Supreme Court No. _____
COA No. 85536-1-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ASYA BRADFORD,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Asya Bradford, petitioner, asks this Court to accept review of the Court of Appeals' decision terminating review. The Court of Appeals issued its opinion on September 30, 2024 (App. A), and it denied Ms. Bradford's motion to reconsider on December 20, 2024 (App. B).

B. ISSUES PRESENTED

1. Prior misconduct evidence is limited-purpose and can never be used to show a defendant's propensity to commit similar crimes. The trial court cited inadequate reasons to admit a prior assault allegation against Ms. Bradford and the prosecutor only argued Ms. Bradford's propensity to assault. Can a reviewing court cure the prejudice to Ms. Bradford by manufacturing additional purposes for the limited-

purpose evidence which were neither adopted by the trial court nor argued to the jury?

2. When an appellant claims instructional error, the reviewing court does not determine credibility or resolve conflicts in the evidence. The reviewing court is not relieved of its burden to review for harmlessness in cases of general denial. In a case where the complainant gave multiple versions of events, one which supported a unanimity instruction, was the reviewing court privileged to select a different version of events to deny giving the instruction? And was the reviewing court entitled to rely on the defendant's silence to short-circuit its harmlessness review?

C. STATEMENT OF THE CASE

Asya Bradford is the stepmother of I.B. RP 256. Ms. Bradford is Black (CP 25), and I.B. is white (Supp. CP 68). In September 2019, when I.B. was seven years

old, she claimed that Ms. Bradford held a knife to her throat, suffocated her, and hit her with a metal baseball bat. RP 381-83. She claimed these events occurred the night before after Ms. Bradford accused I.B. of ruining the family. RP 264, 381.

I.B.'s father, Derick Bradford, approached Ms. Bradford, took the knife away, and separated his wife from his daughter. RP 278. At some point, I.B. was placed in a timeout while watching a movie. RP 381-82, 389. Afterwards, Ms. Bradford hit I.B. with a bat multiple times. RP 278, 292.

I.B. repeated different versions of these allegations to a social worker, a forensic child interviewer, two nurse examiners, a police officer, and the defense investigator. RP 408-16, 434-36, 464-69, 481-84, 531. During one of her tellings, I.B. claimed she had been covered in "bruises, bruises, bruises." RP 333.

She claimed she had been very dizzy and could barely walk. RP 335-36. She also claimed the knife had cut her, causing her to bleed. RP 326, 469.

Despite I.B.'s claims about the assault, a medical examination revealed no injuries on the parts of her body she claimed were hit, marked or cut. RP 384; 436-37, 484, 486-87.

The State charged Ms. Bradford with one count of second degree assault of a child with a deadly weapon, specifically a knife and a bat. CP 55-56. At trial, the State moved to admit evidence Ms. Bradford had previously hit I.B. with a belt, leaving bruises on her legs, in an act of corporal punishment leading to a CPS investigation and a dependency action. RP 16-18. The State offered this evidence under ER 404(b) for a number of purposes, but the court admitted it specifically to explain why I.B. was reluctant to, or

delayed in, reporting the current incident, and why she did not cooperate with the nurses during her physical exams. RP 232-33.

In closing, the State did not elect which act would support the sole charge of assault of a child. RP 588-90. Instead, it urged the jury to convict based on either the knife incident or the bat incident. *Id*. The court did not instruct the jury it had to be unanimous as to the specific act in order to convict Ms. Bradford. *See* CP 38-54. The jury convicted Ms. Bradford as charged. CP 36.

D. ARGUMENT

1. RAP 2.5(a) does not permit a reviewing court to affirm the admission of limited-purpose evidence for reasons never adopted by the trial court or instructed to the jury

This Court should accept review to clarify and explain the limits of the exception in RAP 2.5(a) permitting a reviewing court to affirm lower court decisions for reasons not cited at the time. RAP

13.4(b)(4). In general, parties may not raise a new issue for the first time on appeal. *State v. Barker*, 162 Wn. App. 858, 863, 256 P.3d 463 (2011). The Rules of Appellate Procedure provide an exception to this rule when a party presents "a ground for affirming a trial court decision which was not presented to the trial court" and "the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a).

Here, the Court of Appeals affirmed a trial court evidentiary ruling for reasons that were neither endorsed by the trial court nor argued to the jury. It did so at the invitation of the State, who did not cite to RAP 2.5(a) in its brief. Although it does not cite the Rule, the Court of Appeals' decision necessarily invokes the authority of RAP 2.5(a) because the bases it relied on were not adopted below. The Court needed to follow RAP 2.5(a) in order to affirm for additional reasons.

