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Court of Appeals
Division I
State of Washington

Supreme Court No. 91454-1
COA No. 70807-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES WILLIAM SCHUMACHER,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

James William Schumacher requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Schumacher, No. 70807-4-I, filed February 9, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980), this Court held that generally, in a murder prosecution, evidence regarding the decedent's state of mind and whether she was afraid of the defendant is inadmissible because it is not relevant to the charged crime and is overly prejudicial. In this murder prosecution, the Court of Appeals affirmed the trial court's decision to admit the decedent's statement expressing fear of the defendant. Does the Court of Appeals' opinion conflict with Parr, warranting review? RAP 13.4(b)(1).

2. Did the court abuse its discretion in admitting evidence of prior disputes between Mr. and Ms. Schumacher that occurred at least a year, and up to 40 years before the offense?

3. Did the trial court abuse its discretion in admitting Ms. Schumacher's out-of-court statements made to a physician and social

worker in which she vaguely alleged that Mr. Schumacher had abused her in the past?

4. Should this Court grant review to decide whether the void for vagueness doctrine of the Due Process Clause applies to statutory aggravating factors? RAP 13.4(b)(3), (4).

5. Washington's exceptional sentence statute authorizes a court to impose an exceptional sentence based on a jury finding that the current offense was part of an "ongoing pattern of *psychological* . . . abuse." RCW 9.94A.535(3)(h)(i) (emphasis added). Is the statute unconstitutionally vague, warranting review? RAP 13.4(b)(1), (3).

6. Did the State fail to prove the ongoing pattern of psychological or physical abuse aggravator beyond a reasonable doubt?

C. STATEMENT OF THE CASE

On the afternoon of March 23, 2012, 71-year-old James Schumacher walked into the Bellevue Police Station and told police officers that he had killed his wife Jean and left her body in the house. 5/21/13RP 34. The two had been married for more than 40 years. 5/28/13RP 128.

Mr. Schumacher was charged with first degree premeditated murder with a deadly weapon enhancement allegation. CP 1-2. The

State also alleged the offense involved domestic violence and "was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 1-2 (citing RCW 9.94A.535(3)(h)(i)).

To prove motive and intent, the State moved to admit evidence that Mr. Schumacher had been arrested in November 2010 and later convicted of fourth degree assault after he pushed Ms. Schumacher to the floor during an argument. 5/14/13RP 113-18. The State also moved to admit evidence that Ms. Schumacher told her daughter that she was afraid of Mr. Schumacher when she heard he was to be released from jail following the 2010 incident. 5/15/13RP 58. Finally, the State moved to admit Ms. Schumacher's hearsay statements made to a physician and a hospital social worker following the 2010 incident, in which she alleged that Mr. Schumacher had verbally and emotionally abused her for years. CP 120. The court admitted the evidence over objection. CP 120-21; 5/14/13RP 122-25, 134, 142-43, 149; 5/15/13RP 59-71, 109-11.

Craig Beaver, a licensed psychologist, evaluated Mr. Schumacher and concluded he had mild to moderate dementia which was exacerbated by his poorly-managed diabetes. 5/22/13RP 48, 58.

Together, these factors caused significant impairment in his cognitive functioning and impulse control, which affected his ability to form an intent to kill and control his actions. 5/22/13RP 25, 70, 77-80, 91, 134. The jury was instructed that "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditated intent or intent." CP 66.

The jury did not find Mr. Schumacher guilty of first degree murder but found him guilty of second degree murder instead. CP 80-81. The jury answered "yes" on the verdict form regarding whether the crime was an aggravated domestic violence offense. CP 82. The court concluded the history of domestic violence was a substantial and compelling reason justifying an exceptional sentence and imposed an exceptional sentence of 300 months. CP 107, 118.

Mr. Schumacher appealed and the Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion affirming the trial court's decision to admit the decedent's statement expressing fear of the defendant conflicts with State v. Parr, warranting review. 13.4(b)(1)

In State v. Parr, the defendant was charged with murdering his girlfriend by gunshot. State v. Parr, 93 Wn.2d 95, 96-97, 606 P.2d 263

(1980). At trial, the girlfriend's brother testified that six months before the incident, his sister told him Parr had threatened her with a gun and she was afraid of him. Id. at 98. The Court held that a victim's expressions of fear of the defendant are ordinarily not relevant or admissible in a criminal case. Id. at 102-03. Such evidence carries great potential of unfair prejudice, particularly in a murder case where the defendant has no opportunity to cross-examine the declarant. Id. at 100-03. The evidence is relevant and admissible only if the decedent's state of mind is put at issue by the specific defense raised. If the defense is accident or self-defense, evidence regarding the decedent's state of mind may be probative of the question whether the victim was likely to act in the manner claimed by the defendant. Id. at 103. In Parr, for instance, the evidence was relevant and admissible to rebut Parr's claim that the gun went off accidentally during a struggle after the victim grabbed for the gun. Id. at 96, 106-07. Her state of mind had some bearing on the question whether she was likely to have reached for the gun. Id. at 106. If not for the claim of accident, however, the evidence would have been inadmissible. Id. at 100-03.

