it] decline[d] to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements.*

181 Wn.2d at 925 (emphasis added). Importantly, *Gunderson* also explicitly stated that its opinion "should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness." *Id.* at 925 FN 4. Thus, that a victim does not recant or provide an inconsistent account of the events is not dispositive as to whether prior bad act evidence is properly admissible.

Here, the State established the overriding probative value of Ashley's prior acts of domestic violence against Ms. Gamble because that evidence went directly to the elements of the crime that the State had to prove. But for that history of abuse, the State could not prove, nor could Ms. Gamble explain, how Ashley "knowingly restrained her without consent" and how he was able to do that, in part, by intimidation—Ashley knew he did not need to explicitly threaten her or get physical with Ms. Gamble because he knew that she knew their past and what he was capable of doing. RCW 9A.40.010(6). The jury could not properly assess whether the State proved Ms. Gamble's state of mind without the evidence. *Fisher*, 165 Wn.2d at 744 (citations omitted). Additionally, *Gunderson* does not call into question, or address, the second basis by which *Magers* approved of the admittance of ER 404(b) evidence, i.e., to prove an element of a charged crime. *Compare Magers* 164 Wn.2d at 182-183 with *Gunderson*, 181 Wn.2d at 923-25.

Furthermore, there is no meaningful distinction between an otherwise "inexplicable recantation," which *Gunderson* concludes satisfies the overriding probative value necessary to introduce prior acts of domestic violence, from otherwise inexplicable conduct, which Ashley, at trial, alleged that Ms. Gamble engaged in, especially where the defendant continuously challenges the reasonableness of the victim's actions and

behavior. In both situations the victim is acting because of fear based on the past abuse. A jury cannot properly assess the reasonableness of the victims actions without knowing about the prior bad acts perpetrated against her. Because *Gunderson* specifically stated that its opinion “should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness” that Ms. Gamble did not recant is of no matter. *Id.* at 925 FN 4.

Moreover, *Gunderson* could not be more factually inapposite. In *Gunderson* the State attempted to use the defendant’s prior bad acts against the victim to impeach the credibility of a victim, whose only statement about the event occurred at trial and was exculpatory. Here, the State used the defendant’s prior bad acts to explain why—to makes sense of the fact that—Ms. Gamble could be unlawfully imprisoned in a bathroom for approximately 45 minutes without being explicitly threatened or physically forced by Ashley. The prior bad act evidence showed that her behavior was not inexplicable, not unreasonable, and that she was in the bathroom without consent. When the purposes for which the evidence was introduced is combined with the onslaught against Ms. Gamble’s credibility that was Ashley’s closing argument, the overriding probative value of the evidence becomes even more evident and nothing in

Gunderson suggests that it is an abuse of discretion to allow prior bad act evidence in a case like this for the purposes of establishing an element of the crime and assessing the victim's credibility. The trial court properly admitted the evidence in this case.

CONCLUSION

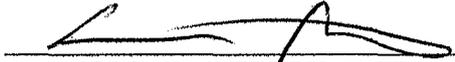
For the reasons argued above, Ashley's conviction should be affirmed.

DATED this 11th day of January 2016.

Respectfully submitted:

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APPENDIX A

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BARON DELL ASHLEY JR.,

Appellant.

No. 45173-5-II

PART PUBLISHED OPINION

JOHANSON, C.J. — Baron Dell Ashley Jr. appeals his jury trial conviction for unlawful imprisonment (domestic violence),¹ his offender score calculation, and the imposition of legal financial obligations (LFOs). He argues that the trial court erred when it included a prior attempted second degree assault juvenile adjudication as one point in his offender score because it did not qualify as a violent offense under RCW 9.94A.030(54). In the published portion of this opinion, we hold that the trial court did not err in counting the prior attempted second degree assault juvenile adjudication as one point and adopt the reasoning set forth in Division One of this court's opinion *State v. Becker*, 59 Wn. App. 848, 801 P.2d 1015 (1990). Ashley further argues that the trial court

¹ RCW 9A.40.040(1); RCW 10.99.020(5).

erred in (1) admitting evidence of prior acts of domestic violence under ER 404(b) and (2) imposing LFOs. In the unpublished portion of this opinion, we hold that the trial court did not abuse its discretion in admitting the prior bad acts evidence and that the trial court erred in imposing LFOs without inquiring about Ashley's future ability to pay. Accordingly, we affirm Ashley's conviction and the calculation of his offender score, but we reverse the LFOs and remand for a new LFO hearing.