Trial court decisions to admit limited-purpose evidence can never satisfy this RAP 2.5(a) exception for three separate reasons.

a. Unfair prejudice accrues from the jury's improper use of limited-purpose evidence, which cannot be cured by hypothetical proper purposes

First, the purpose for admission of limited-purpose evidence matters. A classic example of limited-purpose evidence is prior misconduct evidence. Prior misconduct evidence is limited-purpose because, if admitted, it is categorically barred for use as propensity. *State v. Gresham*, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). It is never permitted to show "the defendant's character and action in conformity with that character." *Id.*

Instead, prior misconduct evidence is only allowed for *other purposes*–which are sometimes misunderstood and characterized as "exceptions." *Id.*

Other purposes are not exceptions because they never justify use of the prior misconduct evidence to prove propensity. *Id.*

Because of the logical tendency by layfolk to misuse prior misconduct evidence for propensity, courts must give a limiting instruction with prior misconduct evidence to attempt to prevent misuse of the evidence by the jury. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

If no limiting instruction is given and the arguments of the parties do not properly guide the jury, the jury will follow their logical tendencies. No instruction or argument will prevent the jury from using the prior misconduct evidence for propensity, to reduce the presumption of innocence, and to overestimate the value of the evidence.

That is exactly what happened in Ms. Bradford's case, but the Court of Appeals excused the error because it relied on purposes never adopted by the trial judge or instructed to the jury. Op. at 4-8. The trial court admitted evidence regarding a prior CPS case against Ms. Bradford for disciplining I.B. RP 233. The court admitted this evidence only to explain minor incidents of reluctance of I.B. when reporting the accusations in this case, and a "delay in reporting." *Id.*

Despite those specific, limited-purposes for the evidence, the State never argued those purposes to the jury. Although the State itself introduced the incidents of minor reluctance, it never argued to the jury that Ms. Bradford's prior misconduct caused I.B.'s reluctance. The State also never argued that Ms. Bradford's prior misconduct caused I.B. to delay reporting.

Instead, the State argued propensity. The prosecutor said that Ms. Bradford abused I.B. for reporting the allegations. RP 249, 250, 583. This could be seen as a dog-whistle allusion to snitching. The State used present participles to suggest that the abuse was ongoing. RP 249-250, 583, 611-12, 614.

Additionally, the trial court never instructed the jury regarding the permissible purposes for which it could use the prior misconduct evidence. Although Ms. Bradford's counsel did not seek this instruction, the lack of an instruction did not license the State to use the prior misconduct for its prohibited purpose. But that is what the State did. The State argued propensity throughout its case to the jury. Reply at 35-38.

This error was not harmless because I.B. claimed multiple, conflicting versions of events and no physical evidence corroborated any of her claims. Sometimes

I.B. claimed that she bled from Ms. Bradford holding a knife to her throat. RP 323, 469. Once she claimed there was a line on her neck. RP 469-70. Sometimes she claimed she was suffocated or strangled. RP 267, 409, 443. Despite these claims, I.B. had no injuries to her neck. RP 443-44.

I.B.'s allegations about the bat were similarly inconsistent. Once she claimed Ms. Bradford swung the bat around but there was no testimony that she was hit by the bat. RP 468-69. Every other time she described Ms. Bradford's use of the bat, she was inconsistent with the location(s) on her body which were struck. RP 294 (leg); RP 328, 335, 352 (stomach, head); RP 349 ("Maybe my arm, but I . . . don't think it hit me in my arm."); RP 383 (legs plural); RP 482 (stomach). No witness corroborated I.B.'s claims. A medical

examination revealed no injuries in any of the varied locations I.B. claimed she was hit. RP 442-46.

Without a limiting instruction, the jury was allowed to accept the State's improper propensity argument and conclude that Ms. Bradford had a propensity to abuse I.B. Since the prior misconduct was for the same conduct—physical abuse of I.B.—the jury could overlook I.B.'s contradictions and the lack of physical corroboration to convict Ms. Bradford. In other words, Ms. Bradford's jury was free to use propensity to plug the holes in the State's case. This was unfairly prejudicial, reversible error.

An appellate epiphany realizing a proper purpose of the evidence cannot retroactively remedy the unfair prejudice that accrued to Ms. Bradford during her trial from the jury's improper use of limited-purpose evidence. Even if the prior misconduct evidence could

have been admitted for the purposes of motive, state of mind, and credibility, those are not the reasons the trial court did admit the prior misconduct evidence, and those are not the reasons for which the State urged the jury to consider it. Thus, supplying additional reasoning for admission of limited-purpose evidence on appeal ignores the real source of prejudice–*the improper use of the 404(b) evidence*—not its admission.

b. A trial court's erroneous reasoning is insulated from review when appellate courts can manufacture justifications for admission

Second, supplying additional reasoning for admission of limited-purpose evidence on appeal insulates the trial court's actual ruling from review. Reviewing courts have refused to allow supplementation of a trial court's reasoning for admission of limited-purpose evidence because it makes the trial court's discretion unreviewable. "The

state will not be permitted to secure the admission of evidence of another unrelated crime for the purpose of impeachment . . . when it is not admissible for that purpose, and then justify its admission on other and proper grounds, suggested for the first time in the appellate court." *State v. Goebel*, 36 Wn.2d 367, 378, 218 P.2d 300 (1950). Where "the record does not set forth an exercise of trial court discretion for [an appellate court] to review," the court should decline to consider additional justifications, offered on appeal, for admission of 404(b) evidence at trial. *State v. Griffin*, 28 Wn. App. 2d 1069, 2023 WL 8370471, *16 (2023) (unpublished, cited pursuant to GR 14.1(a)).