Another controlling case is State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983). In that case, Cameron was charged with

premeditated first degree murder of his stepmother. Id. at 521. He admitted stabbing her but claimed he was insane at the time. Id. At trial, the stepmother's daughter testified that two months before the incident, her mother told her she was having problems with Cameron. Id. at 530. The victim's ex-husband also testified she had told him she was afraid of Cameron. Id. at 529. The Court concluded the evidence was not admissible because it was not relevant to prove Cameron's premeditation or his thought process and was not probative to prove any other material issue in the case. Id. at 531. Moreover, the error in admitting the evidence was not harmless because "the potential for misuse of the testimony or misunderstanding of its application is too great, carrying with it a substantial likelihood of prejudice to petitioner's case." Id.

These authorities make plain that the trial court abused its discretion in admitting Ms. Schumacher's out-of-court statement expressing fear of Mr. Schumacher. The evidence was not probative or admissible to prove whether Mr. Schumacher intended to kill his wife or had the capacity to form such an intent, which was the central issue in the case. Parr, 93 Wn.2d at 100-03; Cameron, 100 Wn.2d at 531.

Mr. Schumacher did not assert a defense such as accident or self-defense which would have put his wife's state of mind at issue.

The State and the Court of Appeals relied upon this Court's decision in State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007). Slip Op. at 6-7. But Athan is consistent with Mr. Schumacher's argument. In Athan, two friends of the decedent testified that the decedent had told them she would not go out with the defendant and that he "g[ave] her the creeps." Athan, 160 Wn.2d at 381. The Court held the decedent's statements were relevant and admissible because "Athan himself put the victim's state of mind into issue." Id. at 383. Athan's defense was that the victim had consensual sex with him and was then later murdered by someone else. Id. at 382-83, 382 n.6. Thus, he made "her feelings toward him a relevant issue." Id. at 383. But her feelings and state of mind were relevant and admissible only to rebut Athan's claim that she had consensual sex with him. That is, they were admissible only to explain *her actions*, not his.

Here, Ms. Schumacher's feelings and emotions were not at issue and therefore her out-of-court statements expressing fear of Mr. Schumacher were not relevant or admissible. Unlike in a case where the defense is accident or self-defense, Ms. Schumacher's actions were

not relevant. To the contrary, the evidence showed Ms. Schumacher was asleep at the time of the incident. 5/21/13RP 37-38, 131. Her feelings and emotions were not relevant to *Mr. Schumacher's* state of mind, which was the central issue in the case. Her alleged fear of Mr. Schumacher some years earlier was not relevant to show whether he had the capacity to form an intent to kill on this occasion.

To some extent, the nature of the relationship between the defendant and the decedent is always relevant in a murder case. But that does not mean that any evidence tending to bear on the nature of the relationship is admissible. Trial courts must still follow the rules of evidence in determining whether such evidence is admissible. In general, a victim's out-of-court statements expressing fear of a defendant are not admissible in a murder trial because of the strong likelihood that any relevance of the evidence will be outweighed by its prejudicial impact. See Parr, 93 Wn.2d at 100, 107. This danger is particularly significant where the defendant has no opportunity to cross-examine the declarant.

Because the Court of Appeals' opinion conflicts with the principles established in Parr, this Court should grant review.

2. The trial court abused its discretion in admitting evidence of prior disputes between Mr. and Ms. Schumacher

Evidence of prior quarrels and ill feeling between spouses is generally admissible in spousal murder cases to show motive or intent. State v. Powell, 126 Wn.2d 244, 260-62, 893 P.2d 615 (1995); ER 404(b). But because such evidence has a great potential for prejudice, it must be of consequence to the action to justify its admission, such as in a case where only circumstantial evidence exists. Id. at 260.

Here, evidence of prior disputes between Mr. and Ms. Schumacher was too remote in time to be relevant to his current motive or state of mind. The most recent incident occurred in November 2010, almost one and one-half years before the current offense. The Schumacher children both testified they were not aware of any serious disputes between their parents occurring after the 2010 incident. James said his parents still argued sometimes but seemed to be getting along and making progress. 5/29/13RP 42-43. Susan testified she did not witness her father calling her mother names after the 2010 incident and was not aware of any further physical altercations. 5/29/13RP 62-63.

3. The trial court abused its discretion in admitting Ms. Schumacher's hearsay statements made to medical providers regarding past "abuse"

ER 803(a)(4) provides that the following out-of-court statements are admissible at trial notwithstanding the hearsay rule:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Two factors are critical to the application of ER 803(a)(4). State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997). First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment. Id. Second, the content of the statement must be such as is reasonably relied on by a medical provider in treatment or diagnosis. Id. These two factors reflect the rationale for the medical purpose exception to the hearsay rule: The declarant has a strong motive to speak truthfully and accurately because her successful treatment depends upon it. Id.

Although courts now routinely admit hearsay statements made to medical providers identifying the perpetrator in domestic violence cases, courts have not expanded the medical hearsay exception to encompass statements relating a history of *prior* abuse. Such

statements are not reasonably pertinent to the purpose of obtaining treatment for a present injury, especially when the alleged prior abuse occurred in the distant past. Because information regarding prior abuse is only marginally relevant to obtaining successful treatment for a present injury, the declarant has a much weaker motive to be truthful and accurate in relating such information. The rationale for applying the hearsay exception is therefore much less compelling in such cases.

