

66624-0

66624-0

NO. 66624-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

J.C. JOHNSON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence Rule 404(b) allows the State to offer testimony about prior violence within a domestic relationship as evidence of elements of the offense such as "reasonable fear," and to assess the victim's credibility. The State offered evidence that Johnson had previously abused the victim to prove her fear of him was reasonable, to prove the aggravating factor that there was a pattern of domestic abuse, and to assess her credibility. Did the court properly exercise its discretion by allowing evidence of Johnson's prior abuse of the victim?

2. Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. The jury was instructed that to find Johnson guilty of assault in the second degree they must find he "intentionally assaulted" the victim and "recklessly inflicted substantial bodily harm." Did the instructions hold the State to its burden to prove the appropriate mens rea for assault in the second degree?

3. Washington courts require that charging documents contain the essential elements of the crime. This Court has held that the definition of a "true threat" is not an essential element of felony harassment. Was the information charging Johnson with felony harassment sufficient even

though the definition of a "true threat" was not contained in the charging document?

4. Washington courts require that charging documents contain the essential elements of the crime, but not all the respective definitions of the elements. Johnson was charged with unlawful imprisonment and the information alleged that he "knowingly restrained" the victim. Was the information sufficient even though the definition of "restrained" was not contained in the charging document?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, J.C. Johnson, was charged by information with three counts of assault in the second degree (counts I, II, III)¹, one count of felony harassment (count IV), and one count of unlawful imprisonment (count V). CP 15-19. The State also charged a deadly weapon enhancement for two counts, alleging a knife was used in count III (assault in the second degree), and duct tape was used as a deadly weapon for

¹ Each count of assault in the second degree charged a different means (strangulation for count I, recklessly inflicted substantial bodily harm for count II, and with a deadly weapon for count III). CP 15-19.

count IV (felony harassment). CP 15-19. The State also alleged as aggravating factors that the crimes were committed with deliberate cruelty and there was a pattern of domestic abuse. CP 15-19.

The jury found Johnson guilty of all charges and the deadly weapon enhancements. CP 132-40, 144-46, 149-51. The jury found the aggravating factor of a pattern of domestic violence, but not deliberate cruelty. Id. However, the jury also returned an interrogatory indicating that the deadly weapon used for the enhancement for felony harassment was a knife rather than the duct tape that was charged. CP 15-19, 141-43, 147-48. The trial court vacated the felony harassment (count IV) charge on double jeopardy grounds and did not impose a sentence enhancement for that count.

Johnson was sentenced to life without the possibility of parole as a persistent offender for all three counts of assault in the second degree. CP 176, 178. The court imposed a standard range sentence for the unlawful imprisonment charge (count V).

2. SUBSTANTIVE FACTS

J.J.² was forty-nine years old and lived in Shoreline. She had three adult children from a previous marriage. 7RP 43³. She met the defendant, J.C. Johnson, in February 2007. J.J. described a "whirlwind" relationship and they were married within two months. 7RP 45, 47.

The first six months of the marriage went well, but then Johnson became paranoid about J.J. cheating on him. Johnson would drive J.J. to work and accompany her on trips to visit her parents. 7RP 129; 8RP 111. When J.J. would speak to her daughter, the defendant was often on speaker phone during the calls. 9RP 35. When J.J. was not working they were together at all times. 7RP 123. J.J. felt Johnson was isolating her. 7RP 45, 50, 129.

J.J. worked for Amtrak in a dining car. 7RP 46. Initially, she worked "long hauls" where she would be gone for six days at a time. 7RP 46. She requested shorter trips so she would not be gone as long. 7RP 46. Johnson made her wear a hands-free phone headset so he could

² The victim's last name was also Johnson. Initials will be used to distinguish between her and J.C. Johnson.

³ The verbatim report of proceedings consists of fifteen volumes, which will be referred to in this brief as follows: 1RP (11/29/10), 2RP (11/30/10 - morning), 3RP (11/30/10 - afternoon), 4RP (12/1/10 - voir dire), 5RP (12/1/10), 6RP (12/2/10), 7RP (12/6/10), 8RP (12/7/10), 9RP (12/8/10), 10RP (12/13/10), 11RP (12/14/10), 12RP (12/15/10), 13RP (12/16/10), 14RP (12/17/10), 15RP (1/26/11).

listen to her at work to be sure she was not talking to other men.

7RP 54-55, 120-21. If he heard J.J. talking to a man, he would "make her pay." 7RP 55.

J.J. would wake up in the middle of the night to find Johnson on her chest, strangling her, accusing her of cheating. 7RP 50. This happened frequently enough that J.J. was unable to count how many times it happened. 7RP 51. The strangulations occurred at night, and during the day Johnson would hit J.J. or pull her hair. 7RP 53. J.J. would leave ornamental rocks on Johnson's pillow when she left for long trips for work. Johnson hit J.J. with the rocks. 7RP 58. Initially, the nighttime strangulations would happen about once per month, but it became more frequent. 7RP 53.

J.J. explained that she stayed in the marriage for several reasons. She loved Johnson and wanted to make the marriage work. 7RP 50. She tried to assure him that she was not cheating. 7RP 51. J.J. said that Johnson seemed to want to make the relationship better as well. 7RP 52. She described being with Johnson at all times, and rarely being alone with friends and relatives. 7RP 50, 59.

J.J. did not tell anyone about the ongoing abuse. 7RP 52. Johnson made threats against J.J.'s adult children, telling her "I don't want to hurt your daughter, she's never done anything to me." 7RP 55. J.J. was afraid

that Johnson would harm her children. 7RP 67, 106. She also feared that if she reported the abuse and she was not believed, Johnson would kill her. 7RP 58-59. On one occasion, J.J.'s boss noticed bruises and asked if Johnson was hurting her. 7RP 98. J.J. denied there was any abuse. 7RP 98-100. She had previously attempted to conceal an injury from her daughter and claimed she had run into a cabinet. 9RP 35.

Starting on May 4th, 2010, Johnson held J.J. in their apartment for days, physically abusing and threatening her. 7RP 63-64. Johnson was demanding to know if J.J. was cheating on him, which J.J. described as a constant theme of their marriage. 7RP 63. J.J. was afraid she would be killed and her body would be left for her children to find. 7RP 64.

