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NO. 67649-1-I

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

REC'D
MAR 26 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DAVID COPELAND,

Appellant.

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

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in instructing the jury on a lesser-included offense over appellant's objection and in the absence of evidence supporting the lesser charge to the exclusion of the greater.

2. The court erred in denying appellant's motions for mistrial after repeated violations of the court's ruling in limine precluding mention of appellant's prior incarceration.

Issues Pertaining to Assignments of Error

1. Instruction on a lesser-included offense is warranted only if there is evidence that the lesser offense was committed to the exclusion of the greater offense. The only evidence of a threat in this case was the complaining witness's testimony that appellant told her he would "take her last breath" and she believed she was about to die. Did the court err in granting the State's request to instruct the jury on the lesser-included offense of misdemeanor harassment, which requires a threat of bodily injury, not a threat to kill?

2. The trial court granted a pretrial motion excluding reference to appellant's prior incarceration. At trial, the complaining witness' daughter mentioned appellant returning from jail, and the court instructed the jury to disregard. The complaining witness then testified about appellant's 60-day absence. The prosecutor argued in closing the only good thing to come from

a prior assault was that appellant and the complaining witness then lived apart for a time. The court denied appellant's repeated motions for a mistrial. Was the cumulative prejudice so great that a mistrial was required to secure appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant David Copeland with second-degree assault and felony harassment. CP 11-13. At the first trial, the jury acquitted Copeland of second-degree assault and could not agree on felony harassment. CP 36, 41. At the second trial, the jury acquitted Copeland of felony harassment and convicted him of the lesser-included offense of misdemeanor harassment. CP 94, 95. The court suspended a 364-day sentence on condition of serving 6 months in jail and 12 months probation. CP 96-97. Notice of appeal was timely filed. CP 101-02.

2. Substantive Facts

a. Charged Offense

The evening of February 16, 2011, King County sheriffs were dispatched to the home Copeland shared with his long-time girlfriend Shawna McCormack, McCormack's seven-year-old daughter Riley from a

previous relationship, and the couple's one-year-old baby. 2RP¹ 28-29 (dispatched); 3RP 89-91. The call came from McCormack's aunt, who called 911 after Riley called and told her Copeland was strangling her mother. 3RP 101; 5RP 6-7. Deputy Skaar testified McCormack told him Copeland choked her and told her he would "end" her. 2RP 33. Deputy Mandella testified McCormack told him Copeland choked her, but did not mention any threats that night. 3RP 33, 48.

McCormack testified Copeland became angry when she asked him about going to a meeting. 3RP 162-63. When he started to yell, she asked Riley to leave the room, but the baby was still on her lap. 3RP 164. He held her by the throat so that she could breathe only a little, and pushed until the recliner she was sitting in fell over. 3RP 165-66. After letting her put the baby down, he left, and McCormack locked all the doors. 3RP 166.

To distract her from the fight, McCormack had given Riley her phone and told her to call her great aunt Carol Wells. 3RP 167-68. After Copeland left, McCormack spoke to her aunt and her sister, asking both of them not to call the police. 3RP 170-72. While McCormack was on the phone with her sister Julie, Copeland returned and forced his way into the house. 3RP 172-73. McCormack testified he ran towards her with a pillow

¹ There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 1, 2011; 2RP – Aug. 2, 2011; 3RP – Aug. 3, 2011; 4RP – Aug. 4, 2011; 5RP – Aug. 9, 2011; 6RP – Aug. 10, 2011; 7RP – Sept. 2, 2011.

in his hands and told her “I’m going to take your last breath.” 3RP 173, 178. She testified she believed she was about to die. 3RP 174. When the deputies arrived, she believed their arrival saved her life. 3RP 176-77.

