71559-3

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No. 71559-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTTYE LEON MILLER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2. Cumulative evidentiary errors together deprived Mr. Miller of his constitutional right to a fair trial.

3. The trial court erred in relying on the aggravating factor that the offense involved domestic violence and was part of an ongoing pattern of psychological or physical abuse manifested by multiple incidents over a prolonged period of time.

4. The phrase "psychological abuse" in the ongoing pattern of abuse aggravator is unconstitutionally vague in violation of due process.

5. The jury instruction informing the jury that "prolonged period of time" means more than a few weeks was an unconstitutional comment on the evidence.

6. The State did not prove beyond a reasonable doubt that Mr. Miller committed the crime shortly after release from incarceration.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of the victim's state of mind is generally not relevant in a murder prosecution. Did the trial court abuse its discretion

in admitting highly prejudicial evidence for the impermissible purpose of establishing the victim's state of mind, where her state of mind was not relevant?

2. Cumulative evidentiary errors may deprive a defendant of a fair trial, even if any one of the errors is not sufficient in itself to justify reversal of the conviction. Was Mr. Miller denied a fair trial, where the trial court repeatedly and erroneously admitted evidence that had a highly prejudicial and unfair cumulative effect?

3. The trial court may not rely on a defendant's prior criminal acts to impose an exceptional sentence, if those acts were already taken into account in establishing the standard sentence range. Did the trial court err in relying on Mr. Miller's prior criminal acts in imposing an exceptional sentence, where those acts were already taken into account in establishing the standard range?

4. Is the phrase "ongoing pattern of psychological abuse" in the exceptional sentence aggravator unconstitutionally vague in violation of due process?

5. A jury instruction informing the jury that "prolonged period of time" means more than a few weeks is an unconstitutional comment

on the evidence. Did the trial court impermissibly comment on the evidence by providing such an instruction?

6. Did the State fail to prove beyond a reasonable doubt that Mr. Miller committed the offense "shortly after being released from incarceration," where the current offense was committed more than two weeks after his release from incarceration?

C. STATEMENT OF THE CASE

Scottye Miller and Patricia "Tricia" Patricelli had an on-again, off-again, romantic relationship for about four years. 11/26/13RP 147; 12/11/13RP 106; 12/11/13RP 106. Ms. Patricelli had two young daughters: Khalani, who was 13 years old at the time of trial, and Niyerrah, who was 10 years old at the time of trial. 11/26/13RP 145; 12/10/13RP 169. Mr. Miller had a good relationship with the girls, who thought of him as a father and called him "dad." 11/26/13RP 147; 12/10/13RP 171; 12/11/13RP 12.

Ms. Patricelli and her daughters had moved from Kent into an apartment in Auburn shortly before the events at issue in this case. 11/26/13RP 150. Mr. Miller lived with them for periods of time, both in Kent and in Auburn. 11/26/13RP 148; 12/10/13RP 173; 12/11/13RP 12. He kept many of his things at their apartment, including his

clothing, a television, and important documents such as his birth certificate and Supplemental Security Income card. 11/26/13RP 38; 12/02/13RP 63; 12/11/13RP 49, 51, 108. Mr. Miller stayed with Ms. Patricelli during some of the days leading up to the incident. 11/26/13RP 6-8; 12/02/13RP 66-68; 12/11/13RP 107.

Mr. Miller and Ms. Patricelli often got along well and would do things with the girls together as a family. 12/11/13RP 48, 107. But sometimes they argued and Mr. Miller would become physically violent with her. 12/10/13RP 174; 12/11/13RP 107. On occasion, Mr. Miller threatened Ms. Patricelli, in order to get his point across when she was not listening. 12/11/13RP 111; 12/12/13RP 71. He did not intend to carry out the threats. 12/11/13RP 112-13. He acknowledged that threatening Ms. Patricelli in that manner was generally not an effective strategy. 12/12/13RP 71.

On the day before the incident, Mr. Miller and Ms. Patricelli argued at her apartment. Mr. Miller was angry because he thought she was exchanging text messages or doing something else with another guy. He thought, if she did not want him around and wanted to be with someone else, she should just say so and he would leave. Before the

argument, they were getting along well. Mr. Miller left the apartment in anger. 12/11/13RP 119-21.

That night, Mr. Miller stayed in a closet on Ms. Patricelli's balcony throughout the night. 12/02/13RP 15-16; 12 /09/13RP 168; 12/11/13RP 137-39. He spent the night there because he had nowhere else to go and had no money. 12/11/13RP 125, 127.