Johnson kept J.J. in the apartment, refusing to allow her to get dressed. 7RP 65. Johnson had bought a large Rottweiler 7RP 62-63. During the three-day ordeal, the dog would bite her when Johnson became aggressive.⁴ 7RP 66-67. Johnson would tell her that the dog would do what he said and commanded the dog to watch her. 7RP 67, 68, 70, 92. One of the reasons J.J. did not flee the apartment earlier was because she was afraid Johnson would hurt her children. 7RP 67, 106. On the

⁴ J.J. explained that the dog was not aggressive toward her when Johnson was not near; hence, she was able to secure the dog when she returned to the apartment later with the police. 7RP 76.

occasions that J.J. was permitted to leave the apartment, she was accompanied by Johnson. 7RP 66.

During the three days J.J. was held captive, Johnson strangled her multiple times. 7RP 67. J.J. had previously had surgery on her throat and Johnson was aware that her throat was particularly sensitive. 7RP 84. On at least one occasion, Johnson slammed her to the ground and strangled her until she lost consciousness. 7RP 68. She awoke when Johnson threw water on her. 7RP 68. On another occasion, J.J. awoke to find Johnson strangling her. 7RP 70. During the struggle, J.J. cut her lip and was bleeding while on the bed. 7RP 70. During one of the strangulations, J.J. lost control of her bladder and urinated on herself. 7RP 86-87. Even after that incident, Johnson would not let her wear clothes. 7RP 87.

Johnson also threatened to duct tape her hands and feet, and then put duct tape on her nose and mouth. 7RP 69. When J.J. asked if he was going to kill her (by suffocating her), he replied by demanding to know the truth about her affairs. 7RP 69. He placed the duct tape on the nightstand by the bed. 7RP 69, 90-91. He also placed a knife and an ice pick in the bedroom. 7RP 69-70. Johnson would point the ice pick at J.J. and use the knife to intimidate her. 7RP 78-80. J.J. testified that he used the knife and the ice pick to "terrorize her." 8RP 13, 16.

Johnson also beat J.J. with different objects in the apartment.

7RP 88-90. J.J. had bought several gifts for Johnson, including a heart-shaped rock. 7RP 88. Johnson would hold the rock in his hands while he struck her. 7RP 88. He tried to use a trailer hitch but it was too heavy. 7RP 90. During one of the beatings, J.J. put up a hand to defend herself and Johnson smashed the ring she was wearing. 7RP 103.

On the final day, Johnson went into the kitchen and commanded the dog to watch J.J. 7RP 70. Even though J.J. was only wearing her bra and underwear she ran out the door. 7RP 70. She heard Johnson yell an expletive in surprise as she went out the door. 7RP 70, 92. J.J. hid in the bushes, then ran to a neighbor's apartment to call the police. She heard her car start and saw Johnson drive away. 7RP 72.

On May 6, 2009, Kay Caldwell was surprised to find his neighbor, J.J., in a panic, pounding on his door wearing only a bra and underwear. 7RP 31. Caldwell allowed J.J. inside and she said her husband had beaten her. 7RP 32. Caldwell allowed J.J. to use the phone to call 911. 7RP 32-33. That same morning another neighbor, Melissa El Campo, heard "bloodcurdling screams" from outside her window that were "like someone dying." 8RP 60. She looked outside and saw J.J.'s car being driven away. 8RP 60. Later in the morning, she called J.J.'s cell phone and Johnson answered. 8RP 62. Johnson started asking what was going

on. 8RP 62. El Campo noticed the police and ambulances responding to the apartment complex; Johnson called her back again asking what was happening. 8RP 65.

Deputy Beth Lavin from the King County Sheriff's Office responded to Caldwell's apartment. 6RP 20. She found J.J. in the apartment still in her underwear and bra, visibly shaken and upset. 6RP 20. Lavin also saw obvious injuries on J.J. 6RP 20. Lavin observed welts on J.J.'s head, and bruises and scratches on her neck, arms, and legs. 6RP 21. Deputy Lavin said the welts on J.J.'s head were the size of golf balls, and the injuries on her neck were consistent with strangulation. 6RP 21-22. J.J. also had what appeared to be a bite mark on her torso. 6RP 30. J.J. went to the hospital, where she was diagnosed with a closed head injury, multiple contusions, and dog bites. 8RP 93-94. Doctor Tina Neiders testified that the injuries on J.J.'s neck were consistent with strangulation. 8RP 89-90.

Deputy Lavin searched J.J.'s apartment. Johnson was not there. 6RP 24. J.J. secured the dog in a bathroom so the police could conduct a search and pointed out evidence. 6RP 24. J.J. pointed out the knife and the ice pick that Johnson used to menace her. 7RP 80-81. Lavin found a butcher knife and an ice pick on the chair in the living room. 6RP 32-33. J.J. also pointed out the bloodstained sheets caused by the cut on her lip

during one of the struggles while Johnson strangled her. 7RP 82-84. She pointed out the trailer hitch and the heart-shaped rock that Johnson had used during the beatings. 7RP 82. She also showed the police the duct tape that Johnson had threatened to suffocate her with. 7RP 83. In the bedroom, Lavin noticed a large bloodstain and a trailer hitch on the bed. 6RP 34, 35. Lavin also found a roll of duct tape and a heart-shaped stone in the bedroom. 6RP 34, 52-53. Detective Mike Mellis later found the ring that was damaged when J.J. attempted to defend herself. 9RP 102. J.J.'s car was found abandoned at a nearby casino. 8RP 129. Johnson fled the state to Mississippi. 9RP 7-8.

Johnson testified at trial and denied that he prevented J.J. from seeing her family alone. 10RP 85-86. He denied the controlling behavior J.J. described, such as requiring her to wear the Bluetooth. 10RP 87-88. He denied ever strangling J.J. 10RP 92-93. He acknowledged only that he had pushed J.J. in the past and did not injure her. 10RP 92-93. He denied that he hit or strangled J.J. during the time between May 3-6. 10RP 130. He admitted that they argued and he pushed J.J. down. 10RP 125-26, 128. He also acknowledged that the dog bit J.J. during a "tussle." 10RP 126. Johnson claimed the dog was trained to "protect" him. 10RP 84, 122, 124-25. According to Johnson, the morning J.J. fled the apartment they had argued and Johnson said he was returning home.

10RP 133. He shoved J.J. and her head hit the bed, and he left in the car. 10RP 134; 11RP 3. He later acknowledged that he knew the police were looking for him when he left for Mississippi. 11RP 5-6, 39. The jury rejected his account and convicted him of all charges. CP 132-40, 144, 146, 149-51.