b. Evidence of Prior Acts

The State was also permitted to present evidence of five prior incidents between McCormack and Copeland. 1RP 32-52. The jury was instructed it could consider these incidents for the limited purposes of determining whether McCormack was placed in reasonable fear and assessing her state of mind and credibility. 3RP 129; CP 63. In December 2008, the couple fought in their bathroom. 3RP 152. McCormack explained she tried to fight back and described the incident as full on wrestling in which she was slammed down and grabbed by the throat. 3RP 153-54. The following December in 2009, McCormack got angry because they had missed Christmas with her family, so she left Copeland at a gas station. 3RP 155-56. He became very angry and the next day when they were in the car, he banged her head on the dashboard. 3RP 156. She told no one about this incident, although she was bruised as though she had been in a car accident. 3RP 156-57. The next year, in December 2010, the couple argued in their bedroom. 3RP 157-58. McCormack was unhappy that Copeland was not coming home every night. 3RP 157-58. During the course of the argument,

she testified, Copeland kicked her in the ribs so hard she flew off the bed she had been sitting on. 3RP 157-58.

On February 15, 2011, the day before the charged incident, McCormack testified, she called her sister, and when her sister did not answer, rather than hang up, she left the phone in her pocket so her sister's voicemail would record her altercation with Copeland. 3RP 126-27. She testified he threatened to leave her in a ditch, to kill her, and to kill her family. 3RP 128. McCormack's sister Julie testified she received a voicemail on this date and recalled hearing Copeland say, "I can take you, I can take your fucking life." 4RP 13-14.

Finally, the morning of the date of these events, McCormack testified, Copeland yelled at her in the car in front of a friend they were driving to an appointment. 3RP 144-45. She claimed he was also stopping and jerking the car and generally driving badly. 3RP 146. She testified this time there were specific threats to her father and stepfather. 3RP 147. She testified he again may have threatened to put her in a ditch and threatened to kill her family, but could not recall the precise threats on this occasion. 3RP 147. McCormack was particularly concerned because, she explained, he had previously been more careful about threatening her in front of others. 3RP 147-48. She testified she opened the door to scream for help, but he pulled

her back inside, held her down by the neck and hit her on the side of the head. 3RP 148-49.

c. Evidence of Prior Incarceration

The court excluded evidence that, just before the events in question, Copeland had returned home after 60 days in jail. 1RP 83-84; CP 69. The court also instructed both parties to carefully advise witnesses of the rulings. 1RP 90. Nevertheless, seven-year-old Riley testified about, “when he came back from jail.” 3RP 91. Copeland moved for a mistrial, arguing that any jury instruction would only call attention to the prejudicial testimony. 3RP 91-93. The court concluded the comment was inadvertent and denied the mistrial motion, but offered a curative instruction. 3RP 93. Copeland agreed the most appropriate would be a simple directive to disregard the last answer. 3RP 94-95. The jury was so instructed. 3RP 99.

McCormack was the next witness to testify that day. She testified that immediately before February 15, 2011, Copeland was not living with them. 3RP 124. She testified he was not living there in January. 3RP 125. She testified he was not there for New Years, or for Christmas. 3RP 125. She testified he had not been to the house at all during those last couple of months. 3RP 125. She testified the number of times she saw him in person leading up to the events in question was “zero.” 3RP 125. Although she talked to him on the phone a couple of times, she stopped taking his calls

when he did nothing but yell at her. 3RP 125-26. At this point there was a sidebar during which defense counsel objected to this re-emphasis on the time Copeland spent in jail and renewed the motion for a mistrial. 3RP 126, 130-31.

McCormack then testified she had begun to realize she needed to end the relationship “during the 60 days in which he – he was not there.” 3RP 128. Copeland again objected, the jury was excused, and Copeland put the previous sidebar on the record and renewed the motion for a mistrial. 3RP 128-30.