While he was in the closet, Mr. Miller overheard Ms. Patricelli talking to her friend Rayford Varnado on the balcony about a new man she was seeing named Nate. 12/02/13RP 19-20; 12/11/13RP 124. Again Mr. Miller became angry that she was seeing another man while still in a relationship with Mr. Miller. 12/11/13RP 126. After she went inside, he called her on her cell phone and the two argued, each of them threatening the other. 12/02/13RP 69, 75-76; 12/11/13RP 27, 30-31, 122-23, 129-36. Mr. Miller also sent several text messages to Mr. Varnado, saying he was angry that Ms. Patricelli was cheating on him and that he was going to hurt her. 12/02/13RP 25-26, 102-03; 12/09/13RP 155. Although Mr. Miller was angry and upset and made those threats, in fact he had no plan or intention to carry them out or do anything in particular. 12/11/13RP 136.

The next morning, October 30, 2012, at around 8 a.m., Ms. Patricelli and her two daughters left the apartment and she drove them to her mother's house, which was a short distance away. 11/26/13RP 154, 157. Khalani could not recall later whether any of them locked the front door behind them. 12/11/13RP 41. After all, Ms. Patricelli's friend Mr. Varnado was still inside on the couch, where he had spent the night. 12/11/13RP 41. Ms. Patricelli dropped off Khalani at her mother's place, then drove her younger daughter to the bus stop. 12/11/13RP 42. She told Khalani she was going to go back home, take a shower and put on fresh clothes before going to work. 11/26/13RP 155; 12/11/13RP 37-40. Ms. Patricelli then drove back home. 11/26/13RP 150.

Meanwhile, when Mr. Miller heard Ms. Patricelli leave the apartment, he went inside, intending to take a shower. 12/11/13RP 139. He was no longer angry about the night before and had calmed down. 12/11/13RP 139; 12/12/13RP 81. He entered through the front door, which was unlocked. 12/11/13RP 140-41. He thought Ms. Patricelli was at work and would not return until later that afternoon. 12/11/13RP 141-42. That day, Tuesday, was a regular work day for Ms. Patricelli. 12/11/13RP 67-68. Mr. Miller routinely showered at

her place. 12/11/13RP 141. His intent in entering the apartment was to take a shower, collect his things, and leave. 12/11/13RP 141, 159, 164.

Mr. Miller turned on the shower in the master bathroom to warm it up. 12/10/13RP 155; 12/11/13RP 142-47. He then heard Ms. Patricelli unexpectedly enter the apartment. She saw him and asked what he was doing there. 12/11/13RP 147. He said he was going to take a shower and then leave. She told him to leave now but he refused, insisting on taking a shower. The two argued. 12/11/13RP 148. As they argued, Ms. Patricelli walked toward him and pushed him out of the way, saying she had to get dressed and get ready for work. She said several angry, threatening and unsettling things that made him angry and upset. 12/11/13RP 150. He went to the kitchen and grabbed a knife, without thinking about what he was doing. 12/11/13RP 151-52. He then went to the bathroom and opened the door; Ms. Patricelli screamed and moved toward the window. 12/11/13RP 152. Mr. Miller stabbed her several times, although he could not remember anything after the first stab wound. 12/11/13RP 153. He did not feel anything but just remembers seeing blood on his hands. 12/11/13RP 154. He did not mean to kill Ms. Patricelli. 12/11/13RP 67. Later it was determined that she died of multiple stab wounds. 12/10/13RP 95-96.

Mr. Varnado, who was sleeping on the couch, woke up when he heard a light scream and then a thump on the floor in the other room. 12/02/13RP 34. He walked toward the master bedroom, heard the shower running, and saw Ms. Patricelli on the floor of the bathroom in a pool of blood. 12/02/13RP 35-36. Mr. Varnado then saw Mr. Miller and asked what he was doing. He told him to leave and said he was going to call 911. 12/02/13RP 36-37; 12/11/13RP 155. Mr. Miller stood for a moment, then realized he should do as instructed. He grabbed his gloves and the knives, put on shoes and socks, and left. He felt sad that he had hurt Ms. Patricelli. 12/02/13RP 38; 12/11/13RP 156-58.

Mr. Miller dropped two knives, a pair of gloves, and Ms. Patricelli's cell phone on the ground nearby.[1] 12/02/13RP 126-29, 135; 12/03/13(a.m.)RP 57-62; 12/11/13RP 159. He was not thinking about what he was doing. 12/11/13RP 160.

Mr. Miller walked to a bus stop. Again, he was not thinking and did not know why he went to the bus stop or why he did not get on a bus. 12/11/13RP 160-61. While at the bus stop, he called Mr. Varnado

[1] Mr. Miller routinely carried a pair of gloves around with him in his back pocket. He wore gloves often because he had a skin condition that caused his hands to sweat excessively. 12/11/13RP 19; 12/11/13RP 77; 12/11/13RP 118.

to check on Ms. Patricelli, hoping she was all right; he did not think she would be dead. 12/11/13RP 161-62. Mr. Varnado did not answer. A short time later, the police found Mr. Miller at the bus stop and arrested him. 12/03/13(a.m.)RP 32-34.