C. ARGUMENT

1. THE COURT PROPERLY ADMITTED JOHNSON'S PRIOR DOMESTIC VIOLENCE ABUSE OF J.J.

Johnson contends that the trial court erred by admitting evidence of prior domestic violence he perpetrated against J.J. Johnson is incorrect. The evidence was relevant to elements of the crimes charged, to the aggravating factors charged, and to assess J.J.'s credibility. The trial court did not abuse its discretion by admitting this evidence.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character and show action in conformity therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). Such evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Powell, 126 Wn.2d at 258-59. Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. Powell, 126 Wn.2d at 258. Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

In the present case, there were multiple reasons to admit evidence of Johnson's prior domestic abuse of J.J. The evidence was relevant for proof of elements of the crimes charged, to prove the aggravating factors charged, and to assess J.J.'s credibility.

a. J.J.'s Reasonable Fear Of Johnson Was An Element Of The Crimes Charged.

Several of the charged crimes required the State to prove that J.J. reasonably feared Johnson. J.J.'s fear was based upon the prior abuse she suffered at Johnson's hands. The evidence of prior abuse was thus directly relevant to the charged crimes.

The State had the burden to prove "reasonable fear" as an element to several of the crimes charged. Johnson was charged with assault in the second degree by means of a deadly weapon. CP 239. 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. RCW 9A.36.021(1)(c); CP 38. In light of this definition of assault, "reasonable fear of bodily injury" was an issue in the case. CP 38.

Johnson was also charged with felony harassment in count IV, which required proof that J.J. reasonably feared he would carry out the threat to kill. CP 239. A defendant is guilty of harassment if he knowingly threatens to cause bodily injury or death to the person threatened. RCW 9A.46.020(1)(a)(i), (2)(b). The defendant must also place the victim in reasonable fear that the threat will be carried out.

RCW 9A.46.020(1)(b). An objective standard is applied to determine whether the victim's fear is reasonable. State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). Accordingly, the State had to prove that it was reasonable for J.J. to believe that Johnson would carry out his threats to kill or injure her. Id.; State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000).

Courts have recognized that prior acts of violence are relevant to prove a victim's "reasonable fear." Ragin, 94 Wn. App. at 409; Barragan, 102 Wn. App. at 759-60. In Ragin, the defendant was charged with harassment based on calling the victim on the telephone from jail and threatening him. Ragin, 94 Wn. App. at 409. The Court of Appeals held that it was not error to admit evidence of the defendant's prior violent acts in order to demonstrate to the jury that it was reasonable for the victim to be fearful of the defendant's threats. Id. at 412. In Barragan, the defendant was charged with first degree assault and harassment, and the trial court admitted evidence of prior assaults by the defendant. Barragan, 102 Wn. App. at 756. The Court of Appeals affirmed the trial court's admission of evidence of the defendant's past violent acts, reasoning that the victim's knowledge of the defendant's acts was relevant to the harassment charge in order to show that the victim reasonably feared that the defendant's threats to him would be carried out. Id. at 759-60. In State

v. Binkin, 79 Wn. App. 284, 902 P.2d 673, 677 (1995), this Court also found that prior threats of violence were admissible to establish reasonable fear as an element of harassment. Id. at 292-93.

In State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126, 132 (2008), the Supreme Court approved of the reasoning in Barragan and Ragin. Magers was charged with domestic violence assault in the second degree and unlawful imprisonment. Id. at 177. The State sought to admit two types of prior misconduct: prior domestic violence of the defendant against the victim, and prior violence by the defendant against others. The purpose of the evidence was to show the victim's reasonable fear of the defendant and to assess her credibility in light of her recantation at trial. Id. at 181-82. The court held that prior domestic violence between the defendant and the victim was relevant to assess the victim's credibility in light of her recantation.

The second category of prior misconduct analyzed in Magers was violence toward others. The victim testified that Magers had previously been in trouble for fighting. Id. at 180. The State offered the evidence to prove the victim's state of mind, i.e., that she "reasonably feared bodily injury," as required to prove assault in the second degree. Id. at 181. The lead opinion believed this was permissible, Justices Madsen and Fairhurst disagreed with that portion of the lead analysis:

Although I agree with the majority that evidence of prior acts which are offered to explain recantation by a victim of domestic violence may be admissible under ER 404(b), I disagree that the evidence of fighting was admissible for this purpose under the facts here. The charge of fighting did not involve Ms. Ray and was, therefore, not a part of the dynamic of domestic violence.

Id. at 194 (emphasis added).

The concurrence's concern about the evidence of fighting with others does not apply to the present case because all of the prior misconduct admitted against Johnson was directed at J.J.

In the present case, the evidence was relevant because the State was required to prove J.J.'s reasonable fear of Johnson as elements of assault in the second degree, and felony harassment. J.J.'s fear of Johnson was based on the abuse she had experienced at his hands in the past. The reasonableness of her fear could only be evaluated in light of the domestic abuse she had suffered at Johnson's hands.

In addition, Johnson's prior abuse of J.J. was relevant to the charge of unlawful imprisonment. While reasonable fear is not an element of the offense, the victim must be restrained by physical force, *intimidation*, or deception. RCW 9A.40.010(1); CP 65. Johnson's history of violence against J.J. was what made him intimidating to her, and her fear kept her from fleeing for several days during this incident.

The evidence of Johnson's prior abuse of J.J. was relevant to elements of the charged crimes. The trial court did not abuse its discretion by admitting evidence directly relevant to the charges.

b. Evidence Of Prior Abuse Was Relevant To Prove The Aggravating Factors Charged.

Johnson was also charged with two domestic violence aggravating factors for each count. CP 15-18. The State alleged that Johnson's crimes involved domestic violence and were part of an ongoing pattern of domestic violence abuse manifested by multiple incidents over a prolonged period of time, and that Johnson manifested deliberate cruelty or intimidation of the victim. RCW 9.94A.535(h)(ii); CP 15-19. The evidence of prior abuse was required to prove the aggravating factors and was clearly admissible for that purpose.

Johnson appears to concede that the evidence of prior misconduct was admissible to prove the aggravating factors, but argues that the trial should have been bifurcated. While Johnson objected to the admission of past misconduct relying upon ER 404(b), at no time did Johnson move to bifurcate the trial, nor did he seek to exclude evidence of prior misconduct on that basis.

An appellate court will not generally review issues raised for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). While there is an exception for manifest error affecting a constitutional right (see State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), evidentiary rulings are not of constitutional magnitude. State v. Jackson, 120 Wn.2d 689, 695 P.2d 76 (1984).