Defense counsel pointed out that, right after Riley let slip that Copeland was in jail, McCormack’s testimony, while complying with the letter of the ruling in limine, had repeatedly emphasized Copeland’s absence. 3RP 130. She even referred to it as “60 days,” clearly a jail term rather than a vacation or an informal separation. 3RP 130. The prosecutor’s questions specifically referenced Christmas and New Years, times he would be expected to see his child, even if separated from her mother. 3RP 130. Additionally, defense counsel put on the record that McCormack paused before saying “60 days,” cleared her throat, and rolled her eyes. 3RP 130. Defense counsel also put on the record that he had approached the bench even before the “60 days” comment at a sidebar to object to McCormack’s exaggerated facial gestures including eye rolling when she talked about

having no contact with Copeland. 3RP 131. Counsel pointed out that the witness had been testifying with her chair swiveled a full 90 degrees away from forward, so she was facing the jury with her back to the judge and defense counsel had to get up and walk across the courtroom to observe her demeanor. 3RP 138, 141.

The prosecutor argued McCormack was merely upset and was not rolling her eyes, but simply did not know where to look because she could not stand to look at Copeland. 3RP 131. He argued the testimony carefully avoided any mention of jail, and was focused on McCormack's realization that she needed to end the relationship. 3RP 132-33.

The court agreed McCormack was "playing fast and loose with the rules." 3RP 134. It directed the prosecutor to re-advise McCormack of the "need to honor the letter and the spirit of the court's order." 3RP 134. Nevertheless, the court denied counsel's renewed mistrial motion. 3RP 134, 141. It further directed that McCormack face defense counsel so he could monitor her facial expressions. 3RP 134-35. The court reasoned the jury was presumed to follow the instruction to disregard Riley's comment and was not more likely to find Copeland guilty merely because he had been in jail. 3RP 141.

During closing argument, the prosecutor again brought up Copeland's two month absence, and this time directly tied it to one of the

prior incidents: “If there’s anything good that came out of this last assault, it’s that they lived apart for a couple of months after that.” 5RP 27. Defense counsel objected at a sidebar, and the objection was noted but argument continued. 5RP 27. As soon as there was time to put the sidebar on the record, defense counsel renewed the mistrial motion. 5RP 45. The prosecutor’s argument clearly suggested a prior assault had led to an arrest and jail time, when in reality Copeland had been in jail on unrelated drug charges. 5RP 45-46. The court again denied the mistrial motion, finding that the fact of being apart does not imply he was in jail and did not deprive Copeland of a fair trial. 5RP 49.

d. Objection to Lesser-Included Offense

Defense counsel also objected to the jury being instructed on the uncharged offense of misdemeanor harassment. 5RP 18. Counsel argued that, in order to instruct on a lesser-included offense, there must be evidence that “the lesser happened, but not the greater.” 5RP 18. The court rejected this argument, saying, “I think that would render almost useless the whole concept of what a lesser included is.” 5RP 18. The jury was then instructed it could find Copeland guilty of plain harassment, a misdemeanor if it found a threat to cause bodily injury to McCormack. CP 60-62.

C. ARGUMENT

1. THE COURT ERRED IN INSTRUCTING THE JURY ON THE LESSER-INCLUDED OFFENSE OF MISDEMEANOR HARASSMENT WHEN THERE WAS NO EVIDENCE THE LESSER OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE GREATER OFFENSE.

An accused person has a constitutional right to be tried only on the offense charged in the information. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). However, a defendant may be found guilty of an uncharged offense if it is a lesser-included offense. RCW 10.61.006. A party is entitled to instruction on a lesser-included offense if (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) there is evidence the defendant committed only the inferior offense. Fernandez-Medina, 141 Wn.2d at 454. The first part of this test is referred to as the “legal prong” and incorporates the idea that because one cannot commit the greater offense without also committing the lesser offense, constitutional notice concerns are assuaged. State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). The second part of the test is referred to as the “factual prong” and incorporates the principal that jury instructions must be supported by the evidence. Id. at 546.

A lesser-included offense instruction requires more particularized evidentiary support than other jury instructions. Fernandez-Medina, 141

Wn.2d at 455. The factual component of the test is not satisfied unless the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Fernandez-Medina, 141 Wn.2d at 455 (citing State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, instructions should be given only when the evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense.² Id.