FACTS

A jury found Ashley guilty of unlawful imprisonment (domestic violence).² The trial court calculated Ashley's sentence with a seven-point offender score, which included one point for Ashley's 1999 attempted second degree assault juvenile adjudication. Ashley challenges his offender score calculation.

ANALYSIS

Ashley argues that the trial court erred in scoring his 1999 attempted second degree assault juvenile adjudication as one point in his offender score. He contends that because this was an attempt offense, it did not qualify as a violent offense under RCW 9.94A.030(54) and it should have counted only as one-half a point. We disagree.

RCW 9.94A.525 establishes how to calculate a defendant's offender score. RCW 9.94A.525(7) provides, "If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and *one point for each juvenile prior violent felony conviction* and 1/2 point for each juvenile prior

² We describe the background facts and procedure in more detail in the unpublished portion of this opinion.

nonviolent felony conviction.” (Emphasis added.) RCW 9.94A.030(54) defines a “violent offense” as including, among other offenses, “[a]ny felony defined under any law as a class A felony or an attempt to commit a class A felony” and second degree assault. RCW 9.94A.030(54)(a)(i), (viii). It does not include attempted second degree assault in this definition. Ashley argues that because attempted second degree assault does not fall under RCW 9.94A.030(54)’s violent offense definition, the trial court erred when it assigned one point to his offender score for that offense rather than one-half a point.

But RCW 9.94A.525(4) requires the sentencing court to “[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.” Thus, under RCW 9.94A.525(4), Ashley’s prior attempted second degree assault would be treated as a completed second degree assault for purposes of calculating his offender score. Because second degree assault is a violent offense under RCW 9.94A.030(54)(a)(viii), RCW 9.94A.525(4) provides that the resulting offender score for that offense would be one point. As a result, it could be argued that RCW 9.94A.030(54) and RCW 9.94A.525(4) conflict.

Division One of this court addressed a substantially similar issue in *Becker*, 59 Wn. App. 848. In *Becker*, the sentencing court counted a prior attempted second degree robbery conviction as two points under former subsection (9) of the former offender score statute, RCW 9.94A.360 (1990), which is now codified as RCW 9.94A.525(8). 59 Wn. App. at 851. Similar to RCW 9.94A.525(7), the provision at issue here, former RCW 9.94A.360(9) provided for a higher offender score for prior violent felony convictions:

If the present conviction is for a violent offense and not covered in subsection (10), (11), (12), or (13) of this section, *count two points for each prior adult and juvenile*

violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(Emphasis added.)

On appeal, Becker argued that his prior attempted robbery conviction did not count as two points in his offender score because it was not defined as a “violent offense” under the general definitional statute, former RCW 9.94A.030(29) (1988) (now RCW 9.94A.030(54)). *Becker*, 59 Wn. App. at 850-51. Noting an “apparent” conflict between the former definitional statute and the former offender score statute, Division One held that the plain language of the statutes did not conflict and, instead, could be harmonized:

The apparent conflict in the sections is based on the assumption that the attempted robbery can only receive two points if it is a “violent offense”. Contrary to Becker’s contention, the offense does not receive two points because it is a violent offense, but rather, *it receives two points because the completed crime of robbery in the second degree would receive two points and the attempted robbery is to be treated as a completed crime.* According to the plain language of [former] RCW 9.94A.360(5) the attempt must be treated the same as the completed crime. Such a reading of the two sections gives effect to each section and does not distort the language of the sections.

Becker, 59 Wn. App. at 852. Division One subsequently followed *Becker* in *State v. Howell*, 102 Wn. App. 288, 292-95, 6 P.3d 1201 (2000), and Division Three has followed *Becker* in *State v. Knight*, 134 Wn. App. 103, 138 P.3d 1114 (2006), *aff’d*, 162 Wn.2d 806, 174 P.3d 1167 (2008). The same reasoning applies here.

Ashley argues that *Becker* and *Knight* were wrongly decided because they “did not adequately take into account the fact that, where the definitional section of the [Sentencing Reform Act of 1981], [RCW 9.94A].030, provides that certain offenses are violent offenses, non-listed offenses are definitionally not violent offenses.” Reply Br. of Appellant at 5. He contends that definitional statutes are “integral to the statutory scheme and must be given effect.” Reply Br. of

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Appellant at 5. We disagree that *Becker* and *Knight* did not give effect to the definitional statute; they did so by harmonizing the definitional statute with the offender score statute.