A party cannot object on one basis at trial, and then claim a different error on appeal. For example, in State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986), the defendant objected to the admission of money seized in a drug case. The defendant stated that the State was trying to prejudice the jury, but at no time did he object to admission of the money under ER 404(b) or any other specific rule of evidence. The court held that the defendant did not preserve an ER 404(b) objection at trial, and a party may only assign error on the specific evidentiary objection made at trial. Id. at 922 (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied., 475 U.S. 1020 (1986); State v. Boast, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976)).

In Guloy, the defendant claimed the trial court erred by not weighing the probative value of the gambling conspiracy evidence against its prejudicial impact as required by ER 403. 104 Wn.2d at 412. The defendant in Guloy never made an objection on that basis at trial. The

court affirmed the conviction, “steadfastly adher[ing] to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” Id. at 421 (citing Bellevue Sch. Dist. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

Johnson did not seek to bifurcate the trial, and did not seek to exclude prior misconduct by bifurcating the trial. The trial judge mentioned the possibility of a bifurcated trial, but Johnson never followed up and requested bifurcation. 3RP 4. This Court should not consider arguments that Johnson failed to raise in the trial court. Even if he had requested the trial be bifurcated in order to exclude evidence of prior misconduct, it would not have likely succeeded. The evidence of prior domestic violence was also relevant to the elements of the charged crimes and to assess the victim's credibility. In other words, it would have been admissible whether the trial was bifurcated or not.

c. Evidence Of Johnson’s Prior Abuse Of J.J. Was Admissible To Assess J.J.’s Credibility.

Evidence of Johnson's prior abuse of J.J. was also admissible to assess her credibility. Washington courts have recognized that a clear understanding of an ongoing domestic violence relationship is important when evaluating the victim's choice to associate with the defendant, and to

assess credibility. For example, in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), the history of domestic violence was relevant to explain the victim's actions. The defendant in Grant had been convicted of assaulting the victim in the past. Id. at 101. That history was relevant to explain why the victim would voluntarily associate with the defendant despite having a protection order and despite having been hurt by him before.⁵ Id. at 108.

Evidence of prior abuse is relevant even if the victim does not recant. State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270, 274 (2011).

In Grant, the court noted:

As is reflected in the present case, victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others. 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 when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail. Ms. Grant's credibility was a central issue at trial. 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.

⁵ Grant recognized a number of legitimate reasons to admit evidence of prior abuse, including to assess the victim's credibility, to assess a victim's recantation, and to explain delays in reporting or minimization of a defendant's conduct. Grant, 83 Wn. App. at 106-08.

Similarly, in the present case, J.J. remained committed to her marriage with Johnson despite his ongoing abuse. 7RP 51. As J.J. described, she tried to placate Johnson and reassure him that she was not cheating. 7RP 52-53. She wanted their marriage to be better and thought Johnson did as well. 7RP 53. She did not report the abuse to her family or authorities both because she was afraid of Johnson, and because she loved him.

This Court in Grant also recognized that the dynamics of a violent domestic relationship can cause a victim to act in a manner inconsistent with the reports of abuse. Id. Evidence of Grant's prior assaults was admissible under ER 404(b) because it was "relevant and necessary to assess Ms. Grant's credibility as a witness and accordingly to prove that the charged assault actually occurred." Grant, 83 Wn. App. at 106. In the present case, J.J. did not report the abuse to family or friends. 7RP 52. She concealed bruises with clothing. 8RP 116. She even denied the abuse when her co-workers saw bruises. 7RP 98-100. The evidence of Johnson's prior abuse was relevant to show why J.J. remained in the abusive relationship for two years, and why she stayed confined with Johnson for the last several days of their marriage while he assaulted and threatened her.

d. The Trial Court Conducted A Proper 404(b) Analysis On The Record.

Finally, Johnson argues that the trial court failed to balance the probative value against the potential prejudice. Johnson is incorrect. The trial court clearly recognized that the evidence was directly relevant to both the credibility of J.J. and to elements of the crimes charged, and properly considered the admissibility of the evidence.

Before admitting ER 404(b) evidence, a 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. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). This analysis must be conducted on the record. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court clearly articulated the correct analysis for ER 404(b) evidence. 3RP 16-19. During the pretrial hearings, the court made its ruling on the record:

The case law has held, when we are talking about a reasonable apprehension of fear, both in assault case, in some assault cases, and in the felony harassment area that

that is an exception to the underlying rule that prior bad acts are not admissible.

3RP 16-17. The court found that the State's offer of proof was sufficient to find the proposed testimony admissible. 3RP 17. The Court went on to say:

The second thing I need to do is identify the purpose for which the evidence is sought to be introduced, and that is to the victim's state of mind as to the reasonableness of her fear.

And the evidence is relevant – the third thing the court looks at, the evidence is relevant to a material issue, that being that it's an element of the crime that her fear was reasonable or that she had, in the case of the assault, that she actually was placed in fear.

The fourth thing the court looks at is does the – 403 says evidence may be excluded that's probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, et cetera. So what I look at is, is there a danger of unfair prejudice.

....

Relevant means evidence having any tendency to make the existence of any fact or consequence to the determination of the action more probable or less probable.

The prior threats, controlling conduct, prior violence directed toward the victim is all relevant to her state of mind and the reasonableness of her apprehension of fear. So in their case in chief, through the testimony of the victim, they may testify to the prior acts as we have outlined.

3RP 17-19 (emphasis added). The trial court clearly articulated that the evidence was directly relevant to elements of the crimes charged, and was not unduly prejudicial. Johnson argues that the court did not specifically

articulate the balancing of the probative value and prejudice in its ruling. However, the trial court clearly recognized that, because the evidence was directly relevant to elements of the crimes charged, it was not unduly prejudicial. 3RP 17-19.

Even if the trial court's oral ruling was not sufficient, this Court can still affirm when the record is sufficient to permit meaningful of review the requirements for admissibility under ER 404(b). State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993); Barragan, 102 Wn. App. at 759. As outlined above, the evidence was directly relevant to elements of the charges, aggravating factors, and to assess J.J.'s credibility. The record amply demonstrates that the evidence was highly probative to these elements and not unduly prejudicial.

e. Any Error Was Harmless.

Any error in the admission of evidence of Johnson's prior domestic violence against J.J. was harmless. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

The trial court gave a limiting instruction regarding evidence of Johnson's prior abuse of J.J.:

Certain evidence has been admitted in this case for only a limited purpose. The evidence consists of testimony regarding alleged acts of domestic violence committed by the defendant against [J.J.] prior to May 4, 2009. This evidence may be considered by you only for the purpose of assessing [J.J.'s] state of mind with respect to counts III, IV, and V, and if you find the defendant guilty of any of the charged offenses or lesser included offense of assault in the third degree on count II. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 37. The jury is presumed to follow the court's instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1986). The court clearly prohibited the jury from any improper use of the evidence for propensity.