Mr. Miller was charged with one count of first degree premeditated murder, RCW 9A.32.030(1)(a), committed with a deadly weapon. CP 14-15. The State also alleged two aggravating factors: (1) that the offense involved domestic violence and "was part of an ongoing pattern of psychological, physical or sexual abuse[2] of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time"; and (2) that Mr. Miller committed the offense "shortly after being released from incarceration." CP 14-15.

Prior to trial, the State moved to admit evidence of prior disputes between Mr. Miller and Ms. Patricelli and prior bad acts by Mr. Miller. Defense counsel objected. 11/20/13RP 26-30, 46-49. The court ruled much of the evidence was admissible under ER 404(b) to prove motive and premeditated intent.[3] 11/20/13RP 56; CP 421.

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[2] Later, the State abandoned the "pattern of sexual abuse" allegation and the jury was instructed to find only whether the incident was part of an ongoing pattern of "psychological or physical abuse." CP 170.

[3] Ultimately, the jury was instructed it could consider evidence of Mr. Miller's actions during prior incidents in February 2011 and

At trial, Mr. Miller testified and admitted killing Ms. Patricelli. 12/12/13RP 83. But he explained he did not intend to kill her when he entered the apartment; at that point he was no longer angry about the argument they had the night before . 12/12/13RP 80-81. He killed her during the heat of the argument they had that day, without meaning to. 12/11/13RP 151. He had no pre-formed plan to kill and did not remember anything after the first stab wound. 12/11/13RP 152-53.

The jury was instructed it could consider the lesser charge of second degree murder. CP 146. Defense counsel argued that Mr. Miller did not premeditate the killing. 12/12/13RP 101-24.

The jury found Mr. Miller guilty of first degree murder as charged, while armed with a deadly weapon. CP 154, 157.

At a separate, later proceeding, the State presented evidence to support the two alleged aggravating factors to the jury. The State presented evidence that Mr. Miller had 15 prior convictions for domestic violence, against both Ms. Patricelli and his ex-wife Angel Miller. 12/16/13RP 86. The State also relied on testimony presented at trial regarding two prior incidents against Ms. Patricelli, which

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December 2011 only for the purpose of considering intent and premeditation and for no other purpose. CP 141.

occurred in February 2011 and December 2011, and for which Mr. Miller had already received criminal convictions. 12/16/13RP 89.

In addition, the State presented testimony from Mr. Miller's community corrections officer, who testified that he had been released from prison on October 15, 2012. 12/16/13RP 92.

The jury found "the offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 158, 170. The jury also found that Mr. Miller committed the offense "shortly after being released from incarceration." CP 159, 167.

At sentencing, the court found Mr. Miller's offender score was 7 and the standard sentence range was 338 to 450 months, plus 24 months for the deadly weapon enhancement, for a total range of 362 to 474 months. CP 206. The court imposed an exceptional sentence of 576 months, plus 24 months for the deadly weapon enhancement, for a total sentence of 600 months. CP 208, 213.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. The trial court abused its discretion in admitting extensive and prejudicial evidence for the purpose of establishing Ms. Patricelli's state of mind because her state of mind was not relevant to the prosecution.

a. The trial court admitted, over objection, several out-of-court statements made by Ms. Patricelli for the purpose of establishing her state of mind.

First, a Kent police officer testified that he responded to a 911 call at Ms. Patricelli's apartment in February 2011. 12/05/13RP 148-52. When he and his partner arrived, they saw Mr. Miller standing on Ms. Patricelli's apartment balcony, peering through the sliding glass door. 12/05/13RP 152. When the officer contacted Ms. Patricelli at the front door, she said, "please don't tell him that I called." 12/05/13RP 155. She said she did not want Mr. Miller to know she had called, and seemed very nervous and scared about the possibility that he might find out. 12/05/13RP 156. When the officer told her he could not guarantee that Mr. Miller would not find out, she started to cry and said, "I should not have called." 12/05/13RP 157.

Second, the trial court admitted a text message from Ms. Patricelli sent to Mr. Miller on the night before the incident, in which

she accused him of "stalking, harassing and threatening me." 12/09/13RP 3-5.

Third, the court admitted Mr. Varnado's testimony that, on the night before the incident, Ms. Patricelli received a text from Mr. Miller about "Nate." 12/02/13RP 20. Ms. Patricelli said to Mr. Varnado that Mr. Miller must be somewhere very close to her apartment because he knew about Nate and must have overheard them talking about him. 12/02/13RP 21. Mr. Varnado said Ms. Patricelli then checked the doors and windows and looked scared. 12/02/13RP 22.