Ashley also argues that any ambiguity must be resolved in his favor under the rule of lenity. But because the approach in *Becker* harmonizes the plain language of the statutes, there is no ambiguity and the rule of lenity does not apply. We also note that the legislature's failure to amend the statutes in the 24 years since *Becker* was issued reflects its acquiescence to the court's conclusions in that case. See *State v. Berlin*, 133 Wn.2d 541, 558, 947 P.2d 700 (1997) ("The failure of the Legislature to amend a statute to change the statute's judicial construction is reflective of legislative acquiescence in the Court's interpretation.").

For the reasons stated in *Becker*, and by harmonizing the definitional and offender score statutes, we conclude that the trial court did not err in treating the attempted second degree assault the same as the completed crime and including this prior offense as one point in Ashley's offender score.

We affirm Ashley's conviction and his offender score calculation.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Ashley further argues that the trial court erred in (1) admitting prior bad acts evidence under ER 404(b) and (2) imposing the LFOs. These arguments also fail.

ADDITIONAL FACTS

I. BACKGROUND

On May 27, 2013, officers from the Vancouver Police Department arrived at Ashley's sister's apartment to arrest Ashley and his sister on outstanding arrest warrants. The officers knocked repeatedly on the door. Although the officers had initially heard voices inside the apartment, no one responded.

About 45 minutes later, the officers obtained a key from the apartment manager and announced that they had a key and were opening the door. When they opened the door, the officers called out to anyone inside the apartment, explained they were the police and were not going away, and asked the people inside to come out. Makayla Gamble, Ashley's former girlfriend, and her children met the officers in the downstairs living area.

Once Gamble was outside, the officers asked Gamble if Ashley was inside, and she told them that he was upstairs. She also told the officers that Ashley had detained her in the bathroom.

II. PROCEDURE

A. MOTION TO ADMIT PRIOR BAD ACTS EVIDENCE

The State charged Ashley by amended information with unlawful imprisonment (domestic violence). Before trial, the State moved to introduce evidence of Ashley's prior domestic violence against Gamble. The State argued that this evidence was to show why Ashley was able to keep Gamble in the bathroom without her consent despite the lack of any explicit threat.

At the motion hearing, Gamble testified that she had been in a relationship with Ashley from 2000 to 2005, and that he was the father of two of her children. She testified that she and her children were visiting Gamble's sister when the police arrived and that Ashley had put her and her

infant in an upstairs bathroom so the police would not hear them. She remained in the bathroom for 40 to 50 minutes despite her telling Ashley several times that she wanted to leave. She further testified that she did not feel free to leave—in part because prior domestic abuse by Ashley caused her to fear Ashley. She stated that if it had not been for her history with Ashley, she would have gone downstairs rather than stay in the upstairs bathroom.

Gamble also testified about several past domestic violence incidents that happened between 2000 and 2008. Gamble stated that she had reported only one incident, a 2004 incident, to the police, but she then “dropped it.” 1A Report of Proceedings (RP) at 78. In addition, Gamble testified that she still feared Ashley and that she felt unsafe when she was in the bathroom because of his assaultive history. But she admitted that Ashley did not expressly threaten her when he told her to go in the bathroom and be quiet.

The State argued that Ashley’s prior violence against Gamble explained the dynamics of their relationship and would help the jury understand why Ashley was able to control Gamble’s behavior without any express threats and why Gamble initially complied with Ashley’s directions and did not yell for help. The State further argued that although the past acts of violence occurred several years earlier, these acts were still relevant because Gamble was aware that Ashley was capable of violence against her. Ashley argued that the trial court should not admit this evidence because the State was not using it to establish an element of the offense, it was not relevant to Gamble’s credibility because she was not recanting her earlier statements, Gamble’s testimony and the single police report from 2004 were not sufficient to establish the prior acts by a preponderance of the evidence, and the passage of time had made the incidents less probative.

The trial court found that (1) Gamble's testimony established the prior acts of violence by a preponderance of the evidence, (2) the purpose of the evidence was to show the restraint was without her consent because of her ongoing fear based on this history, and (3) the probative value of the prior acts evidence outweighed the possible prejudice. The trial court admitted the prior domestic violence evidence and invited the parties to submit limiting instructions related to this evidence.

B. TRIAL

At trial, Gamble testified that when the police arrived on May 27, Ashley forced her to remain in an upstairs bathroom. Gamble told Ashley twice that she wanted to leave the bathroom and to go home; Ashley did not respond. She also tried to open the door three or four times, but Ashley would close it again. Once when she opened the door, Ashley was in the hallway, and when he saw her open the door, "his face was different," and "he looked pissed off." 1B RP at 195.