Indeed, the Court of Appeals' opinion does not analyze the sufficiency of the actual reasons that the trial court admitted the prior misconduct. Op. at 5-7. Rather, it expands the reasoning to include I.B.'s

credibility, writ large, including her inconsistent statements (Op. at 6-7), although the trial court did not endorse this reason and no one argued it to the jury. The misconduct evidence was only allowed to explain I.B.'s "reluctance" to cooperate in two minor situations, and a "delay" in reporting. RP 233. The Court of Appeals never endorsed those justifications as sufficient.

Ms. Bradford briefed the insufficiency of these reasons as a proper purpose of prior misconduct evidence, and the Court of Appeals' opinion examined none of her arguments. Brief of Appellant at 8-22; *see* Op. at 6-7. Instead, the court added justifications of motive, inconsistent statements, and state of mind, which were not relied on by the trial court or ever argued to the jury. Op. at 5-7. This turned the Court of Appeals' decision into purely an academic exercise, a

disfavored function. *Grays Harbor Paper Co. v. Grays Harbor Cnty.*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968).

c. Conditioning error correction on an appellant's ability to prophesy the State's manufactured justifications is unfair and undermines the purposes of the Rules of Appellate Procedure

Third, justifying admission of limited-purpose evidence for different reasons on appeal unfairly requires appellants to predict what justifications the State may add. If they predict incorrectly, appellants may not assign error to every required finding of fact, or raise appropriate objections to justifications never before proffered. This concern has caused a court to deny review to additional, manufactured justifications to affirm in other cases. *Barker*, 162 Wn. App. at 864. There, the court refused to review an additional reason to affirm the trial court because the respondent did not raise the new reason until "his response on appeal,"

which meant the appellant "had no reason to challenge the factual finding" on which the new claim rested. *Id.*

The exception in RAP 2.5(a) allowing the reviewing courts to affirm for new grounds on appeal applies only when the record has been "sufficiently developed to fairly consider the ground." Decisions to admit limited-purpose evidence for incorrect purposes cannot satisfy this requirement. Even if the record discloses additional, relevant purposes of the limited-purpose evidence, prejudice from the error arises from the jury's improper use of the limited-purpose evidence, not the trial court's decision to admit it. As a result, the record at trial does not allow the reviewing court to "fairly" assess new justifications which were not used to guide the jury's decision. RAP 2.5(a).

For each of these three reasons, the Court of Appeals should have rejected the State's invitation to

affirm the trial court's admission of limited-purpose evidence for reasons it never adopted or instructed to the jury. The record shows that the trial court admitted the prior misconduct for un-justifiable reasons. But, more troubling than the evidentiary error, the prior misconduct was used for its *prohibited purpose*, not even the trial court's insufficient purposes.

This Court should grant review to give guidance to lower courts about when and how a reviewing court may invoke RAP 2.5(a)'s exception to permit additional justification for trial court rulings admitting limited-purpose evidence.

2. This Court should grant review to correct its ill-considered dictum in *Powell*,[1] which is being used to uphold verdicts tainted by propensity evidence

The Court of Appeals makes the same error as this Court in *Powell*, and any review of the prior misconduct issue raises the applicability of this case.[2] One line of dictum in *Powell* has sown confusion over the proper scope of review of trial court decisions to admit limited-purpose evidence. *See Powell*, 126 Wn.2d at 259. This line in *Powell* states that a court reviewing whether ER 404(b) evidence was properly admitted may "consider bases mentioned by the trial court as well as other proper bases on which the trial court's

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[1] *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

[2] The Court of Appeals does not cite this case, but the State cites it several times as "controlling" precedent regarding the review of trial court decisions to admit limited-purpose evidence. A review of this issue thus necessarily implicates this case.

admission of evidence may be sustained." *Id.* (citations omitted).

This proclamation was unnecessary to this Court's holding. *Powell* involved a case where the trial court admitted evidence of prior spousal misconduct for the purposes of motive, opportunity, intent, and res gestae (although the trial court did not use the words "res gestae"). *Id.* at 253-54. This Court concluded that the evidence was inadmissible for the purposes of intent and opportunity, since those were not relevant at trial. *Id.* at 262-63.

However, the evidence was admissible as motive and res gestae. *Id.* at 264. The trial court's ruling did not require reversal because some of its stated reasons for admitting the evidence were valid and appropriate. *Id.* The Court held that it will "uphold a trial court's decision to admit evidence of prior misconduct under

ER 404(b) *if one of its cited bases is justified*." *Id.* (emphasis added).