Fourth, the court permitted Tasha White, a co-worker of Ms. Patricelli's, to testify that Ms. Patricelli would sometimes ask her to walk with her through her apartment when she came home from work because she was afraid that Mr. Miller might be hiding inside. 12/09/13RP 104-07, 111-12, 116. The court also permitted Ms. White to testify that sometimes Mr. Miller would send her threatening letters at work and that Mr. Patricelli said the letters made her afraid. 12/09/13RP 125-26.

Fifth, Khalani testified that, after the February 2011 incident, Ms. Patricelli told her that she was afraid because Mr. Miller had climbed up to her balcony. 12/11/13RP 5.

Sixth, Khalani testified that, shortly before Mr. Miller returned home in October 2012, Ms. Patricelli told her that she was nervous and a little relieved that he was coming home. 12/11/13RP 11.

b. The trial court's rulings were erroneous because Ms. Patricelli's state of mind was not relevant and because some of the statements related Mr. Miller's actions that purportedly caused her to feel afraid.

Generally, an out-of-court statement offered for the truth of the matter asserted is not excluded by the hearsay rule if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." ER 803(a)(3). But although "statements offered as circumstantial evidence of the declarant's state of mind are not hearsay, such statements must be relevant to be admissible." State v. Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987); ER 402 ("Evidence which is not relevant is not admissible.").

It is well-established that, in a murder prosecution, evidence of the decedent's state of mind is not relevant or admissible, unless her state of mind is put at issue due to the nature of the defense raised. The controlling case in Washington is State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). There, Parr was charged with murdering his girlfriend by

gunshot. Id. at 96-97. 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 Washington Supreme 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 is not relevant to prove the defendant's intent or conduct and 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.

Evidence of the decedent's state of mind is relevant and admissible only if her 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.

Moreover, even if the decedent's state of mind *is* somehow relevant to rebut the defense, the court may not admit statements about the conduct of the defendant that incited her state of mind, due to the potential for unfair prejudice. Id. at 104. The Parr court explained,

> In the interest of protecting both the State's right to disprove accident or self-defense and the defendant's right to a fair trial, free of unnecessary and prejudicial evidence which is not subject to cross-examination, the trial court should allow the State to prove the victim's declarations about his or her own state of mind, where relevant, but should not permit it to introduce testimony which describes conduct or words of the defendant.

Id.; see also State v. Sublett, 156 Wn. App. 160, 199, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012) ("even if [the decedent's] state of mind were relevant, statements discussing the conduct of another person that may have created the declarant's state of mind are inadmissible under ER 803(a)(3).") (citing Parr, 93 Wn.2d at 104).

Another controlling case is State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983). There, 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 Supreme 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 the numerous statements made by Ms. Patricelli expressing fear of Mr. Miller. The evidence was not probative or admissible to prove whether Mr. Miller acted with a premeditated intent to kill her, which was the central issue in the case. Parr, 93 Wn.2d at 100-03; Cameron, 100 Wn.2d at 531. Mr. Miller did not assert a defense such as accident or self-defense which would have put Ms. Patricelli's state of mind at issue. Her state of mind was simply

not relevant and the evidence was therefore inadmissible. Stubsjoen, 48 Wn. App. at 146.

Moreover, the court compounded the error by repeatedly admitting portions of Ms. Patricelli's statements that described Mr. Miller's actions which purportedly caused her state of mind. Parr, 93 Wn.2d at 104; Sublett, 156 Wn. App. at 199. For example, the trial court admitted a text message sent by Ms. Patricelli to Mr. Miller on the night before the incident in which she accused him of "stalking, harassing and threatening me." 12/09/13RP 3. The court also admitted testimony from Mr. Varnado that Ms. Patricelli was afraid on the night before the incident, and checked all her doors and windows, because she thought Mr. Miller was present somewhere near her apartment. 12/02/13RP 21-22. Likewise, the court admitted testimony from Ms. Patricelli's co-worker Ms. White to the effect that Ms. Patricelli felt afraid when she received threatening letters from Mr. Miller. 12/09/13RP 125-26. Finally, the court admitted testimony from Khalani who said her mother was afraid in February 2011 because Mr. Miller had climbed up her balcony. 12/11/13RP 5.

In short, the trial court committed several unfairly prejudicial evidentiary errors when it permitted the jury to hear extensive

testimony regarding Ms. Patricelli's fear of Mr. Miller and his actions that purportedly caused her fear. Parr, 93 Wn.2d at 100-04; Cameron, 100 Wn.2d at 531; Sublett, 156 Wn. App. at 199. The evidence was inadmissible because it was not relevant. Even if Ms. Patricelli's state of mind *were* somehow relevant, the portions of her statements describing Mr. Miller's actions which caused her fear were still inadmissible. The admission of this extensive evidence was both highly prejudicial and unfair because Mr. Miller had no opportunity for cross-examination.