Gamble also testified about four instances of past physical abuse that occurred from 2000 to 2005. She testified that she had only called the police after the 2004 incident and that she later recanted her allegations because she loved Ashley. In addition, Gamble testified that she had only seen Ashley three or four times since 2008.

On cross-examination, Gamble admitted that Ashley did not yell at her, threaten her, or physically force her into the bathroom. And she agreed that she "remained in the bathroom under [her] own power." 1B RP at 203. But on redirect, Gamble reiterated that Ashley did not have to threaten to harm her to keep her in the bathroom because she was still afraid of him given their

past history and because all he had to do was to look at her a certain way and she would comply. Ashley did not call any witnesses.

The jury found Ashley guilty of unlawful imprisonment (domestic violence). Ashley argued at sentencing that he did not have the current or future ability to pay LFOs, noting that he was currently indigent, that he already owed over \$6,000 in child support or outstanding LFOs from previous convictions, that he had four children, and that he was being incarcerated for up to 33 months. The trial court responded that it was imposing LFOs because Ashley had not made a "showing that he is unable to work and has future inability to pay." 1B RP at 321. The trial court imposed \$3,420 in LFOs: (1) a \$500 victim assessment, (2) a \$100 domestic violence assessment, (3) \$520 in court costs, (4) \$1,700 fees for court-appointed attorney and trial per diem, (5) a \$500 fine, and (6) a \$100 deoxyribonucleic acid collection fee. It also noted that restitution and costs for any court-appointed defense experts or other defense costs were to be set at a later date. The judgment and sentence does not, however, contain any findings regarding Ashley's ability to pay LFOs.

ADDITIONAL ANALYSIS

I. ER 404(B) EVIDENCE

Ashley argues that the trial court erred in admitting the prior bad acts evidence under ER 404(b) because (1) the State failed to prove the prior acts by a preponderance of the evidence, (2) the evidence was not relevant to an element of the crime, and (3) the evidence was overly prejudicial because the prior acts were too remote in time to be probative. We disagree.

A. STANDARD OF REVIEW AND ER 404(B) ANALYSIS

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). It is the appellant's burden to prove abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

ER 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007) (quoting ER 404(b)). Before admitting prior bad acts evidence, the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not." *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005).

B. PROOF OF PRIOR BAD ACTS

Ashley argues that the evidence did not establish the prior bad acts by a preponderance because Gamble did not provide any police or medical documentation of the incidents and because Gamble admitted that she called the police to report only one of the incidents and then recanted her allegations. We disagree.

At the motion hearing, Gamble testified about each of the incidents she later described to the jury, that testimony was not disputed, and the trial court apparently found Gamble's testimony credible. Ashley cites to no authority establishing that a witness's testimony alone cannot establish a fact by a preponderance of the evidence. Furthermore, to the extent the trial court's decision rested on it finding Gamble's testimony credible, we do not review a trial court's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, this argument fails.

C. RELEVANCE

Ashley next argues that the evidence was not relevant to an element of the crime. Again, we disagree.

A person commits unlawful imprisonment if he "knowingly restrains another person." RCW 9A.40.040(1). RCW 9A.40.010(6) provides,

"Restrain" means to restrict a person's movements *without consent* and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, *intimidation*, or deception.

(Emphasis added.) The trial court expressly found that the purpose of the evidence was to show that the restraint was without Gamble's consent because of her ongoing fear based on Ashley's history of violence with her. Essentially, the trial court found that the domestic violence evidence was material and relevant to both Gamble's lack of consent and to whether Ashley accomplished the restraint by intimidation. We agree that personal history with a violent person can certainly be

relevant to whether a particular action or behavior amounts to intimidation from the victim's perspective.³ Accordingly, this argument fails.

D. PROBATIVE VS. PREJUDICIAL VALUE

Ashley next argues that because the domestic violence incidents occurred several years before this incident, they were too remote to be probative, and, thus, the trial court erred when it determined that their prejudicial value did not outweigh any probative value. Again, we disagree.

Although the evidence of the prior domestic violence incidents is potentially highly prejudicial, that evidence was also highly probative in this instance because the State claimed that Ashley had restrained Gamble through the use of a subtle form of intimidation that the jury could fully understand if it was aware only of the violent nature of Gamble and Ashley's relationship. Although the prior incidents had taken place several years earlier, this history was still highly relevant to how Gamble perceived the situation, and Gamble's testimony about her relative lack of contact with Ashley in recent years explained why these incidents were so dated. Accordingly, this argument fails.