In making this determination, the court considers all evidence presented at trial by either party and views the supporting evidence in the light most favorable to the party seeking the instruction. Id. at 455-56. In this case, even when viewed in the light most favorable to the State, there was no evidence appellant committed only the offense of harassment to the exclusion of felony harassment because there was no evidence of threats other than a threat to kill. The factual prong of the lesser-included offense test was not met and the court erred in instructing the jury on misdemeanor harassment over Copeland's objection.³

Harassment occurs when a person knowingly threatens to injure a person, damage property, physically confine a person, or do any other act

² The factual component of the test for lesser-degree offenses is the same as that for lesser-included offenses. Fernandez-Medina, 141 Wn.2d at 455.

³ The instruction on the lesser-included offense of misdemeanor harassment was limited to threat of bodily injury. CP 62. The jury was not instructed regarding any of the other alternative means of commitment harassment. CP 62.

intended to harm a person's health or safety without lawful authority and the recipient of the threat is placed in reasonable fear that the threat will be carried out. RCW 9A.46.020.⁴ Harassment is a gross misdemeanor.

⁴ RCW 9A.46.020 provides in relevant part:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if any of the following apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant

However, the offense is elevated to a class C felony if “the person harasses another person . . . by threatening to kill the person.” RCW 9A.46.020(2). The State charged Copeland with felony harassment by threatening to kill McCormack. CP 12. McCormack testified Copeland came at her with a pillow and told her, “I’ll take your last breath.” 3RP 173. Detective Skaar recalled McCormack telling him Copeland said he would “end her.” 2RP 33-34, 39. No other witnesses heard or could recall what Copeland may have said to McCormack that night. There was no evidence he made any other unlawful threat other than the threat to “end her” or “take her last breath.” Nor was there evidence she only feared bodily injury. McCormack testified, “I thought I was going to die.” 3RP 174. In other words, there was no evidence of a threat of bodily injury instead of or “to the exclusion of” a threat to kill. Fernandez-Medina, 141 Wn.2d at 455.

The fact that the jury may not have entirely believed McCormack’s account is not sufficient to show the lesser rather than the greater offense: “Our case law is clear, however, that the evidence must affirmatively establish the defendant’s theory of the case-it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id. (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State

would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)). This principle is illustrated in State v. Wright, 152 Wn. App. 64, 70, 214 P.3d 968 (2009). In Wright, the court instructed the jury on the lesser-included offense of third-degree rape over defense objection. Id. The jury convicted the defendants of third-degree rape after leaving blank the verdict form for second-degree rape because it could not agree on that charge. Id. On appeal, the court held the court erred in instructing the jury on third degree rape. Id. at 74. The State presented evidence only of rape by forcible compulsion, and the defense theory was consent. Id. Under these facts, no evidence supported third-degree rape without forcible compulsion and the third-degree rape instruction was improper. Id. The court reversed the third degree rape convictions. Id.

Defense counsel attempted to alert the court to this requirement, arguing there had to be “grounds that the lesser happened, but not the greater. 5RP 18. But the court rejected it out of hand and declared it would give the State’s requested instruction. 5RP 18. This was error.

Under Fernandez-Medina and Wright, it is not enough that a jury might not believe McCormack’s testimony that Copeland threatened to take her last breath and she believed she was going to die. Fernandez-Medina, 141 Wn.2d at 455; Wright, 152 Wn. App. at 74. There must be affirmative

evidence of some threat or reasonable belief of a threat other than the threat to kill. The record is devoid of any such evidence.

Apparently, the jury did not believe McCormack's testimony. CP 95 (verdict acquitting Copeland of felony harassment). However, perhaps due to the copious evidence of prior misconduct admitted under ER 404(b), it felt compelled to find Copeland guilty of something. The jury instruction on misdemeanor harassment, though devoid of any supporting evidence, provided the jury with that opportunity. It is prejudicial error to submit an issue to the jury without sufficient evidence. Fernandez-Medina, 141 Wn.2d at 455. Copeland's conviction should be reversed.