Here, medical providers were permitted to testify about Ms. Schumacher's vague allegations regarding a history of psychological and verbal abuse by her husband, although such information was not reasonably pertinent to obtaining treatment for her present injuries. Mr. Schumacher never had an opportunity to cross-examine Ms. Schumacher about her vague allegations of past "abuse," or inquire about their reliability and her possible motive for making them. This Court should hold that the medical hearsay exception is not broad enough to encompass Ms. Schumacher's incriminating hearsay statements conveying allegations of prior, unrelated acts of abuse. The trial court abused its discretion in admitting the hearsay statements.

4. This Court should grant review to determine whether, in light of Blakely v. Washington, the void for vagueness doctrine applies to Washington's statutory aggravators

The vagueness doctrine of the Due Process Clause rests on two related principles, that penal statutes must provide citizens with fair notice of what conduct is proscribed, and that laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); U.S. Const. amend. XIV; Const. art. I, § 3.

In State v. Baldwin, the Court concluded that statutory aggravating factors are not subject to a vagueness challenge. State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). The Court's holding in Baldwin is untenable in light of the United States Supreme Court's later decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).[1]

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[1] In Blakely, the Supreme Court held "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely, 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

In Baldwin, the Court held "the void for vagueness doctrine should have application only to laws that proscribe or prescribe conduct and that it was analytically unsound to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences." 150 Wn.2d at 458 (internal quotation marks and citation omitted). Baldwin concluded that because the sentencing guidelines statutes "do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature," the void-for-vagueness doctrine "ha[s] no application in the context of sentencing guidelines." Id. at 459.

Baldwin's conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" is indisputably incorrect following Blakely. There, the Court held statutory aggravating factors *do* alter the statutory maximum of the offense. Blakely, 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." Baldwin, 150 Wn.2d at 458. The vast majority of aggravating factors may not be considered by a sentencing judge at all, unless they are first found by a jury beyond

a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-Blakely scheme, aggravating factors do not merely direct judicial discretion.

Baldwin also concluded no liberty interest is at stake in the determination of an aggravating factor, stating "before a state law can create a liberty interest, it must contain substantive predicates to the exercise of discretion and specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." Baldwin, 150 Wn.2d at 460 (internal quotation marks and citation omitted). This conclusion is also contrary to the Supreme Court's opinions in Blakely and Apprendi, which concluded the Due Process Clause *does* apply to aggravating factors.

Blakely concluded that the Sixth Amendment right to a jury trial applies to statutory aggravating factors. Blakely, 542 U.S. at 305. It is by virtue of the Fourteenth Amendment Due Process Clause that the Sixth Amendment jury trial right is incorporated against the states. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The Sixth Amendment jury trial right is "among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, . . . is basic in our system of jurisprudence, and . . . is a fundamental right, essential to a fair trial."

Id. at 148-49 (internal quotation marks and citations omitted). "[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id. at 156. Thus, the Sixth Amendment right to a jury applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake. Because the Sixth Amendment applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

Apprendi and Blakely establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as Apprendi expressly noted, sentencing enhancements impact the most basic of liberty interests—the right to be free from confinement. 530 U.S. at 484. It is because they affect the most basic liberty interest that enhancements and aggravating factors, just like traditional elements, must be proved beyond a reasonable doubt.

Thus, in light of Blakely, the void for vagueness doctrine stemming from the Due Process Clause applies to statutory aggravating factors. RAP 13.4(b)(3), (4).

5. The exceptional sentence statute is unconstitutionally vague

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation marks and citation omitted). The test for vagueness is whether a person of reasonable understanding must guess at the meaning of the statute. Id. at 297.

The aggravating factor required the jury to find whether the current offense involved domestic violence and "was part of an ongoing pattern of *psychological* or physical abuse of the victim manifested by multiple incidents over a prolonged period of time." CP 76 (emphasis added); see RCW 9.94A.535(3)(h)(i). The statute does not define the term "psychological abuse." Under the Court's decision in State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), the term is unconstitutionally vague.

In Williams, the Court considered the constitutionality of the criminal harassment statute. The statute provided that a person was guilty of harassment if, without lawful authority, he or she knowingly threatened "'[t]o cause bodily injury in the future to the person

threatened or to any other person," or "[m]aliciously 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 "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.'" Id. at 203 (quoting former RCW 9A.46.020(1)(a)(i), (1)(a)(iv), (b) (1992)) (emphasis in Williams). The Court concluded the term "mental health," which was not defined in the statute, was impermissibly vague. Id. at 205-06.

First, a person of reasonable understanding must guess at what conduct was prohibited by the term "mental health." Id. at 204. For example, the statute did not make clear whether a person was prohibited from making threats that cause others mere irritation or emotional discomfort, or whether it prohibited only those threats causing others to suffer a diagnosable mental condition. Id. "Without knowing what is meant by mental health, the requirement that one intentionally commit an act designed to substantially harm the mental health of another does not tell us what that act might be." Id.

Second, the term "mental health" was inherently subjective. Id. at 205-06. "[T]he average citizen has no way of knowing what conduct is prohibited by the statute because each person's perception of what

constitutes the mental health of another will differ based on each person's subjective impressions." Id. at 206. Similarly, the statute offered law enforcement no guide beyond the subjective impressions of the person responding to a citizen complaint. Id.