The trial court conducted the proper ER 404(b) analysis, and Ashley does not show that its findings were improper. Thus, we hold that the trial court did not abuse its discretion when it admitted this evidence.

³ Citing *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008), and *State v. Baker*, 162 Wn. App. 468, 475, 259 P.3d 270 (2011), Ashley also argues that "this sort of prior act evidence is appropriate in cases where the alleged victim recants, to show why she might do so out of fear, which was not the circumstance here." Br. of Appellant at 6. Although these cases state that prior domestic violence evidence is admissible "to assist the jury in judging the credibility of a recanting victim," these cases do not establish that this is the *only* purpose for which the trial court can admit such evidence. *Magers*, 164 Wn.2d at 186; *see also Baker*, 162 Wn. App. at 474-75.

II. LFOs

Finally, Ashley challenges his LFOs, arguing that (1) the trial court erred in requiring him to prove his future inability to pay LFOs, and (2) the trial court's finding of no showing of future inability to pay was not supported by any evidence. Based on our Supreme Court's recent decision in *State v. Blazina*, ___ Wn.2d ___, 344 P.3d 680 (2015), we agree that the trial court failed to make an adequate individualized inquiry into Ashley's future ability to pay.⁴

As a preliminary matter, the State argues that Ashley did not preserve this issue for review and that it is within our discretion to decline to consider it.⁵ But Ashley clearly argued at sentencing that he did not have the current or future ability to pay LFOs. Thus, we cannot decline to consider this issue under RAP 2.5(a).

Our Supreme Court recently held that the "trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *Blazina*, 344 P.3d at 681, 685. Although Ashley presented information relevant to his current ability to pay and his ability to pay during his incarceration, he did not present any information about his work experience, education, work skills, or potential employment prospects upon release from prison. Even though the trial court recognized that Ashley had not presented any evidence demonstrating he would be unable to pay LFOs after his release, it did not inquire further into any factors that would have been relevant to its decision to impose LFOs. *Blazina* has

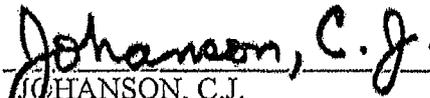
⁴ The parties have addressed *Blazina* in a motion for reconsideration and an answer to the motion for reconsideration.

⁵ The State also argues that this issue is not ripe for review because the State has not attempted to collect the LFOs. Our Supreme Court recently rejected the State's ripeness argument in *Blazina*, 344 P.3d 680 n.1. Accordingly, the fact that the State may not yet be attempting to collect Ashley's LFOs does not preclude our review of this issue.

No. 45173-5-II

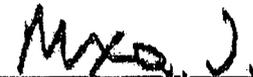
clarified that it is the *trial court's* statutory obligation to make an "individualized inquiry" into such matters. 344 P.3d at 685. The trial court failed to do so here. Accordingly, we reverse the LFOs and remand for a new LFO hearing.

We affirm Ashley's conviction and offender score, but we reverse the LFOs and remand for a new LFO hearing.

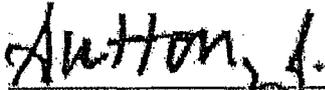


JOHANSON, C.J.

We concur:



MAXA, J.



SUTTON, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BARON ASHLEY, JR.,

Petitioner.

NO. 91771-0

ORDER

C/A NO. 45173-5-II

Filed
Washington State Supreme Court

NOV - 5 2015

Ronald R. Carpenter
Clerk

This matter came before the Court on its November 5, 2015, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is granted. Each party should serve and file a supplemental brief within 30 days of this order, and the supplemental briefing should at least in part address the impact, if any, of *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014) on this case.

DATED at Olympia, Washington this 5th day of November, 2015.

For the Court

Madsen, C. J.
CHIEF JUSTICE

725/159

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Subject: State v. Baron Del Ashley, Jr., No. 91771-0
Importance: High

RE: State v. Baron Del Ashley, Jr.
WA State Supreme Court No. 91771-0

Dear Clerk,

Please accept the attached Supplemental Brief of Respondent for filing. A copy of this brief is being sent to counsel for Petitioner via copy of this email message.

Please let me know if you have questions or need anything further to process this request.

Sincerely,

Pam Bradshaw
Legal Assistant
Clark County Prosecutor's Office
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