Powell's holding thus involved the court's cited reasons to admit the evidence, not uncited reasons. The earlier line of the opinion stating that even unconsidered reasons may justify admission played no part in the holding. This makes this line of *Powell* unnecessary to decide the issue in the case and unrelated to the issues before the Court. It was therefore dictum and not controlling. *State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992). But more than just being not-controlling, the line is ill-considered and this Court should now abrogate it.

Powell relied on the cases of *State v. Markle* and *Pannell v. Thompson* for its proposition that a reviewing court can rely on uncited purposes to justify admission of ER 404(b) evidence. *Powell*, 126 Wn.2d at

259 (citing *State v. Markle,* 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); *Pannell v. Thompson,* 91 Wn.2d 591, 603, 589 P.2d 1235 (1979)). Neither of those cases support this proposition. Both cases, without examination, announced rules that a court's decision to exclude evidence may be sustained for any reasons, even those not cited below. *Markle*, 118 Wn.2d at 438; *Pannell*, 91 Wn.2d at 603.

It is illogical to extend this "doesn't matter" reasoning to decisions admitting limited-purpose evidence. The purpose for which limited-purpose evidence is admitted *does matter*: the purpose dictates its use at trial. Limited-purpose evidence is limited because the evidence is prone to misuse or misunderstanding.

It is well known that admission of prior, uncharged misconduct creates the real possibility that

a jury will convict "not because they find the defendant guilty of the charged crime beyond a reasonable doubt, but because they believe the defendant deserves to be punished for a series of immoral actions." *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987) (quotation omitted) (*abrogated on other grounds by Lough*, 125 Wn.2d at 889). Introducing other acts of misconduct strips away the presumption of innocence by its implicit inference to the defendant's general propensity for criminality. *Id.* The jury may also "overestimate" the value of the prior misconduct, which is particularly likely when the prior acts are similar to the charged crime. *Id.* (citations omitted).

If a reviewing court sanctions the introduction of limited use evidence for a reason wholly different than that contemplated by the trial court or instructed to the jury, there is no assurance that the jury used it for

that permissible, but uninstructed, purpose. The question is not whether a hypothetical jury could have considered the evidence in a permissible way, but whether this actual jury did.

Here, we know that the jury did not consider the evidence in a permissible way because there was no limiting instruction, which the prosecutor took as license to argue the impermissible purpose of propensity. It is the jury's misuse of the prior misconduct evidence that caused prejudice to Ms. Bradford. No post-hoc justifications can cure this prejudice. This requires reversal.

3. The Court of Appeals' decision conflicts with published opinions about the necessity of a unanimity instruction in a case where one of multiple versions of events showed separate and distinct assaults

Article I, section 21 entitles every criminal defendant to a unanimous verdict. *State v. Ortega-*

Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When evidence at trial discloses multiple acts where any one act could constitute the crime charged, a defendant's right to jury unanimity requires that the jury must be unanimous as to which act constituted the charged crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This requires either that the prosecutor elect the act upon which it requests conviction or that the trial court instruct the jury that it must agree which act was proven beyond a reasonable doubt. *Id*. The lack of both election and instruction can be raised for the first time on appeal. *Id*.

Here, the jury's guilty verdict as to the count of assault of a child in the second degree could have been based on either of two distinct assaultive acts. Among the various claims I.B. made, she testified that Ms.

Bradford assaulted her with a knife and later assaulted her with a bat. The State did not elect either act; instead it invited the jury to convict Ms. Bradford for either assault. RP 588-90. The trial court also failed to instruct regarding unanimity.

The Court of Appeals found these failures to not be error after misapplying the test for a continuing course of conduct. A unanimity instruction is not required when the only interpretation of the evidence at trial was that both assaults were part of a continuing course of conduct. *State v. Aguilar*, 27 Wn. App. 2d 905, 925, 534 P.3d 360 (2023). A continuing course of conduct is generally an "ongoing enterprise with a single objective." *Id.* Where the timeline of events is uncertain and indicates that different activities intervened between the potential criminal

acts, the facts are more consistent with multiple acts rather than a continuing course of conduct. *Id.* at 927.

The Court of Appeals' opinion agreed that the jury's verdict could have been based on different alleged assaults but insisted that no unanimity instruction was necessary because the assaults may be viewed as a single course of conduct. Op. at 9.

But the Court of Appeals was not entitled to pick one version of events over another when deciding whether instructional error occurred. Just as when reviewing for sufficiency of the evidence, the appellate court cannot resolve conflicting evidence, evaluate witness credibility, or weigh the evidence. *State v. Johnson*, 159 Wn. App. 766, 774, 247 P.3d 11 (2011). The reviewing court must look at the evidence "in the light most favorable to the proponent of the instruction." *State v. Hanson*, 59 Wn. App. 651, 656,

800 P.2d 1124 (1990) (emphasis added). In cases where there are multiple versions of the events, this means that the reviewing court must interpret the evidence using the version most favorable to giving the instruction.