Like the term "mental health," the statutory term "psychological abuse" is vague for similar reasons. A person of reasonable understanding must necessarily guess at what conduct the term encompasses. Does it encompass behavior that merely causes ongoing irritation or emotional discomfort, or does it require that the behavior cause a substantial, diagnosable psychological condition? The answer is not clear. A person of reasonable understanding is left to guess at what is meant by "psychological abuse."

Because a reasonable person must guess at the conduct encompassed by the term "psychological abuse" and it is inherently subjective, the statute is unconstitutionally vague to the extent it references "psychological abuse." Williams, 144 Wn.2d at 205-06.

6. The evidence was insufficient to prove an ongoing pattern of psychological or physical abuse beyond a reasonable doubt

A jury must find any facts supporting aggravating circumstances beyond a reasonable doubt. State v. Stubbs, 170 Wn.2d 117, 123, 240

P.3d 143 (2010); U.S. Const. amend. XIV. The evidence must show several, repeated acts of abuse in order for the "ongoing pattern of abuse" aggravator to apply. See State v. Harris, 123 Wn. App. 906, 915, 99 P.3d 902 (2004), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (at least four incidents of abuse over six-month period); State v. Atkinson, 113 Wn. App. 661, 671-72, 54 P.3d 702 (2002) (at least three incidents of domestic violence over seven- to ten-month period); State v. Zatkovich, 113 Wn. App. 70, 52 P.3d 36 (2002) (several, repeated acts of abuse); State v. Quigg, 72 Wn. App. 828, 840-41, 866 P.2d 655 (1994) ("chronic, repeated" acts of abuse over several-year period); State v. Overvold, 64 Wn. App. 440, 442, 444, 825 P.2d 729 (1992) (repeated acts of abuse over several-year period).

Here, the evidence was not sufficient to establish a "pattern" of physical or psychological abuse beyond a reasonable doubt. The only concrete evidence of any prior physical abuse was the evidence from the November 2010 incident in which Mr. Schumacher pushed his wife and she fell to the floor. 5/28/13RP 108, 112, 128-30. In addition, the hospital social worker testified that Ms. Schumacher said her husband hat hit her and shoved her once before, causing a black eye. 5/28/13RP

123. There was no testimony regarding when this alleged prior incident occurred, or the circumstances surrounding it. The evidence was not sufficient to prove a regular pattern of ongoing physical abuse.

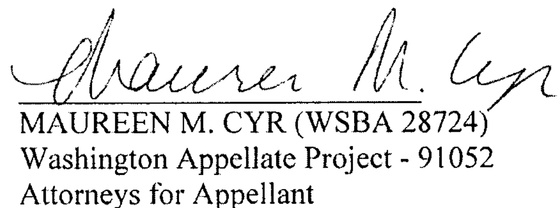
Likewise, the evidence was not sufficient to establish a pattern of psychological abuse. The only evidence to support the allegation of "psychological abuse" was the Schumacher children's testimonies that they had observed their parents yelling and screaming at each other and observed their father call their mother derogatory names, 5/29/13RP 14-15, 52-53, and Ms. Schumacher's vague hearsay statements to the medical providers alleging verbal and emotional abuse by her husband in the past, 5/28/13RP 109, 113-14, 122.

This evidence was insufficient to prove the aggravator beyond a reasonable doubt and the exceptional sentence must be reversed.

E. CONCLUSION

For the reasons provided above, this Court should accept review and reverse Mr. Schumacher's conviction and exceptional sentence.

Respectfully submitted this 10th day of March, 2015.



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APPENDIX

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

STATE OF WASHINGTON, Respondent,	)	No. 70807-4-I
v.	)	
JAMES WILLIAM SCHUMACHER, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: February 9, 2015

VERELLEN, A.C.J. — James Schumacher appeals from a second degree murder conviction for the murder of his wife, Jean.[1] He contends that the trial court erred by admitting evidence of Jean's state of mind, his past abuse of Jean, general marital discord, and statements Jean made to medical providers about past abuse. Because Schumacher put at issue the tumultuous nature of the marital relationship, evidence that Jean feared him was relevant and properly admitted. And because the other challenged evidence was properly admitted as evidence of Schumacher's intent and motive, we affirm the conviction.

Schumacher further challenges his exceptional sentence, contending that the sentencing aggravator of an ongoing pattern of psychological abuse is unconstitutionally vague and that the evidence was insufficient to support a finding of

[1] To avoid confusion, we refer to Schumacher's wife by first name.

that aggravator. Because the void for vagueness doctrine does not apply to a sentencing aggravator, and the record supports the jury's finding that there was an ongoing pattern of physical or psychological abuse, we affirm the exceptional sentence.

FACTS

On March 23, 2012, James Schumacher walked into the Bellevue Police Department headquarters and confessed to murdering his wife of 46 years, Jean. He told the first officer he met that he and Jean had been arguing for over 15 years and that a few days earlier, during an argument, she approached him with a hammer and threatened to divorce him. She did not strike him with the hammer, but put it away and went to bed, telling him she did not want to be bothered. She went to her separate bedroom and locked the door.

Schumacher stayed up all night "seething" about the incident.[2] The next morning, he got up and retrieved a hatchet from the garage. He picked the lock on Jean's bedroom door and while she was still sleeping, struck her in the face with the hatchet five to six times, killing her.