Furthermore, the evidence against Johnson was overwhelming. J.J. fled her home nearly naked and in panic. 7RP 31. When she sought help from her neighbor she had extensive visible injuries, including welts, extensive bruising, and bite marks. 6RP 20-31. Much of J.J.'s testimony was corroborated by the physical evidence. J.J. testified that she had been terrorized with a knife and an ice pick, and the police found the knife and ice pick at the scene. 6RP 32-33; 8RP 13, 16. She testified that Johnson threatened to suffocate her with the duct tape and police found the duct tape in the bedroom. 6RP 34, 52-53; 7RP 69. J.J. testified she had been beaten with the heart-shaped rock and the trailer hitch and those items

were also discovered in the bedroom. 5RP 34-35; 7RP 88-90. J.J. testified that she was injured and bleeding during one the strangulation episodes on the bed and police found the bloody sheets in the bedroom. 6RP 34-35; 7RP 70. J.J. said she was strangled, beaten, and bitten by the dog, and there was medical testimony that her injuries were consistent with a beating, strangulation and dog bites. 8RP 89-90. After the incident, Johnson took off in J.J.'s car, only to abandon it before fleeing the state. 8RP 129; 9RP 7-8.

The evidence of Johnson's prior abuse was properly admitted and the trial court did not abuse its discretion by admitting it. Furthermore, the State's case was strong. Even if the trial court erred, it was harmless.

2. THE JURY INSTRUCTIONS PROPERLY REQUIRED THE STATE TO PROVE JOHNSON RECKLESSLY INFLECTED SUBSTANTIAL BODILY HARM.

Johnson argues that the jury instruction misstated the law by requiring only that he recklessly committed a wrongful act, rather than recklessly inflicted substantial bodily harm. Johnson is incorrect. The "to convict" instruction specifically required that he "recklessly inflicted substantial bodily harm." CP 48. Furthermore, Johnson proposed the instruction that he claims was flawed, and any error was invited. CP 101.

Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991). It is reversible error to instruct the jury in a manner that would relieve the State of the burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Accordingly, Johnson may challenge the jury instruction defining recklessness for the first time on appeal. RAP 2.5(a)(3). Challenged jury instructions are considered as a whole, and the challenged portions are read in context. State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897, 901 (2010). The Court reviews alleged errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Johnson was charged with assault in the second degree by recklessly inflicting substantial bodily harm in count II. CP 15-16. The jury was instructed that to convict Johnson, the State had to prove beyond a reasonable doubt:

- (1) That during the time intervening between May 4, 2009 and May 6, 2009 the defendant **intentionally assaulted** [J.J.]; and
- (2) That the defendant thereby **recklessly inflicted substantial bodily harm** on [J.J.].
- (3) That the acts occurred in the State of Washington.

CP 48 (emphasis added). The jury instructions defined recklessness as:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 11.

Johnson argues that the instructions misstated the law because the definition of recklessness referred to a “wrongful act” rather than the specific result of substantial bodily harm. Johnson’s argument fails because he focuses on the jury instruction that defines recklessness in general terms. However, the “to convict” instruction clearly instructed the jury that they must find the defendant “intentionally assaulted [J.J.]” and “recklessly inflicted substantial bodily harm.” CP 48. While recklessness is defined in general terms, the “to convict” instruction for assault in the second degree specifically required that Johnson recklessly inflicted substantial bodily harm.

Jury instructions must be evaluated as a whole. It should be noted that the second paragraph of the definition of recklessness addresses the hierarchy of mens rea, but also indicates that recklessness can apply to a result, not just a wrongful act. These instructions, read as a whole, are

clear that to convict Johnson of assault in the second degree the jury must find that he knowingly disregarded a substantial risk that he would inflict substantial bodily harm.

a. This Court Should Not Follow Division Two's Holding That Assault In The Second Degree Instructions Are Inadequate.

Johnson argues that the definition of reckless relieved the State of the burden to prove he recklessly inflicted substantial bodily harm, because the definition of reckless referred only to a reckless act. Johnson relies on Division Two's holding in State v. Harris, 164 Wn. App. 377, 236 P.3d 1276 (2011). However, the State respectfully believes Harris was wrongly decided and this court should decline to follow Division Two, as it has in other cases addressing the sufficiency of the instruction for assault in the second degree.

A similar argument was made challenging the sufficiency of the jury instructions for assault of a child in the second degree in State v. Holzkecht, 157 Wn. App. 754, 238 P.3d 1233 (2010). In Holzkecht, assault in the second degree was defined as:

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Id. The court defined recklessness:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. Recklessness is also established if a person acts intentionally or knowingly.

Id. (emphasis added).

The defendant argued that the instructions relieved the State of its burden to prove the separate elements of intent and recklessness for assault of a child in the second degree. Id. at 760-61. In Holzknrecht, the defendant argued that the definition of knowledge conflated the mens rea that applied to the assault and the resulting substantial bodily harm. He did not specifically challenge the use of the term “wrongful act” in the definition of recklessness. Holzknrecht used the same instructions as the present case. However, this Court held:

The instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm. The instructions thus clearly require two separate inquiries, and nothing in the knowledge instruction suggests otherwise.

Id. at 766. The instructions remain equally clear in this case despite Johnson’s challenge to a different definition in the instructions.

Division Two has taken a different and inconsistent approach when analyzing instructions for assault in the second degree. In State v. Keend,

140 Wn. App. 858, 166 P.3d 1268 (2007), the defendant argued that the instruction allowed the jury to presume that he recklessly inflicted substantial bodily harm on the victim if it found he intentionally assaulted the victim. Division Two rejected this argument, noting that the to-convict instruction clearly advised the jury that the mens rea of “intentionally” related to the act (assault), while the mens rea of “recklessly” related to the result (substantial bodily harm), both of which were defined. Id. at 686. Thus, there was no possibility that the jury was confused because the instructions did not conflate the mental states and were accurate, clear, and separate. Id. at 866-68.