The Court of Appeals failed to understand the implications of these dual mandates in this case because it adopted the State's version of events, not Ms. Bradford's, in order to find that no instructional error occurred.

The jury heard evidence that I.B. told seven different versions of the events in this case, including her trial testimony, her statements in a defense interview, and her statements to five additional witnesses.

In one of I.B.'s versions of the events, she claimed that events intervened between the assault with the

knife and the assault with the bat. RP 380. First, I.B. claimed that Ms. Bradford suffocated I.B. RP 381. Elsewhere, I.B. demonstrated strangling happening during the time Ms. Bradford held a knife to her neck. RP 409; see also RP 267, 275. Then, I.B.'s dad stopped Ms. Bradford. RP 276, 381. Then "at some point there was hair pulling." RP 381. I.B. was then put in timeout, which was during a movie. RP 381-82, 389. I.B. also said that she was put in timeout in the middle of dinner. RP 435. After the timeout, I.B. was hit with a metal bat. RP 381-82, 435.

The hair-pulling, timeout and movie were events that separated the assault with a knife from the assault with the bat. The timeout and movie show that the two assaults were broken up by other, non-assaultive activities. Ms. Bradford had time and opportunity to pause, reflect, and cease the assault.

Under this reasonable interpretation of the evidence at trial, the acts were not a continuing course of conduct.

The Court of Appeals erred by adopting the State's version of the evidence, which caused it to overlook the presence of intervening events of a movie and timeout. It erroneously failed to follow its dual mandates to not weigh the evidence but also to interpret the evidence at trial in the light most favorable to giving the instruction. *Johnson*, 159 Wn. App. at 774; *Hanson*, 59 Wn. App. at 656. The facts most favorable to giving the instruction showed distinct acts which were not continuing, contrary to the Court of Appeals' decision. This Court should grant review because the Court of Appeals' decision failed to appropriately synthesize its mandates to interpret the evidence in the light most favorable to the instruction while not re-weighing the evidence before the jury,

which is an issue of substantial public interest. RAP 13.4(b)(4).

4. The Court of Appeals' implementation of the harmless error standard unconstitutionally relied on Ms. Bradford's silence

A failure to give a unanimity instruction when one is required is reversible error unless shown to be harmless beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06. The error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Id.* Conflicting testimony as to each act is sufficient to raise a reasonable doubt for a rational juror. *Id*. at 412. Inconsistencies and omissions by the complainant may create a reasonable doubt in the mind of a juror. *Aguilar*, 27 Wn. App. 2d at 930.

The Court of Appeals wrongly interpreted this test to shift the burden to Ms. Bradford. Op. at 12. The Court of Appeals tersely concluded that because Ms. Bradford's defense was general denial and only I.B. testified about her accusations, any error was harmless beyond a reasonable doubt. *Id.*

The defense of "general denial" means that the defendant chose to remain silent at trial and to argue that the State failed to meet its burden rather than raise an affirmative defense. It is fundamentally unfair and a violation of due process and the defendant's Fifth Amendment right to remain silent for the State to use a defendant's post-Miranda silence against her. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). There is no case exempting an appellate court from these constitutional mandates.

Hand in hand with this mandate, due process places the burden on the State to prove guilt beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The State's own evidence may be insufficient. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State cannot rely on a defendant's pre- or post-arrest silence to argue guilt to the jury in the face of its own insufficient evidence to convict. *Id.*

The Court of Appeals' fundamental misunderstanding of the harmless error test caused it to short-circuit its review of the evidence in this case. It was not entitled to rely on Ms. Bradford's silence and fail to examine the State's evidence. If the Court of Appeals had not stopped at Ms. Bradford's silence, but instead reviewed the State's evidence, it would have unearthed multiple, competing versions of events, with

contradictory accusations to different listeners. *See, e.g.*, RP 294 (I.B. testified she was hit on leg only with bat); RP 328. 335. 352 (I.B. said in defense interview she was hit in stomach, head); RP 349 (I.B. testified that "maybe" bat hit on her arm); RP 383 (I.B. told Jenelle Huber she was hit in the legs, plural, with bat); RP 482 (I.B. told Vanessa Elan she was hit in stomach with bat). Sometimes I.B. claimed that the knife left a mark or a cut (RP 323-24, 353, 469-70), and she claimed she was covered in "bruises, bruises, bruises" from the bat (RP 333). But, upon medical examination, she had no injuries on areas of her body she claimed were struck. RP 443-44. I.B. even contradicted herself on the number of bats used. RP 389 (two bats); cf. RP 312, 435, 482 (one bat).

It was not for the Court of Appeals to overlook these contradictions, inconsistencies, and lack of

corroboration and fault Ms. Bradford for presenting a defense of "general denial." The Court of Appeals' reference to Ms. Bradford's choice of silence was a significant error of constitutional dimensions, RAP 13.4(b)(3), and this Court should also accept review because the proper test for harmless error review is an issue of substantial public interest. RAP 13.4(b)(4).