He hid the body under the bed. He put the hatchet back in the garage, packed up some belongings and considered fleeing. He went to the bank, withdrew money, and took the family dog to an animal shelter to be boarded for an extended period. He then reconsidered leaving town and contemplated killing himself, but ultimately decided to turn himself in.

[2] Report of Proceedings (RP) (May 21, 2013) at 37.

After Schumacher confessed, the officer asked him if he felt okay, and Schumacher responded that he felt "a weight had been lifted."[3] He proceeded to give a full videotaped confession, detailing how he murdered his wife and that he did so because he was tired of her constant nagging. He stated that he decided that morning that "he just [couldn't] take it anymore" and hit her with the hatchet five or six times "to make sure that it was done . . . [t]hat she was dead."[4]

Police found the body hidden under the bed, as he had indicated. The medical examiner confirmed that Jean had suffered at least five chopping wounds to her head and found no defensive wounds on her body.

The State charged Schumacher with first degree murder with a deadly weapon sentencing enhancement. The State also alleged as a sentencing aggravator that the crime was a domestic violence offense that was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim.

At trial, Schumacher asserted a defense of diminished capacity. He offered the expert testimony of Dr. Craig Beaver, who opined that Schumacher has early stage dementia and that his unmanaged diabetes, depression, poor nutrition, and illness contributed to his diminished mental state. He further testified that the stress of Schumacher's tumultuous marriage contributed to his mental impairment.
Dr. Beaver concluded that, as a result of this impairment, Schumacher was unable to intend or premeditate the murder. The State offered expert testimony from Dr. Brian Judd, who testified that even if Schumacher had mild dementia, neither this condition

[3] Id. at 46.

[4] Ex. 241 at 19, 24.

nor his other health ailments rendered him incapable of forming premeditated intent at the time of the murder.

Over defense objection, the State also offered evidence of prior marital discord between Schumacher and Jean, including a domestic violence incident in November 2010 that resulted in Schumacher's conviction for fourth degree assault. The State also offered statements Jean made to her daughter that she feared Schumacher would kill her when he was released from jail following the November 2010 incident and statements that Jean made to medical providers in 2010 about past abuse. The court ruled that all of this evidence was admissible and probative of motive and intent.

A jury found Schumacher guilty of the lesser included offense of second degree murder and also found that the State proved the sentencing enhancement and the sentencing aggravator. The court imposed an exceptional sentence of 300 months based on the sentencing aggravator. The standard range was 147 to 244 months. Schumacher appeals.

DISCUSSION

Evidence of the Victim's State of Mind

Schumacher contends that the trial court erred by admitting Jean's statement that she feared he would kill her upon his release from jail in November 2010 because her state of mind was not at issue in the case. We disagree.

Over defense objection, the trial court admitted evidence of Jean's statements to her daughter, Susan Schumacher (Susan), made after Schumacher had been arrested in November 2010 on a domestic violence charge. The court permitted

Susan to testify that after Jean learned Schumacher was going to be released from jail following the November 2010 incident, Jean "started screaming and crying" and said, "He is going to kill me. Oh my God, what am I going to do?"[5] The court ruled:

> [W]ith respect to the statements made on hearing [of] his release from jail, and certainly, the State will have to lay a foundation for an excited utterance, but it appears to meet all the criteria for an excited utterance. I can't imagine what could be a more startling event than knowing someone that you fear, that assaulted you in the past, is now going to be released and will have access to you again. . . . And again, because there is no question of identity and whether, in fact, the killing—whether in fact, he actually killed her, while a limiting instruction may be appropriate, it's not—we could certainly offer, if someone wants to prepare a limiting instruction, we can certainly indicate, I suppose, that they are not to consider it for the fact of whether her opinion was accurate that in fact he was going to kill her, although I'm not sure how that would benefit the defense or State of the factual circumstances, I'm not sure that that's necessary. But rather, it is to show the depth of the dysfunctionality of their relationship; that she would think not only that he would be angry, but that she was so fearful that she would have an opinion, rightly or wrongly, and wrongly as it turned out, because of course, he did not kill her upon being released from jail, that he was going to kill her as a result of being arrested. For that reason, the Court finds that it's not unfairly prejudicial and is more probative than unfairly prejudicial and will allow it.[6]

ER 803(a)(3) provides an exception to the hearsay rule for statements "of the declarant's then existing state of mind."[7] But the declarant's state of mind must still be "relevant to a material issue in the case."[8] Thus, "[i]n a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of

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[5] RP (May 29, 2013) at 54-55.

[6] RP (May 16, 2013) at 118-19.

[7] As the trial court also found, Jean's hearsay statements fall within the excited utterance exception to the hearsay rule.

[8] State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991).

fears or other emotions is ordinarily not relevant."[9] But in cases where the defendant asserts accident or self-defense, admission of evidence of the victim's fears is relevant to whether the victim would have been likely to act as the defendant claimed.[10]

In State v. Athan, the court held it was not an abuse of discretion to admit a murder victim's statements under ER 803(a)(3) as evidence of state of mind because the defendant put the victim's state of mind at issue.[11] There, the State alleged the defendant sexually assaulted the victim before murdering her, but at trial, the defendant's theory was that he had had consensual sex with her and that she was murdered by someone else.[12] The trial court admitted statements the victim made to her friends that she had no romantic interest in the defendant and that he gave her "the creeps."[13] On appeal, the court rejected the defendant's argument that the victim's state of mind was irrelevant because he did not raise a claim of accident or self-defense. Rather, the court concluded that, by suggesting that he had a romantic relationship with the victim, her statements about her feelings toward him became relevant.[14]

Likewise here, Schumacher put at issue the nature of his relationship with Jean. He claimed that the tumultuous nature of the relationship contributed to his

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[9] State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980).