Finally, as in Cameron, admission of the evidence requires reversal. An error in admitting evidence in violation of the evidence rules is prejudicial and requires a new trial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Benn, 161 Wn.2d 256, 266 n.4, 165 P.3d 1232 (2007). The improper admission of evidence is harmless error only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

Here, Mr. Miller admitted killing Ms. Patricelli but the evidence to support premeditation was not overwhelming. Mr. Miller testified that he entered her apartment that morning in order to take a shower

and collect his belongings before she returned from work, and not with any intent to kill. 12/11/13RP 139-41, 159, 164; 12/12/13RP 81. This explanation is plausible, as Tuesday was a regular work day for Ms. Patricelli and ordinarily she would not have returned to the apartment until later that afternoon. 12/11/13RP 67-68, 141-42. Mr. Miller routinely showered at her apartment and kept his clothing there. 11/26/13RP 38; 12/02/13RP 63; 12/11/13RP 49, 51, 108, 141. The highly prejudicial evidence regarding Ms. Patricelli's fear of him and his threatening actions which supposedly caused that fear likely influenced the jury's verdict.

Mr. Miller admitted making threats to Ms. Patricelli but did not mean to carry them out. 12/11/13RP 111-13; 12/12/13RP 71. The evidence regarding the effect of his threats and other actions on her state of mind undoubtedly made the jury view the threats as much more serious than they otherwise would have seemed. Because the inadmissible evidence likely influenced the jury to find Mr. Miller acted with premeditated intent, the conviction must be reversed. Benn, 161 Wn.2d at 266.

2. The cumulative and unfairly prejudicial effect of the above evidentiary errors denied Mr. Miller a fair trial.

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel); Taylor v. Kentucky, 436 U.S. 478, 487-88, 487 n.15, 490, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several

errors may have cumulative effect of violating due process guarantee of fundamental fairness); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) ("Although each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."); U.S. Const. amend. XIV; Const. art. I, § 3.

Here, as in those cases, the cumulative effect of the trial court's several evidentiary errors denied Mr. Miller a fundamentally fair trial, even if any one of the court's rulings alone would not justify reversal. As discussed, the multiple out-of-court statements by Ms. Patricelli expressing fear of Mr. Miller and recounting his actions that caused that fear, together severely undercut his defense that he did not act with a premeditated intent. The cumulative effect of the multiple errors denied Mr. Miller a fair trial.

3. The trial court erred in relying upon the "ongoing pattern of abuse" aggravator to impose an exceptional sentence.

a. The court erred in relying upon the "ongoing pattern of abuse" aggravator because it was based upon prior crimes that were already taken into account in establishing the offender score.

To determine whether an aggravating factor legally supports a departure from the standard sentence range, the Court applies a two-part test. State v. O'Dell, __ Wn.2d __, 2015 WL 4760476, at *5 (Aug. 13, 2015, No. 90337-9). First, a factor cannot support the imposition of an exceptional sentence if the Legislature necessarily considered that factor when it established the standard sentence range. Id. (citing State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995)). Second, in order to justify an exceptional sentence, a factor must be "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." O'Dell, 2015 WL 4760476, at *5.

Whether a particular factor can justify an exceptional sentence is a question of law the Court reviews *de novo*. Id. at *4.

As the Washington Supreme Court recently reaffirmed in O'Dell, it is well-established that a court may not rely upon an

offender's criminal history[4] in imposing an exceptional sentence. Id. at *5 n.3; Alexander, 125 .2d at 725. Criminal history is already taken into account in computing the offender score for sentencing purposes. State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995). Thus, an offender's criminal history cannot justify an exceptional sentence because criminal history is one of the two components (the other being the seriousness of the offense) used to compute the presumptive range. O'Dell, 2015 WL 4760476, at *5 n.3 (citing State v. Nordby, 106 Wn.2d 514, 518 n.4, 723 P.2d 1117 (1986)).

Here, the court imposed an exceptional sentence based on the aggravating factor that "the offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 158, 170, 213; RCW 9.94A.535(3)(h)(i). To support the aggravating factor, the State presented evidence of multiple prior incidents of domestic violence for which Mr. Miller had already received criminal convictions. See 12/05/13RP 159-60, 176; 12/16/13RP 93-104, 135-36, 143-44; Ex. 342, 344, 344A, 397A and B, 398, 399, 400, 401, 402A and B, 403,

[4] "Criminal history" is defined as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11).

404, 405. In closing argument, the deputy prosecutor told the jury it could rely upon those prior convictions in determining whether the aggravating factor was proved. 12/16/13RP 223-27. But the Legislature already took Mr. Miller's criminal history into account in establishing his standard sentence range. O'Dell, 2015 WL 4760476, at *5 n.3. Therefore, the court was not permitted to rely upon those prior incidents in imposing an exceptional sentence. Id.; Alexander, 125 Wn.2d at 725; Nordby, 106 Wn.2d at 518 n.4.