In Wright, the remedy was remand for a new trial because the jury had failed to reach a verdict on the greater charge. 152 Wn. App. at 74. However, in this case, double jeopardy principles prevent retrial because the jury acquitted Copeland of felony harassment. CP 95. "That a person may not be retried for the same offense following an acquittal is 'the most fundamental rule in the history of double jeopardy jurisprudence.'" State v. Wright, 165 Wn.2d 783, 791-92, 203 P.3d 1027 (2009) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)).

2. COPELAND'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE STATE'S WITNESSES VIOLATED THE RULING IN LIMINE AND THE PROSECUTOR EMPHASIZED THE INADMISSIBLE EVIDENCE DURING CLOSING ARGUMENT.

A mistrial is required when a defendant has been so prejudiced by a trial irregularity that only a new trial can ensure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). On appeal, this Court determines whether a mistrial should have been granted by considering: (1) the seriousness of the trial irregularity; (2) whether the trial irregularity involved cumulative evidence; and (3) whether a proper instruction to disregard cured the prejudice against the defendant. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

- a. Allowing the Jury to Hear Evidence and Argument Regarding Copeland's Prior Incarceration Was a Very Serious Trial Irregularity.

The purpose of pretrial rulings is to clarify questions of admissibility before trial and to prevent the admission of highly prejudicial evidence. See State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981); State v. Cole, 74 Wn. App. 571, 577, 871 P.2d 878, rev. denied, 125 Wn.2d 1012 (1994); State v. Austin, 34 Wn. App. 625, 633, 662 P.2d 872 (1983), aff'd sub nom., State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); see also ER 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so

as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements . . . in the hearing of the jury.”). There is no question that the testimony about Copeland’s release from jail shortly before the night of the charged incident was inadmissible. 1RP 83-84; CP 69. This incarceration was for violations of the controlled substances act and was unrelated to prior domestic violence incidents admitted to show the complaining witness’ reasonable fear. 5RP 45-46.

Evidence is unfairly prejudicial when it is “more likely to arouse an emotional response than a rational decision by the jury.” City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (quoting State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). This is especially true where the improper testimony relates to an accused person’s prior criminal conduct; such evidence tends to impermissibly “shif[t] the jury’s attention to the defendant’s propensity for criminality, the forbidden inference. . . .” State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997) (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (Prior conviction evidence is “very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crime.”).

The evidence of Copeland’s prior incarceration was particularly prejudicial in this case because during closing argument, the prosecutor led

the jury to believe it was connected to his previous assault of the complaining witness. 5RP 27 (“If there’s anything good that came out of this last assault, it’s that they lived apart for a couple of months after that.”). Based on this argument, the jury was likely to believe that a jury had already found Copeland guilty beyond a reasonable doubt of assaulting McCormack in the past. This information would make the jury much more likely to make the “forbidden inference” and find him guilty of threatening her in the instant case based on a criminal propensity.

A new trial was necessary because this evidence, particularly when combined with the prosecutor’s closing argument, implanted in the minds of the jury the idea that he had been jailed for similar conduct in the past and thus was more likely to have committed the offense in question. See State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). In Miles, one of the arresting officers in a Grandview robbery case was permitted to testify that he arrested the defendants based in part on a teletype he received that said the two suspects were in a car “headed for Spokane and were going to duplicate the robbery committed in Grandview.” Id. at 68. On appeal, the court concluded, “This testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that the defendants had committed other robberies of this type and were therefore most likely to have committed the one charged.” Id. at 70. The court pointed out that the prejudice could not

be cured by instruction and a more detailed instruction would only have emphasized the testimony. Id. The court concluded the defendants were denied a fair trial. Id. at 71.