[10] Id.

[11] 160 Wn.2d 354, 383, 158 P.3d 27 (2007).

[12] Id. at 381-82.

[13] Id. at 381.

[14] Id. at 383.

impaired mental state and offered expert testimony from Dr. Beaver that the stress of the relationship affected his ability to form intent. Thus, as in Athan, Jean's perspective of the relationship, which included her fears of him, became relevant. Indeed, Dr. Beaver agreed that an understanding of the nature of the marital relationship was helpful to determining whether he had the ability to form the requisite intent to commit the murder.

Dr. Beaver testified that Schumacher told him that he was very unhappy in his marriage, that Jean had a separate bedroom with a lock on the door, and that Jean always criticized him. Dr. Beaver further testified that "there was a lot of stress and tension between he and his wife, some indication that he felt threatened,"[15] and that Schumacher said that there were threats to kill made by both of them. He also testified that Schumacher described an incident where Jean came into his room and waived a hammer at him because she was upset with him for not getting out of bed and taking care of chores around the house. Dr. Beaver opined that the increasing conflict was a factor that contributed to Schumacher's stress and impacted his cognitive ability to form the requisite intent. Thus, evidence that Jean in fact feared him was relevant to address these claims and present the complete picture of the relationship that he claimed contributed to his diminished mental state. The trial court did not abuse its discretion by admitting the statements.

Schumacher's reliance on State v. Cameron is misplaced.[16] In Cameron, the court held it was reversible error to admit evidence that the murder victim expressed

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[15] RP (May 22, 2013) at 70.

[16] 100 Wn.2d 520, 674 P.2d 650 (1983).

fear of the defendant because "the victim's state of mind itself was not relevant to any material issue before the before the jury."[17] There, the defendant asserted an insanity defense, claiming that he killed the victim because she was possessed by an evil spirit and on a "strong sorcery trip."[18] The victim's daughter and ex-husband testified that before the murder, the victim told them she feared the defendant. Because self-defense was not at issue and these statements were about the victim's state of mind, the court held that they were not admissible to prove the defendant's thought process at the time of the murder.[19]

But unlike here, Cameron did not involve a spousal murder, and there was no history of conflict and abuse between the defendant and the victim. And more importantly, the defendant in Cameron did not put at issue the nature of his relationship with the victim, nor did he claim that it affected his ability to form intent, as Schumacher did here. Thus, unlike here, what the victim in Cameron feared in the past was irrelevant to the defendant's state of mind at the time of the murder.

ER 404(b) Evidence

Schumacher also challenges the trial court's admission of evidence of his assault conviction in November 2010, testimony from his son and daughter about his past verbal and physical abuse of Jean, and Jean's statements to police that he had hit her in the past and had verbally and emotionally abused her for years before the

[17] Id. at 531.

[18] Id. at 523.

[19] Id. at 530-31.

November 2010 incident. He contends that such evidence was inadmissible under ER 404(b) because it was not probative of his motive or intent at the time of the murder. We disagree.

We review the decision to admit evidence of a defendant's prior bad acts for an abuse of discretion.[20] ER 404(b) provides that evidence of a defendant's prior misconduct may be admissible for a purpose other than to prove propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." In cases of marital homicide, courts may properly admit evidence of prior bad acts to show motive, intent, opportunity, premeditation, and res gestae.[21] A diminished capacity defense puts at issue the defendant's state of mind because it allows the defendant to negate the requisite intent that is an element of a crime.[22]

Here, the trial court ruled that the prior incidents of domestic violence and conflict between Schumacher and his wife were relevant to prove Schumacher's motive and intent to cause the death of his wife and that the probative value outweighed any prejudice to Schumacher. As the court explained:

> Here, we have a first degree murder case where the State must prove not only intent, but the intent was a settled intent, and also must, in order to prevail, rebut the claim of diminished capacity. Although it's true that diminished capacity merely allows the jury to take evidence of mental illness or disorder into consideration in determining whether the defendant had the capacity to form a settled intent or a premeditated intent, the jury will not only look at expert evidence, such as the two doctors, but they will look at their—they will draw on their own common

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[20] State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997).

[21] State v. Powell, 126 Wn.2d 244, 260-64, 893 P.2d 615 (1995).

[22] See State v. Stumpf, 64 Wn. App. 522, 525, 827 P.2d 294 (1992).