E. CONCLUSION

For all of the foregoing reasons, Ms. Bradford requests that this Court grant review to clarify the scope of review of trial court decisions to admit limited-purpose evidence. She also requests that this Court grant her a new trial where she can be tried without impermissible propensity arguments and with proper instructions to a jury.

Counsel certifies this brief contains approximately 4,963 words and complies with RAP 18.17.

DATED this 21st day of January, 2025.

Respectfully submitted,

s/Ariana Downing

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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ASYA RUTHEA BRADFORD, Appellant.	No. 85536-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Asya Bradford was charged and subsequently found guilty of second degree assault of a child, which included acts with a knife and a metal bat. Bradford appeals and asserts that the court erred in allowing the State to present evidence of a prior, uncharged act of violence by Bradford, and in not providing the jury with a unanimity instruction regarding the assault charge. Finding no error, we affirm.

FACTS

In 2019, seven-year-old I.B. was living with her father, stepmother, brothers, and sister. In January 2019, I.B. reported to child protective services (CPS) that her stepmother, Asya Bradford, had hit her with a belt. Bradford admitted she had hit I.B., but stated it was merely parental discipline that had "gone awry."

Several months later, in September 2019, while I.B. and her family were eating dinner, Bradford became angry with I.B. for reporting the January incident

to CPS. I.B. believed Bradford was mad at her because she "was destroying the family, and [she] wasn't good." Bradford was crying and yelling and told I.B., "I will murder you." Bradford grabbed I.B. from behind and put a knife to her throat. I.B.'s brothers and father screamed at Bradford to stop. I.B.'s father managed to take the knife from Bradford. There were no visible marks left on I.B. from the knife.

After I.B.'s father took the knife from Bradford, she grabbed a metal bat from a nearby closet. Bradford began hitting C.C., I.B.'s brother, and I.B.'s father. Bradford then hit I.B. on the leg, but before Bradford could hit I.B. again, C.C. covered I.B. with his body. I.B.'s father got the bat away from Bradford and I.B. was able to get up. Eventually I.B. made it to her bedroom.

The next day at school, I.B. reported the incident to the school counselor. I.B. told the counselor that her mom had suffocated her, put a knife to her neck, and hit her with a metal bat. After school, I.B. was placed on a bus to her daycare and CPS was notified. That same day I.B. spoke with a deputy from the Snohomish County Sherriff's Office and, later, a forensic nurse. I.B. told the nurse that her mom "was trying to murder [her] with the knife," but when asked to tell the nurse more, I.B. said she wanted to "talk about something else." The nurse attempted to obtain photographs of some small bruises on I.B.'s back, but I.B. refused. I.B. was worried someone would show her parents the photographs.

In subsequent interviews, I.B. continued to express reluctance to talk about the incident. I.B. also had slightly different variations of the incident.

During an interview with a forensic nurse examiner, in response to a question about a bat, I.B. stated, "[w]e don't talk about the bat." Only after the advocate who had accompanied I.B. left the room did I.B. talk to the nurse. I.B. said that her mother had gotten angry with her and held a knife to her throat and hit her in the stomach with a metal bat.

In another interview with a child interview specialist, I.B. hesitated to answer the specialist's questions. I.B. worried that her dad and Bradford would see the recording. Eventually, I.B. did describe the incident, telling the specialist that Bradford was swinging the knife and a "little bit" of blood was on it.

Bradford was charged with second degree assault of a child. At trial, the court allowed the State to bring in evidence of Bradford's previous abuse of I.B. Bradford declined a limiting instruction to the jury. In its closing argument, the State argued that both being struck by a bat or having a knife held against one's neck could constitute "intentional touching or striking of another that is harmful or offensive," a necessary element of the charge. The jury found Bradford guilty of second degree assault of a child.

ANALYSIS

Admission of Evidence

Bradford contends that the court erred when it admitted evidence of previous abuse allegations against Bradford. The State asserts that the evidence was used for other, admissible purposes and its probative value outweighed any prejudicial effect. We agree with the State.

This court reviews a trial court's decision to admit evidence under ER 404 for abuse of discretion. State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons." State v. Sullivan, 18 Wn. App. 2d 225, 234, 491 P.3d 176 (2021).

Washington Rules of Evidence (ER) 404(b) determines the admissibility of evidence of other crimes, wrongs or acts. It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of other purposes included in ER 404(b) is non-exhaustive. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Before a court can admit evidence of a prior act, it 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, 1165 (2002).

Here, the parties do not dispute that the first prong is met. The parties disagree regarding the evidence's purpose, relevance, and probative value.