Ordinarily, the "real facts doctrine" precludes the court from relying on facts that establish additional crimes in imposing a sentence above the standard range. RCW 9.94A.530(3).[5] A general exception exists for cases involving evidence of an "ongoing pattern of psychological, physical, or sexual abuse." Id.; RCW 9.94A.535(3)(h)(i). But the "ongoing pattern of abuse" exception does not apply in a case such as this, where the purported pattern of abuse consists of acts that sustained prior criminal convictions.

The "pattern of abuse" exception to the real facts doctrine was initially developed by the courts to accommodate the problems of proof

[5] RCW 9.94A.530(3) provides: "Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h)."

common in child abuse cases. State v. Daniels, 56 Wn. App. 646, 653-54, 784 P.2d 579 (1990); State v. Brown, 55 Wn. App. 738, 754-56, 780 P.2d 880 (1989). "The 'spirit' of the exception derives from the nature of child abuse cases in general." Daniels, 56 Wn. App. at 653.

> Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places.

Brown, 55 Wn. App. at 746-47. Such cases "present problems of proof that make multiple charges impractical" and provide a justification for permitting courts to consider evidence of additional crimes at sentencing. Id. at 755.

In child abuse cases where there is evidence of multiple incidents but the evidence is insufficient to sustain a separate criminal charge for each act, "[i]f prosecutors were required to rely on separate convictions for each particular instance of abuse, 'the most egregious child molesters effectively would be insulated from prosecution.'" Daniels, 56 Wn. App. at 653-54 (quoting Brown, 55 Wn. App. at 749). Thus, "the proportionality goals of the SRA are better served by

consideration of those incidents in the sentencing decision." Brown, 55 Wn. App. at 755.

Consistent with this underlying justification, courts traditionally apply the "ongoing pattern of abuse" exception to the real facts doctrine only in cases where there is evidence of multiple incidents of abuse for each current criminal charge. "So long as there is proof of multiple incidents per count, this exception applies." Quigg, 72 Wn. App. at 840 (citing Daniels, 56 Wn. App. at 654; Brown, 55 Wn. App. at 755-56).

In Brown, for example, "[a]lthough Brown was convicted of multiple counts, his conviction *on each count* was based upon a single episode of a particular type of abuse, of which there was evidence of many acts." 55 Wn. App. at 756 (emphasis in Brown). "[T]he additional incidents were not the basis for the convictions, and were not necessarily considered in determining Brown's presumptive sentencing range." Id. For that reason, "[t]he trial court properly relied on evidence of multiple incidents as a substantial and compelling reason justifying the exceptional sentences." Id.; see also Quigg, 72 Wn. App. at 841 (exception applied where there was evidence of multiple,

repeated acts of abuse but only two criminal charges); Overvold, 64 Wn. App. at 445-46 (same).

But by the same reasoning, the "ongoing pattern of abuse" exception to the real facts doctrine does *not* apply in cases where the State presents evidence of prior acts for which the offender has already received criminal convictions. Such cases do not present "problems of proof" that justify allowing courts to consider evidence of additional crimes at sentencing. Brown, 55 Wn. App. at 755. More important, such cases involve prior incidents that were already necessarily considered in determining the offender's presumptive sentencing range. Id. at 756. Thus, it is improper for a court to rely upon such prior incidents in imposing a sentence above the standard range. O'Dell, 2015 WL 4760476, at *5 n.3; Alexander, 125 Wn.2d at 725; Nordby, 106 Wn.2d at 518 n.4. The offender has already been punished for those offenses, both at the time of the original conviction, and at the time of the present conviction, through consideration of the prior offenses in calculating the standard range. Thus, the goals of proportionality of the SRA are not served in such cases by permitting the court to impose *additional* punishment in the form of a sentence above the standard range.

In sum, the court erred in relying on evidence of multiple prior incidents—facts that established additional crimes and which were already considered in calculating the standard range—in imposing an exceptional sentence.

b. The ongoing pattern of abuse aggravator is unconstitutionally vague to the extent it references "psychological abuse."

The vagueness doctrine of the Due Process Clause[6] rests on two related principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, 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). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. A statute fails to adequately guard against arbitrary enforcement if it lacks ascertainable or legally fixed standards of

[6] The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." In addition, article I, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973).

"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 is required to guess at the meaning of the statute. Id. at 297. The Court considers whether the statute is vague as applied to the particular facts at issue in the case. Id. The Court reviews a vagueness challenge *de novo*. State v. Williams, 159 Wn. App. 298, 319, 244 P.3d 1018 (2011).