> sense as to whether an older man, who has been married for 46 years to a woman, would suddenly bludgeon her to death without there being any discord or difficulties in the relationship, or whether, if this were to come out of the blue, what must it necessarily be or more likely be as a result of some sort of diminished capacity. So it's relevant to those claims, generally speaking. Moreover, while the 2010 incident in itself might not be evidence of settled intent, it is material to the State's argument that the defendant had a settled intent to do everything he could to prevent his wife from leaving him, and that over pretty much the entirety of their relationship, he had that intent, that he expressed it in violent and abusive ways to her, and was willing to do whatever was necessary to make sure she did not leave him.[23]
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> . . . The evidence is not too remote. Certainly in 2010, there seemed to be some evidence that could come in that some people were seeing some changes in his thinking or behavior. And given his age, a jury might well speculate that, well, in 2010, he was also, perhaps, having some early dementia, and maybe this is what caused his behavior. So the issue is relevant to the issue of whether there is premeditated intent, and it is more probative than prejudicial; certainly, not unfairly prejudicial.[24]

The trial court's ruling was a proper exercise of discretion. The evidence was directly related to Schumacher's state of mind and intent at the time of the murder. He told police that he and Jean had been arguing for years and that this most recent argument is what caused him to finally act. He talked about his assault of Jean in 2010, being charged with a crime, having a protection order against him, having to stay away from the home for eight months, and that when he was allowed to go back home, "the bullshit started again."[25] He further stated that in the last few weeks before the murder, "she really started pissing and moaning" and that he decided he'd

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[23] RP (May 14, 2013) at 133-35.

[24] RP (May 15, 2013) at 63-64.

[25] Ex. 241 at 14.

"had enough" and "could not take this anymore."[26] Finally, he stated that he was "seething" and did not sleep at all the night before the murder, and in the morning, he said to himself "[t]his is it" before proceeding to kill her.[27] Additionally, Schumacher himself put the nature of the marital relationship at issue. As discussed above, Schumacher's expert testified about the nature of the marital relationship and how the increasing conflict had an impact on his state of mind and ability to form the requisite intent.

Schumacher contends that evidence of the prior abuse and marital discord was not relevant because these acts were not close in time to the current offense. He notes that the most recent incident occurred in November 2010, nearly a year and a half before the charged offense. He cites State v. Acosta, where the court held inadmissible evidence of the defendant's prior arrests and convictions that were all at least two years old because they were irrelevant to his intent to commit the current offense.[28] But in Acosta, the State offered evidence of 23 arrests and convictions unrelated to the charged offense that dated back more than a decade to rebut a claim of diminished capacity.[29] The court held that because they involved unproven charges and charges unrelated to the crime charged, the prior arrests and convictions were not relevant to the defendant's state of mind during the current offenses.[30] As discussed above, this case is demonstrably different. The history of

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[26] Id. at 15-16.

[27] Id. at 19.

[28] 123 Wn. App. 424, 435, 98 P.3d 503 (2004).

[29] Id. at 429-30.

[30] Id. at 434.

conflict and abuse was directly related to, and was what eventually led to, the charged offense.[31]

Evidence of Statements Made to Medical Providers

Schumacher contends that the trial court erroneously admitted evidence of statements Jean made to medical providers who treated her for injuries she sustained as a result of the November 2010 domestic violence assault incident. He contends that these statements do not fall within the scope of ER 803(a)(4), the medical diagnosis exception to the hearsay rule. But because Schumacher did not challenge the admission of this evidence on this basis at trial, he has waived the issue on appeal.[32] Nonetheless, his claim is without merit.

ER 803(a)(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Such statements are admissible if (1) the declarant's motive in making the statement is consistent with the purpose of promoting treatment, and (2) the content of the statement must be that upon which a medical provider would reasonably rely in treatment or diagnosis.[33] "Medical diagnosis and treatment"

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[31] This evidence was also material to the pattern of abuse aggravator.

[32] See State v. Simms, 77 Wn. App. 236, 240-41, 890 P.2d 521 (1995) (refusing to consider for the first time on appeal defendant's challenge to statements as not falling within ER 803(a)(4) hearsay exception).

[33] State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997).

includes both physical and psychological treatment.[34] In domestic violence cases, our courts have routinely held admissible victims' statements to medical providers about the nature of the abuse and the identity of the abuser, recognizing the unique circumstances of such cases where the patient is in an intimate or familial relationship with the abuser, may be suffering from emotional or psychological injury due to long term abuse, and may be at risk of future harm from the same abuser.[35]

Here, an emergency room physician testified that Jean told him Schumacher verbally and emotionally abused her for years. A social worker also testified that Jean told her there was a history of verbal and emotional abuse and that Schumacher had hit and shoved her once before in the past. The court properly admitted these statements as reasonably pertinent to treatment because they contained information that enabled both providers to evaluate her condition and recommend treatment.

Schumacher contends that because these statements relate to a history of prior abuse, they are not reasonably pertinent to treatment of a present injury or condition and therefore do not fall with the medical diagnosis exception to the hearsay rule. But the scope of the rule is not limited to statements about treatment for injuries related to the charged offense, and Schumacher provides no authority to the contrary. Rather, the focus of the rule is reliability of the statements; so long as

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[34] State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

[35] See, e.g., Simms, 77 Wn. App. at 239-40; State v. Butler, 53 Wn. App. 214; 222, 766 P.2d 505 (1989); In re Dependency of S.S., 61 Wn. App. 488, 503, 814 P.2d 204 (1991).

they were made to facilitate treatment, they are sufficiently reliable hearsay.[36] Of course, they still must be relevant to a material issue in the case, but as discussed above, the court properly found that they were relevant to Schumacher's motive and intent to commit premeditated murder.