1. Purpose

Bradford claims the admission of allegations of previous abuse were offered to show her propensity for committing the crime charged and,

therefore, is inadmissible. The State contends the evidence was used for admissible purposes, such as Bradford's intent and motive, I.B.'s state of mind, dynamics of the relationship, and I.B.'s credibility.

a. Motive

The evidence supports that Bradford's prior abuse of I.B. was motive for the current incident. "Motive" is the moving course, the impulse, the desire that induces criminal action on part of the accused. State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Evidence of prior assaults or threats is admissible to show motive. Powell, 126 Wn.2d at 260. Here, I.B. testified that the reason Bradford was mad at her on the day of the attack was because she had "told [CPS] . . . about the bruises and things" from the previous abuse. I.B. believed Bradford blamed her for "destroying the family." Because the prior abuse was a catalyst for the current incident, evidence of the prior abuse goes to Bradford's motive.

b. State of Mind

The prior abuse is also related to I.B.'s state of mind. Evidence of abuse is admissible to prove the victim's state of mind when it is an element of the offense. State v. Ashley, 186 Wn.2d 32, 44, 375 P.3d 673 (2016). Evidence of abuse can be helpful to show the victim reasonably feared the defendant. Ashley, 186 Wn.2d at 45 ("It is unquestionably reasonable . . . to conclude that a domestic violence victim would continue to fear her tormentor, even years after the last incident of abuse.") Here, the jury was instructed that assault is "an act done with 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." Because I.B.'s state of mind is relevant to the charge—it must be shown that I.B. experienced reasonable fear—evidence of prior abuse is admissible.

c. Credibility

Evidence of prior abuse is also admissible to support I.B.'s credibility. When a witness gives conflicting statements about the defendant's conduct, evidence of past violence may be admissible to explain inconsistent accounts of the event. State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). Inconsistent accounts of an event can stem from the relationship between the victim and defendant. State v. Grant, 83 Wn. App. 98, 107-08, 920 P.2d 609 (1996). "Victims . . . 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." Grant, 83 Wn. App. at 107. Understanding the dynamics of the relationship between the victim and defendant, including past abuse, helps the jury evaluate the credibility of a witness. Grant, 83 Wn. App. at 108 ("The jury was entitled to evaluate [the witness's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.")

Here, Bradford highlighted conflicting accounts of the events, and the State explicitly stated that I.B.'s credibility "is going to be in question." Evidence of the prior abuse helps explain why discrepancies occurred in

I.B.'s statements to some of the witnesses and I.B.'s reluctance to allow photographs. I.B. was worried someone would show the pictures to her parents and Bradford would get mad, because that is what happened when the prior abuse occurred. Because the occurrence of prior abuse is being used to support I.B.'s credibility, it is admissible.

2. Relevance

In addition to identifying an admissible purpose, the State must show the evidence is relevant before it can be admitted. State v. Lough, 125 Wn.2d 847, 861-62, 889 P.2d 487 (1995). Evidence is relevant "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 259. When a prior history of abuse exists against the same victim, that prior history "become[s] extremely relevant to the case." Grant, 83 Wn. App. at 108.

Here, the evidence of prior abuse is relevant because it tends to show Bradford's motive for committing the charged crime and I.B.'s reasonable apprehension of bodily injury. The evidence also helps to explain I.B.'s inconsistent statements regarding the assault and aids the jury in evaluating her credibility. For these reasons, the evidence is relevant to prove an element of the assault charge.

3. Probative Value

Finally, before evidence of a prior act can be admitted, the court must find that the evidence's probative value substantially outweighs its prejudicial effects. Thang, 145 Wash. 2d at 642. When a history of abuse exists against the same

victim, the probative value of evidence of prior abuse is high. Grant, 83 Wn. App. at 108. The probative value of evidence used to explain a witnesses conflicting accounts also outweighs prejudice. Gunderson, 181 Wn.2d at 925. And evidence tending to show the defendant's motive has substantial probative value. State v. Arredondo, 188 Wn.2d 244, 264, 394 P.3d 348 (2017).

Here, evidence of the prior abuse goes to Bradford's motive and explains conflicting statements by I.B.; therefore, its probative value substantially outweighs any prejudicial effects.

Accordingly, the trial court did not err when it admitted the evidence of Bradford's prior abuse. Admission of the evidence was for a purpose other than to prove Bradford's character; the evidence was relevant; and its probative value outweighed its prejudicial effects.

4. Limiting Instruction

Bradford claims the court erred when it failed to provide a limiting instruction to the jury. The State contends that no error exists because Bradford explicitly declined a limiting instruction. We agree with the State.

If evidence of prior abuse is admitted, the party against whom the evidence is admitted is entitled to a limiting instruction upon request. Gresham, 173 Wn.2d at 420. A court is not required to give a limiting instruction sua sponte. State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011). The lack of a limiting instruction is not a reversible error when no instruction was requested. Russell, 171 Wn.2d at 123.

Here, Bradford did not request a limiting instruction. In fact, Bradford specifically declined a limiting instruction, stating "I don't want a limiting instruction. Even though [the court] ruled that 404(b) came in, it's my decision that I don't want that." Because Bradford declined a limiting instruction, the trial court did not err when it did not provide one to the jury.