The statutory aggravating factor at issue required the jury to find whether "[t]he offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 170; RCW 9.94A.535(3)(h)(i). Neither the statute nor the jury instructions defined the term "psychological abuse." Under the Washington Supreme 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, the term "mental health" was vague because a person of reasonable understanding must guess at what conduct was prohibited by the term. 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. The court explained, "[w]ithout 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 unconstitutionally vague because it 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.

Thus, the statute was unconstitutionally vague to the extent it referenced "mental health." Id. The court held the term "mental" must be severed from the statute. Id. at 212-13.

The statutory term "psychological abuse" is no less vague than the term "mental health," and 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."

Similarly, as with the term "mental health," the term "psychological abuse" is inherently subjective. Each person's perception of what constitutes "psychological abuse" differs based on each person's subjective impressions. The statute offers the jury no guide beyond the subjective impressions of each juror in determining whether an ongoing pattern of "psychological abuse" occurred.

In this case, as in Williams, any reasonable juror was required to guess at what conduct allegedly committed by Mr. Miller was encompassed by the term "psychological abuse." See Williams, 144 Wn.2d at 205-06. The statute is therefore unconstitutionally vague as applied to Mr. Miller's case. Duncalf, 177 Wn.2d at 296-97.

Mr. Miller is presumed prejudiced and the State bears the burden to show beyond a reasonable doubt that the jury would have reached the same result without the error. Williams, 144 Wn.2d at 213. The error is not harmless if it impossible to discern whether the jury relied upon the unconstitutional aspect of the statute in reaching its verdict. Id.

Here, it is impossible to discern whether the jury's verdict regarding the aggravating factor was based on a finding that Mr. Miller engaged in an ongoing pattern of "psychological abuse." The error is therefore not harmless and the court erred in relying upon the improper factor in imposing the exceptional sentence. Id.

c. The jury instruction informing the jury that "prolonged period of time" means more than a few weeks was an unconstitutional comment on the evidence.

The Washington State Constitution explicitly provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. VI, § 16. This provision prohibits judges "from influencing the judgment of the jury on what the testimony proved or failed to prove." State v. Zimmerman, 130 Wn. App. 170, 174, 121 P.3d 1216 (2005) (internal quotation marks and citation omitted). "It is thus error for a judge to instruct the jury that matters of fact have been established as a matter of law." Id. at 174 (internal quotation marks and citation omitted).

In Brush, the Washington Supreme Court held that a jury instruction identical to the instruction provided in this case was an impermissible comment on the evidence. State v. Brush, 183 Wn.2d 550, 556-57, 353 P.3d 213 (2015). In Brush, the defendant was

charged with the aggravated domestic violence aggravator and the jury found it was proved. Id. at 553-54. As in this case, the jury was instructed that an "'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks."[7] Id. at 555. The court concluded that the instruction defining "prolonged period of time" as "more than a few weeks" essentially resolved the factual issue of whether the abuse occurred over a "prolonged period of time." Id. at 557. The instruction essentially informed the jury that, "[a]s long as the State showed that the abuse lasted longer than a few weeks, the jury was instructed to find that the abuse occurred over a 'prolonged period of time.'" Id. at 559.

It is up to the jury, not the judge, to decide whether a particular pattern of abuse occurred over a "prolonged period of time." Id. at 558. An instruction that informs the jury that "prolonged period of time" means "more than a few weeks" is an improper comment on the evidence that effectively relieves the prosecution of its burden of

[7] The jury instruction reflected the pattern jury instruction, which states, "[t]he term 'prolonged period of time' means more than a few weeks." Brush, 183 Wn.2d at 557; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.17 (3d ed. 2008).

establishing an element of the domestic violence aggravating factor. Id. at 557.

Here, the jury was instructed that in order to find the "ongoing pattern of abuse" aggravator, it must find that "the offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 170. As in Brush, the jury was further informed that "[a]n 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks." CP 170. This instruction amounted to an unconstitutional comment on the evidence by the trial court. Brush, 183 Wn.2d at 556-57.

Judicial comments are presumed prejudicial and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Id. at 559. In Brush, the error was not harmless because the evidence showed the abuse occurred just longer than a few weeks and "a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse . . . met the given definition of a 'prolonged period of time.'" Id. at 559-60.