Schumacher also asserts that because these statements were in response to questions aimed solely at ensuring patient safety, they do not fall within the hearsay exception for statements of treatment or diagnosis, citing the Ninth Circuit's opinion in People of the Territory of Guam v. Ignacio.[37] Schumacher's reliance on Ignacio is misplaced. There, the court held inadmissible a child abuse victim's statements to a social worker where the record showed that the social worker questioned her simply to determine whether to report the suspected abuse to Child Protective Services, not for the purpose of treating or diagnosing the child's physical or psychological needs.[38] Statements the child made to the medical provider who initially examined her, however, were properly admitted.[39] Here, the testimony established that Jean's statements were not made solely to report the allegations but were made for the purpose of medical treatment and diagnosis.

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[36] See Butler, 53 Wn. App. at 220 ("'[I]t is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay.'" (quoting United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980))).

[37] 10 F.3d 608 (9th Cir. 1993).

[38] Id. at 613.

[39] Id.

Sentencing Aggravator

Schumacher challenges as unconstitutionally vague the sentencing aggravator of an ongoing pattern of psychological, physical, or sexual abuse of a victim and contends that his exceptional sentence based on this aggravator must be reversed. He concedes that our Supreme Court has expressly held in State v. Baldwin that the "the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines,"[40] but asserts that Baldwin is no longer good law after the United States Supreme Court's decision in Blakely v. Washington.[41] Blakely held that a judge may not impose a sentencing enhancement without findings by the jury or a stipulation by the defendant.[42]

Schumacher focuses on Blakely's treatment of aggravator factors as equivalent to elements of a crime, arguing that this establishes a due process right that encompasses vagueness challenges to sentencing enhancements. But Blakely implicated the right to a jury trial, while the vagueness doctrine focuses on providing notice to the public and protecting against arbitrary state intrusion.[43] Schumacher provides no cogent legal argument that Baldwin does not survive Blakely. Because we are bound by the court's decision in Baldwin, we reject the vagueness challenge.

Finally, Schumacher challenges the sufficiency of the evidence to support the finding of the aggravating factor of an ongoing pattern of psychological or physical

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[40] 150 Wn.2d 448, 459, 78 P.3d 1005 (2003).

[41] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[42] Id. at 303-04.

[43] Baldwin, 150 Wn.2d at 458.

abuse. Viewed in the light most favorable to the State, the evidence supports the finding.

A jury must find any facts supporting aggravating circumstances beyond a reasonable doubt.[44] We review the jury's finding under the standard for challenges to the sufficiency of the evidence.[45] Under that standard, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt.[46] We must draw all reasonable inferences from the evidence in favor of the State and construe the evidence most strongly against the defendant.[47]

Schumacher contends that the evidence shows only one or two prior incidents of past physical abuse and vague accounts of psychological abuse and is therefore insufficient to support an ongoing pattern of abuse. We disagree. Viewed in the light most favorable to the State, the evidence sufficiently demonstrates such a pattern.

Courts use the common meaning of "pattern," which is "'a regular, mainly unvarying way of acting or doing.'"[48] The evidence here establishes such a pattern. Schumacher's son recalled that for his "entire life," Schumacher would lose control and scream at Jean, calling her derogatory names.[49] His daughter similarly testified

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[44] State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010).

[45] Id.

[46] State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

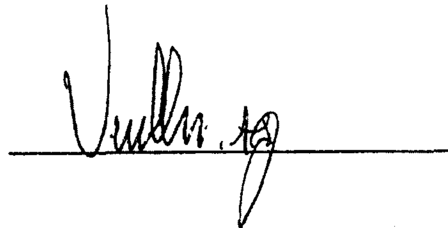
[47] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[48] State v. Russell, 69 Wn. App. 237, 247, 848 P.2d 743 (1993) (quoting WEBSTER'S NEW WORLD DICTIONARY 1042 (1976)).

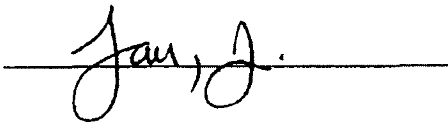
[49] See RP (May 29, 2013) at 14-15 (he called her a "fucking bitch," and "honky," a similar derogatory term used for Eastern European immigrants).

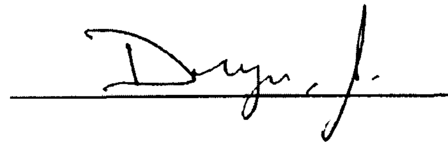
that he called Jean derogatory names while the daughter lived at home and after she moved out.[50] Schumacher also admitted to his son and at the hearing for a protection order in 2010 that he had been physically and verbally abusive many times in the past. Additionally, as discussed above, Jean told medical personnel in 2010 that he had been physically and verbally abusive to her for 43 years. Schumacher also stated that he argued with her one to two times a weeks for 40 years and admitted that he had threatened to kill her several times in the past. Based on this evidence, a rational trier of fact could find beyond a reasonable doubt that Schumacher engaged in a pattern of physical and emotional abuse of Jean for a prolonged period of time.

We affirm the judgment and sentence.



WE CONCUR:





[50] See id. at 52 ("[T]he defendant would call my mother a bitch, a whore, a cunt, a mother fucking cunt, a honky, an asshole, bitch.").

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70807-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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