The challenge to the assault in the second degree instructions in Keend and Holzkecht was based largely on successful challenges to instructions on assault in the third degree on a police officer. In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), and State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010), both this Court and Division Two found that the knowledge instruction was confusing and relieved the State of its burden to prove the defendant knew the victim was a police officer. Goble, 131 Wn. App. at 203. In response, the definitions set out in WPIC's 10.02 (knowledge) and 10.03 (recklessness) were revised in 2008 to include bracketed language to insert specific facts to which the definitions applied. Holzkecht, 157 Wn. App. at 764.

After the 2008 amendments, Division Two again considered a challenge to a knowledge definition in an assault case. In State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009), the court held that the instruction conflated the mens rea for assault with that required for the resulting harm, relieving the State of its burden to prove the separate element of reckless infliction of substantial bodily harm. Division Two relied heavily on the 2008 amendment to WPIC 10.03 (the definition of recklessness) to justify the different result from Keend. Id. at 645-46. In Holzkecht, this Court rejected Division Two's analysis and criticized their approach, noting that "clarification of the standard instruction does not amount to an indictment of earlier versions." Holzkecht, 157 Wn. App. at 765.

It is clear there is a split between this Court and Division Two as to the clarity of the jury instructions for assault in the second degree. This Court has held that the definition of knowledge did not conflate the intent to assault and the reckless infliction of substantial bodily harm. The instructions were clear and held the State to its burden for both. Division Two has gone on to compound its error by finding the definition of recklessness also relieves the State of the burden of proving that the defendant recklessly inflicted substantial bodily harm. State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011).

b. Division Two Incorrectly Held That The Definition Of Recklessness Relieved The State Of The Burden To Prove The Reckless Infliction Of Substantial Bodily Harm.

Johnson relies on State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), and State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), to argue that the definition of recklessness must include specific reference to the resulting serious bodily injury. However, Gamble does not address the jury instructions, and this Court should decline to follow Division Two's flawed analysis in Harris.

In Gamble, the Supreme Court held that manslaughter is not a lesser included offense of felony murder because manslaughter required a reckless disregard of the risk a death may occur. Gamble, 154 Wn.2d at 459-60. Gamble did not address the jury instructions that are required. Gamble simply noted that manslaughter requires a reckless disregard of the risk of a specific result: death.

This Court applied Gamble to the jury instructions in manslaughter cases in State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011). This Court held that the manslaughter instructions given were deficient because they required the State to prove only “a substantial risk that a wrongful act may occur,” rather than “a substantial risk that death may occur.” Id. at 837-38. However, the manslaughter instructions given in Peters were very

different from those given in the present case. In Peters, the "to convict" instruction told the jury:

- (1) That on or about the 16th day of November, 2008, the defendant engaged in reckless conduct;
 - (2) That [S.P.] died as a result of defendant's reckless acts;
- and . . .

Id. at 845 (emphasis added). The definition of recklessness indicated:

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that *a wrongful act* may occur . . .

Id. (emphasis in original). Neither the "to convict" instruction nor the definition of recklessness required a reckless disregard of the risk that a specific result (death) would occur, as required in Gamble. In contrast, the instructions in the present case clearly required the State to prove that the defendant "recklessly inflicted substantial bodily harm." CP 48.

In Harris, Division Two held that the same instructions used in the present case misstated the law:

the definitional instruction that told the jury it need only find that Harris disregarded the risk of a "wrongful act," even read with the "to convict" instruction, did not properly state the law and these instructions relieved the State of its burden to show that Harris knew and recklessly disregarded that great bodily harm could result from his picking TH up and shaking him.

Harris, 164 Wn. App. at 388.

The State respectfully disagrees with the holding in Harris. There are several clear flaws in the Harris decision. First, the court failed to read the instructions as a whole. It should be noted that Division Two's belief that the "to convict" instructions required that a defendant recklessly inflict substantial bodily harm is not clear enough, is not supported by this Court's holding in Holzkecht. Second, they relied upon this Court's holding in Peters without analyzing the difference in the instructions given. Id. at 387. As noted, the manslaughter instructions failed to make any connection between the result and reckless mens rea in *either* the "to convict" instruction or the definition of recklessness. By contrast, instructions in this case clearly required the State to prove that the defendant "recklessly inflicted substantial bodily harm." Third, the Harris court relied upon the changes to the WPICs as evidence that the prior version was inadequate. Id. at 384-85. Division Two used the same reasoning in Hayward, and this Court specifically rejected it.

Just as in Holzkecht, this Court should decline to follow Division Two's analysis of assault in the second degree instructions. Division Two held that the definition of knowledge relieved the State of its burden to prove the separate mens rea for assault and the resulting substantial bodily harm in Hayward, 152 Wn. App. at 645-46. This Court disagreed. Holzkecht, 157 Wn. App. at 766. The same reasoning requires this Court

to reject Division Two's holding that the definition of recklessness relieves the State of the burden of proving the reckless infliction of substantial bodily harm in Harris. As in Holzkecht, this Court should find that the instructions as a whole "made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm." Holzkecht, 157 Wn. App. at 766.

c. Johnson Proposed The Instruction He Claims Misstated The Law And Any Error Was Invited.

- i. Johnson cannot appeal a jury instruction that he requested.

Even if the definition of recklessness was incorrect, Johnson himself proposed it, and cannot now complain that it was given. The doctrine of invited error precludes a party from appealing an incorrect instruction that he requested. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars a party from raising an alleged error even if it is of constitutional magnitude. Patu, 147 Wn.2d at 720; State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The doctrine applies when the trial court's instruction contains the same error as the defendant's proposed instruction even though the court does not

instruct the jury in the exact same language of the defense proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999), affirmed, 141 Wn.2d 731, 10 P.3d 358 (2000).

In the present case, Johnson complains that the definition of reckless is incorrect. The court's instruction defined reckless as:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 11. Johnson argues that the instructions misstated the law because the definition of recklessness referred to a "wrongful act" rather than the specific result of substantial bodily harm. However, Johnson proposed the following instruction:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

[Recklessness also is established if a person acts [intentionally] [or] [knowingly]].

CP 101 (emphasis added). Johnson proposed the same language he now complains misstates the law. Any error from using the "wrongful act"

language in the instructions was invited by Johnson and cannot be appealed.

- ii. Johnson's counsel was not ineffective by proposing the standard WPIC.

Next Johnson argues his counsel was ineffective because he proposed the WPIC defining recklessness. Johnson is incorrect. It is not ineffective assistance to propose a standard WPIC instruction. Johnson went to trial in December of 2010. Division Two's opinion in Harris disapproving of the WPIC's use of the "wrongful act" language was not issued until October 2011, well after Johnson's trial. Johnson's counsel was not ineffective by relying upon the Pattern Jury Instruction.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id.