Unanimity Instruction

Bradford asserts that her right to a unanimous jury verdict was violated when the State presented evidence of multiple acts to serve as a basis for one count of criminal conduct but the court did not instruct the jury it must be unanimous as to the specific act. The State contends the assault was a continuing course of conduct and the court was not required to instruct the jury that they must agree on a separate, distinct act as the basis of the count. We agree with the State.

Whether a unanimity instruction was required is a question of law reviewed by this court de novo. State v. Lee, 12 Wn. App. 2d 378, 393, 460 P.3d 701 (2020).

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the State presents evidence of multiple acts, any of which could serve as the basis for one count of criminal conduct, the State must either elect the act that will serve as the basis of the charge or the court must provide the jury with instructions on its duty to unanimously agree on which underlying criminal act was established beyond a

reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (overruled on other grounds). An election of an act or unanimity instruction is only required where the State presents evidence of "several distinct acts." Petrich, 101 Wn.2d at 571. If the evidence indicates the act was a "continuing course of conduct," then neither an election or unanimity instruction is required. Petrich, 101 Wn.2d at 571.

To determine whether an act is several distinct acts or a continuing course of conduct, "the facts must be evaluated in a commonsense manner." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Courts will consider factors such as the location, timing, subject, and intent of the act to determine whether it is a single, continuous act or several, distinct acts. See Lee, 12 Wn. App. 2d at 393; Handran, 113 Wn.2d at 17. Where the evidence shows conduct occurring at one place, within a brief period of time, toward a single victim, and with intent to accomplish a single objective, the conduct is a continuous course of conduct. Lee, 12 Wn. App. 2d at 394. A "brief period of time" can include action over the course of a few hours, or even weeks. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (noting that an act which occurred between 3-5 p.m. was "continuous conduct"); State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993) (finding repeated assaults during a three-week period constituted a continuing course of conduct).

Here, the assault against I.B. was a continuing course of conduct. Even though a knife and a bat were both used during the assault, the incident occurred at a single location, within a short amount of time, and arose from the same

motive. The fact that some jurors may have believed the assault occurred with the knife and others believed it occurred with the bat does not change application of the continuing course of conduct. In Handran, two potential sources of an assault occurred (kissing and hitting), but the Court did not required a limiting instruction because the "two acts of assault were part of a continuing course of conduct." 113 Wn.2d at 775. Similarly, the assault on I.B. with the knife and bat was a continuing assault; therefore, a limiting instruction was not required.

Harmless Error

Assuming that a unanimity instruction should have been given, Bradford contends the failure to give a unanimity instruction was not harmless. The State disagrees, claiming that even if a unanimity instruction was required, the failure to provide one was harmless. We agree with the State.

When a unanimity instruction is required but not given, reversal is required unless the evidence establishes the error was harmless beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). An error is harmless where no distinguishing evidence exists between the charges, such that "if the jury reasonably believed one incident occurred, [then] all the incidents must have occurred." State v. Bobenhouse, 166 Wn.2d 881, 894, 214 P.3d 907 (2009). When no conflicting evidence from witnesses exists and the defendant offers only a general denial, "the jury ha[s] no evidence on which it could rationally discriminate between the two incidents." Bobenhouse, 166 Wn.2d at 95.

Here, the jury was presented evidence of the incident from one witness, I.B.,[1] and Bradford offered only a general denial. No evidence distinguishes between the use of the knife and the use of the bat in the assault. Therefore, even if the two acts were not part of a continuing course of conduct, the lack of a unanimity instruction was harmless beyond a reasonable doubt.

Because no error occurred or any error was harmless, Bradford's right to a unanimous verdict was not violated.

We affirm.

Smith, C.J.

WE CONCUR:

Feldman, J.

Mann, J.

[1] I.B.'s younger brother, C.C., did testify but denied the abuse. When asked about a bat, C.C. said "I don't know anything about a bat" and said there were no bats in the home. C.C. also testified that he did not want to talk and he was "being pressured." He said he felt like he was "going to lose somebody," and he just wanted to "live a life with my mom" and didn't "want anybody messing with our family."

APPENDIX B

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

STATE OF WASHINGTON, Appellant, v. ASYA RUTHEA BRADFORD, Respondent.	No. 85536-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION TO FILE REPLY BRIEF

Appellant Asya Bradford moved for reconsideration of the opinion filed on September 30, 2024. Respondent State of Washington filed an answer. The panel considered the motion pursuant to RAP 12.4 and determined that the motion should be denied.

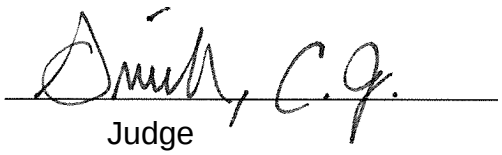
Appellant Asya Bradford also moved to file a reply brief. The panel considered the motion pursuant to RAP 12.4(d) and determined the motion should be granted.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the motion to file a reply brief is granted.

FOR THE COURT:



Judge

WASHINGTON APPELLATE PROJECT

January 21, 2025 - 4:19 PM

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