Here, as in Brush, the record does not show that no prejudice could have resulted and the error is not harmless beyond a reasonable doubt. The evidence showed multiple incidents of abuse over a period longer than a few weeks. See 12/05/13RP 159-60, 176; 12/16/13RP 93-104, 135-36, 143-44; Ex. 342, 344, 344A, 397A and B, 398, 399, 400, 401, 402A and B, 403, 404, 405. "[A] straightforward application of the jury instruction would likely lead a jury to conclude that the abuse . . . met the given definition of a 'prolonged period of time.'" Brush, 183 Wn.2d at 559-60. Thus, the error is not harmless and the jury's verdict regarding the aggravating factor must be vacated. Id.

d. The exceptional sentence must be reversed

When a court relies upon an improper aggravating factor in imposing an exceptional sentence, remand for resentencing is required unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. State v. Parker, 132 Wn.2d 182, 189-90, 937 P.2d 575 (1997). The SRA requires that the end sentence be the result of "principled discretion." Id. at 190. If it is likely that the judge relied, at least in part, on an incorrect aggravator, affirming the exceptional sentence would defeat the purpose of the SRA. Id.; see also State v. Ferguson, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271

(2001) (remand for resentencing required where sentencing judge imposed an exceptional sentence by placing significant weight on an improper aggravating factor).

Here, if the Court vacates the "ongoing pattern of abuse" aggravator but upholds the other aggravator, the exceptional sentence must still be reversed. Although the trial court found, in boilerplate language, that each aggravating factor was a "substantial and compelling reason justifying an exceptional sentence," CP 213, the record shows the court placed significant weight on the improper "ongoing pattern of abuse" aggravator. Most of the evidence presented was in support of the "ongoing pattern of abuse" aggravator. See 12/16/13RP 94-105, 114-99. The court imposed an exceptional sentence of 600 months, which was 126 months above the top of the standard sentence range. CP 206, 208, 213. It is unlikely the court would have imposed such a lengthy exceptional sentence based only on the remaining aggravating factor—that the offense was committed shortly after Mr. Miller's release from incarceration. Because it is likely that the judge relied on the improper "ongoing pattern of abuse" aggravator in imposing the exceptional sentence, remand for

resentencing is required. Parker, 132 Wn.2d at 189-90; Ferguson, 142 Wn.2d at 649 & 649 n.81.

4. The court erred in relying upon the "rapid recidivism" aggravating factor in imposing the exceptional sentence.

The jury found that Mr. Miller "committed the crime shortly after being released from incarceration." CP 159, 167; see RCW 9.94A.535(3)(t). The court relied upon that factor in imposing the exceptional sentence. CP 213.

The State was required to prove the aggravating factor beyond a reasonable doubt. State v. Rowland, 160 Wn. App. 316, 330, 249 P.3d 645 (2011), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012); Blakely v. Washington, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Const. amend. XIV.

The reviewing court assesses the sufficiency of the evidence to support an aggravating factor by viewing the evidence in the light most favorable to the State and asking whether a rational trier of fact could have found the aggravating facts beyond a reasonable doubt. State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

The jury's findings in support of the "rapid recidivism" aggravating factor must be "distinguishable from mere criminal

history." State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 876 (1994). An exceptional sentence is properly based on this factor when the circumstances show "a greater disregard for the law than otherwise would be the case" based on the "especially short time period between prior incarceration and reoffense." Id.

Here, Mr. Miller was released from incarceration on October 15, 2012, more than two weeks before the current offense was committed on October 30, 2012. 12/16/13RP 92; CP 145. This is not sufficient to prove beyond a reasonable doubt that he committed the current offense "shortly after release from incarceration."

In Butler, the Court held that "Butler's immediate reoffense, *within hours of his release*, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense." 75 Wn. App. at 54 (emphasis added). Similarly, in State v. Cham, the Court held, "Cham's commission of a crime *within one hour of release from jail* satisfies the statutory definition." State v. Cham, 165 Wn. App. 438, 450, 267 P.3d 528 (2011) (emphasis added).

Here, in contrast to those cases, Mr. Miller's commission of a crime *more than two weeks after release* from prison is not sufficient to prove beyond a reasonable doubt that he committed the crime "shortly

after release from incarceration." The facts are not "distinguishable from mere criminal history." See Butler, 75 Wn. App. at 54. Thus, the court erred in relying upon that aggravating factor in imposing the exceptional sentence.

E. CONCLUSION

The trial court abused its discretion in repeatedly admitting highly prejudicial but irrelevant evidence of the victim's state of mind. The cumulative effect of the trial court's repeated improper rulings together denied Mr. Miller a fair trial. The conviction must be reversed. In addition, for three reasons, the trial court erred in relying upon the "ongoing pattern of abuse" aggravator in imposing the exceptional sentence. Because the court placed significant weight upon that improper factor, the exceptional sentence must be reversed and remanded for resentencing. In addition, the State did not prove the "rapid recidivism" aggravating factor beyond a reasonable doubt.

Respectfully submitted this 29th day of September, 2015.

s/ Maureen M. Cyr

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

STATE OF WASHINGTON, Respondent, v. SCOTTYE MILLER, Appellant.	)))))))))	NO. 71559-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF SEPTEMBER, 2015.

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