Johnson has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a two-part standard:

(1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, Johnson must affirmatively show prejudice. Id. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. at 693. Johnson must establish a reasonable probability that, but for

counsel's errors, the result of the proceeding would have been different. Id. at 694.

For Johnson to prevail on his claim of ineffective assistance of counsel, the record must establish that his counsel's performance was deficient, and there was a reasonable probability that the outcome would have been different but for the deficient performance. The record does not establish either.

First, Johnson has failed to show his counsel was ineffective by relying upon a standard WPIC instruction. In State v. Studd, 137 Wn. App. 533, 973 P.2d 1049 (1999), the defendant also claimed that his attorney was ineffective for proposing a flawed self defense instruction. At the time of trial, however, case law held that the proposed self defense instruction was constitutional. Thus, our Supreme Court rejected this claim because “[trial] counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02.” Studd, 137 Wn.2d at 551.

Similarly in State v. Summers, 107 Wn. App. 373, 377-78, 28 P.3d 780 (2001), the defendant was charged with unlawful possession of a firearm and claimed the “to convict” instruction was flawed because it failed to require the jury to find knowledge. Id. at 377-78. He also claimed his attorney was ineffective by proposing a standard jury

instruction that did not require knowledge. As in the present case, in Summers, the cases requiring knowledge as an element of unlawful possession of a firearm were decided after Summers was tried. The Court held that “trial counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC appellate courts had repeatedly and unanimously approved.” Id.

Johnson must also show prejudice. As argued above, the instructions were clear that the jury had to find Johnson recklessly inflicted substantial bodily harm. Furthermore, as discussed above, the evidence against Johnson was overwhelming. In Harris, Division Two reversed a charge of assault of a child in the second degree inflicted by shaking an infant. The defendant in that case was relatively young and it was unclear whether he understood the risks of shaking an infant. Harris, 164 Wn. App. at 387. In the present case, Johnson severely beat J.J., intentionally assaulting her with a weapon, and causing visible injuries over a prolonged period of days. The evidence presented at trial established that Johnson knew the risk of causing “temporary but substantial disfigurement, loss or impairment of the function of any body part or organ, or causing a fracture.” CP 49. Johnson has failed to demonstrate prejudice in light of the overwhelming evidence and the clear instructions to the jury.

The record does not establish that Johnson's counsel's performance was deficient by proposing a standard jury instruction. Furthermore, he cannot show prejudice; hence, his claim of ineffective assistance of counsel fails.

3. THE INFORMATION WAS SUFFICIENT FOR ALL CHARGES.

Johnson challenges the charging language for unlawful imprisonment (count V) and felony harassment (count IV). The unlawful imprisonment charge contained the necessary element of “knowingly restrain.” The language used in the felony harassment charge has already been held sufficient by this Court in prior cases.

Washington courts require that charging documents contain the essential elements of the crime. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). The primary goal of the “essential elements” rule is to give notice to an accused of the nature of the crime. Id. Defendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense. State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

Charging documents that are not challenged until after the verdict are liberally construed. In Kjorsvik, the Supreme Court held that when the

sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity than if raised before verdict. Kjorsvik, 117 Wn.2d at 105-06. Because Johnson did not challenge the charging language before the verdict, this liberal standard of review applies.

When the issue is first raised on appeal, the test is: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice. Id. The first prong of the test looks to the face of the charging document itself, and there must be some language in the document giving at least some indication of the missing element.

a. The Information Was Sufficient To Charge Felony Harassment.

Johnson argues that the information was also insufficient to charge felony harassment because it did not include a "true threat" as an element of the crime. As a preliminary matter, the felony harassment charge was vacated to avoid any double jeopardy issues with the assault in the second degree charges in count III (alleged threats with a knife). Johnson thus asks this Court to vacate a count that has already been vacated. Arguably,

the felony harassment charge could be revived if the conviction for assault in the second degree in count III were found invalid. However, Johnson does not make any challenges specifically to count III. Johnson's claim is not ripe unless the need to reinstate the felony harassment charge arises.

As to the merits, this Court has already addressed the specific challenge made by Johnson in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784, 798 (2011), and State v. Atkins, 156 Wn. App. 799, 803, 236 P.3d 897 (2010). As in the present case, the charging documents in Atkins and Allen did not allege a true threat. However, this Court has held that a true threat is not an essential element that must be included in the information.

A person is guilty of felony harassment if the person harasses another person by threatening to kill. RCW 9A.46.020(2)(b). The First Amendment grants the freedom of speech, but does not extend to "unprotected speech." State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). "True threats" occupy one category of unprotected speech. Id. at 43. Consistent with this requirement, Washington courts interpret statutes criminalizing threatening language as proscribing only true threats. State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007).

Essential elements must be included in the charging document and in the "to convict" instruction. See, e.g., State v. Smith, 131 Wn.2d 258,

265, 930 P.2d 917 (1997). In Tellez, this Court construed the analogous felony telephone harassment statute, RCW 9.61.230(2)(b). However, the Court held that the concept of “true threat” was not itself an essential element of the crime. Id. at 483-84. Consequently, the “true threat” requirement need not be included in the charging document or the “to convict” instruction. Id. Again, in State v. Atkins, this Court held that a “true threat” is not an essential element of felony harassment and was not required to be included in the information. Atkins, 156 Wn. App. at 803.

Johnson argues that the Supreme Court’s holding in State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010), has undermined this Court’s holdings in Tellez and Atkins. Johnson is wrong. In Schaler, the defendant was charged with felony harassment. Id. at 278. The Supreme Court reiterated that the harassment statute can only proscribe “true threats.” Id. The Court went on to reverse Schaler’s conviction because the jury instructions did not adequately limit the statute’s reach. Id. Schaler expressly left open the question of whether the required mens rea is an essential element of the felony harassment charge such that it needed to be included in the information and the “to convict” instructions. Id. at 288; State v. Allen, 161 Wn. App. 727, 753, 255 P.3d 784 (2011). The Supreme Court emphatically stated in Schaler that its opinion did not address the issues raised in Tellez and Schaler, 169 Wn.2d at 288 n.6.

After the Supreme Court's decision in Schaler, this Court again reaffirmed its holding that a "true threat" is not an essential element that must be included in the information. State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784, 798 (2011). Johnson notes that the Supreme Court has accepted review of Allen. Johnson's speculation that the Washington Supreme Court may overrule Allen is not a basis to reverse his conviction. This Court has repeatedly rejected Johnson's argument that a "true threat" must be alleged in the information.⁶

b. The Information Was Sufficient To Charge Unlawful Imprisonment.