The chain of evidence and argument in this case leads to the same conclusion. The jury cannot be expected to ignore the testimony and argument implying Copeland was previously arrested for virtually the same conduct. Id.; see also Escalona, 49 Wn. App. at 255-56 (unsolicited statement by witness that defendant “already has a record and had stabbed someone” was extremely serious and court abused its discretion in denying mistrial).

The jury obviously had doubts about McCormack’s testimony because it acquitted Copeland on the felony harassment charge. CP 95. If McCormack were believable, the jury would have had to convict on that charge because she testified Copeland threatened to “take her last breath” and she believed she was about to die. CP 56; RCW 9A.46.020 (elements of felony harassment). Instead, the jury acquitted Copeland of felony harassment, and despite an utter absence of evidence of any other non-lethal threats, found him guilty of the lesser-included offense of misdemeanor harassment. CP 94. This suggests the jury did not believe McCormack but nonetheless found Copeland needed to be punished on some other basis, such as his prior offenses, one of which appeared corroborated by an actual

arrest and jail time. Under these circumstances, knowledge of Copeland's prior incarceration was likely a deciding factor.

b. The Inadmissible Evidence Was Not Cumulative.

Evidence is not "cumulative," unless it is "cumulative of other evidence properly admitted." Escalona, 49 Wn. App. at 254. Evidence of Copeland's incarceration was not cumulative because the other evidence of uncharged acts involved only the complaining witness' allegations, not the intervention of the criminal justice system. This distinction is significant because the jury clearly found cause to doubt the veracity of the complaining witness' version of events. Evidence that Copeland was incarcerated was highly prejudicial and not cumulative because it added the imprimatur of the criminal justice system to McCormack's story.

c. The Evidence Was So Highly Prejudicial that an Instruction Would Only Have Exacerbated the Impact on the Jury.

Although it is generally presumed that juries follow instructions to disregard, there are instances where the evidence is so "inherently prejudicial" that no instruction can cure it. Escalona, 49 Wn. App. at 255 (quoting Miles, 73 Wn.2d at 71). Evidence of prior criminal acts qualifies as such inherently prejudicial evidence because it portrays the defendant as the "criminal kind," leading the jury to believe he has a propensity to commit crimes like the one with which he is charged. See, e.g., Hardy, 133 Wn.2d at

706; Miles, 73 Wn.2d at 71; Escalona, 49 Wn. App. at 256. Consequently, Washington courts often find the erroneous introduction of this type of propensity evidence cannot be cured by an instruction to disregard. See State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (appellant's prior similar crimes evidence "beyond hope of cure by corrective instruction."); Miles, 73 Wn.2d at 70 (evidence that defendant committed other robberies "so prejudicial . . . that its effect upon the [jurors' minds] could not be expected to be erased by an instruction to disregard it"); State v. Suleski, 67 Wn.2d 45, 50-51, 406 P.2d 613 (1965) (in narcotics by fraud prosecution, evidence of defendant's criminal record "irretrievably" prejudicial); Perrett, 86 Wn. App. at 319-20 (evidence raising inference defendant committed prior similar crime "unfairly prejudicial" and warranted a new trial).

Even if the trial court were correct that the initial reference to Copeland being in jail was inadvertent and the jury likely followed the instruction to disregard, that conclusion does not hold after this evidence was emphasized by both McCormack's testimony and the prosecutor's closing argument. The trial court properly recognized that testimony about Copeland's prior incarceration was improper, but failed to recognize the accumulated impact of repeated violations of the ruling excluding that evidence. Therefore, this Court should reverse Copeland's conviction.

D. CONCLUSION

The court erred in instructing the jury on the lesser-included offense of misdemeanor harassment. Because the jury acquitted Copeland of felony harassment, Copeland's conviction should be reversed and the case dismissed with prejudice. Alternatively, a new trial is required because the court erred in denying a mistrial due to repeated prejudicial violations of the motion in limine.

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Respectfully submitted,

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