Johnson argues that the unlawful imprisonment charging language was deficient because the definition of restraint was not included in the charging document. Johnson is incorrect. Each statutory element was contained in the information, and the definitional elements are not required to be alleged in the information. State v. Rhode, 63 Wn. App. 630, 635, 821 P.2d 492 (1991).

⁶ Even if Johnson were correct, the remedy for a defective information is to dismiss without prejudice. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); see also State v. Quismundo, 164 Wn.2d 499, 505 n.3, 192 P.3d 342 (2008) (noting that there are no double jeopardy issues when a defective charging document is dismissed without prejudice, quoting Vangerpen).

Johnson was charged with unlawful imprisonment under RCW

9A.40.040. The statute is as follows:

A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.

RCW 9A.40.040 (emphasis added). The information alleged:

That the defendant J.C. Johnson in King County, Washington, during the period of time intervening May 4, 2009 through May 6, 2009, did knowingly restrain [J.J.], a human being.

CP 18 (emphasis added). The statute requires "knowing restraint" and the information alleged that Johnson did "knowingly restrain" J.J. The information contained all of the elements of unlawful imprisonment.

Johnson argues that the information was deficient because it did not include the definition of restraint. Restraint is defined as:

to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.

RCW 9A.40.010. Johnson cites to no case that holds that the definition of restraint must be included in the charging document. Instead, Johnson relies on State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000).

However, Warfield does not hold that the information must contain the definition of restraint. Warfield interpreted the statute and held that knowingly modifies every aspect of the definition of restraint; and in

Warfield, the evidence was not sufficient to prove the defendants knew they were not authorized to restrain the victim.⁷ Id. at 157.

As noted above, not all definitions need be included in a charging document to be sufficient. For example, in State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002), the defendant was charged with attempted murder. The information alleged only that the defendant attempted to cause the death of the victim. Id. at 362. The information did not include the definition of an attempt or allege that the defendant took a "substantial step" to commit murder. Id. Borrero challenged the charging document before verdict, and hence, it was strictly construed. Id. at 357. Even under the more stringent standard, the Supreme Court held that "[i]t can reasonably be concluded that the element of 'substantial step' is conveyed by the word 'attempt' itself. Despite the failure to include an explicit reference to 'substantial step' in the information, Borrero had notice of that element because the word 'attempt' conveyed the same meaning and import." Id. at 363.

Courts have also held that language alleging assault contemplates knowing, purposeful conduct. State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683 (1984). "The word 'assault' is not commonly understood as

⁷ In Warfield, the defendants were private citizens who detained the victim to return him to Arizona for an outstanding warrant. Warfield, 103 Wn. App. at 154-55.

referring to an unknowing or accidental act.” Id. at 94. In State v. Hopper, the Supreme Court agreed that when the information is liberally construed, the term “assault” conveys the necessary element of “knowingly,” and thus the information was sufficient. State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992); see also State v. Chaten, 84 Wn. App. 85, 86, 925 P.2d 631 (1996) (applying strict construction standard and holding that the term “assault,” standing alone, conveyed the essential element of intent).

Courts have also held that when the elements of one crime refer to another underlying crime, it is not necessary for the information to list the elements of the underlying crime. State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985).

In the present case, Johnson did not challenge the information until after the verdict, so the information must be liberally construed. The Court therefore asks if the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, can Johnson show that he was nonetheless actually prejudiced by the inartful language that caused a lack of notice. Kjorsvik, 117 Wn.2d at 105-06. Johnson was charged with “unlawful imprisonment,” and the information

alleged that he “knowingly restrained” J.J. The fact that the charging document did not define the words of every element that the State is required to prove does not render the document inadequate. State v. Rhode, 63 Wn. App. 630, 635, 821 P.2d 492 (1991). The definition of “restrain” established how a restraining can occur rather than creating an additional element to the crime of unlawful imprisonment. The charging document, liberally construed, provided Johnson with notice that he knowingly and unlawfully restrained J.J.

Furthermore, even if this Court held that the information was inartful, Johnson cannot show any prejudice as required under Kjorsvik, 117 Wn.2d at 105-06. The information must sufficiently notify the accused of the crime charged so that the accused “can prepare a proper defense.” In this case, Johnson was informed that he was charged with unlawful imprisonment and that he knowingly restrained J.J. Factually, he was accused of holding his wife captive for days by beating her, threatening her, and refusing to allow her to get dressed. Johnson has failed to show any prejudice from the charging document.

In sum, the information was sufficient for all charges. Johnson has failed to demonstrate that the charging document was defective, and has failed to show any prejudice. This Court should reject his challenge to the adequacy of the information.

4. THE TRIAL COURT PROPERLY VACATED THE “DUCT TAPE” DEADLY WEAPON ENHANCEMENT ON DOUBLE JEOPARDY GROUNDS.

Johnson argues that the deadly weapon alleged for the felony harassment in count IV was insufficient. As noted above, the felony harassment charge was vacated on double jeopardy grounds because the trial court was concerned that the jury’s verdict was based on the same facts as the assault in the second degree charge in count II. However, should the felony harassment conviction need to be revived in the future, the State would have to concede that the deadly weapon finding could not stand. Factually, there was evidence that Johnson threatened to suffocate J.J. with duct tape. However, while the State alleged that the deadly weapon for the felony harassment charge was duct tape, the jury’s answer to the interrogatory clearly indicated that they found the knife was the

deadly weapon. CP 18, 147-48. However, this claim of error is moot because no sentence for the enhancement was imposed, and Johnson's appeal of this issue is not ripe unless and until the State attempts to revive the felony harassment conviction.

5. THE STATE CONCEDES JOHNSON'S OFFENDER SCORE SHOULD BE 14 INSTEAD OF 15.

Johnson argues that his offender score is incorrect. It appears that Johnson is correct that the offender scores reflected on the judgment were calculated including one point for the felony harassment charge (count IV), which was vacated. CP 176. While this has no practical effect on his life sentence as a persistent offender, and does not alter his standard range, the State agrees that his score is 14 instead of 15. Johnson correctly notes that the remedy is remand to the trial court for an order correcting the offender score. See In re Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

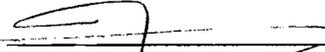
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Johnson's convictions and sentence. The Court should remand the case to correct the offender score.

DATED this 7th day of March, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Gannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent , in STATE V. J.C. JOHNSON, Cause No. 66624-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

3/7/12
Date 3/7/12