71559-3

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 REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The court abused its discretion in admitting evidence offered to prove Ms. Patricelli's state of mind.

a. Mr. Miller did not waive his right to challenge admission of evidence offered to prove Ms. Patricelli's state of mind.

Mr. Miller properly preserved his objection to the erroneous admission of evidence regarding Ms. Patricelli's state of mind. During a pretrial hearing, his attorney objected to the admission of almost all of the proffered evidence regarding prior incidents of abuse—including evidence of Ms. Patricelli's reactions and her purported fear of Mr. Miller. In addition, during trial, counsel made numerous hearsay objections to Ms. Patricelli's out-of-court statements. These objections were sufficient to preserve his challenge to admission of evidence offered to show Ms. Patricelli's state of mind.

Generally, an appellant may not challenge a trial court's decision to admit evidence unless "a timely objection or motion to strike [wa]s made, stating the specific ground of objection, if the specific ground was not apparent from the context." ER 103(a)(1). The purpose of requiring a timely objection is to provide the trial court

an opportunity to prevent or cure the error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

When an objection is made to the admission of evidence in a motion in limine, counsel need not object again when the evidence is admitted at trial. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). "[T]he purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial." Id. Thus, "the losing party is deemed to have a standing objection when a judge has made a final ruling on the motion." Id.

Here, defense counsel objected in a motion in limine to the admission of almost all of the evidence of prior incidents of abuse. CP 49-61. An extensive pretrial hearing was held. 11/20/13RP 25-56. Counsel repeatedly argued the evidence was inadmissible because it was relevant only to prove *propensity*. 11/20/13RP 25-28, 46-47. Counsel also argued any probative value of the evidence was outweighed by the danger of unfair prejudice. 11/20/13RP 28-30 (citing ER 403). The parties specifically discussed the evidence regarding Ms. Patricelli's fear and her reactions to the alleged abuse, in addition to the evidence regarding Mr. Miller's actions. 11/20/13RP 39, 42-43.

Counsel's objection that the evidence was relevant only to show propensity was sufficient to preserve Mr. Miller's challenge to the evidence on the basis of relevance. Prior bad act evidence is categorically inadmissible for the purpose of showing the defendant's character and action in conformity with that character. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012); ER 404(b). By arguing the evidence was relevant only to show propensity, counsel effectively argued the evidence was not relevant or admissible for any other purpose. In addition, because the issue was extensively litigated in a pretrial hearing, counsel provided the court ample opportunity to prevent the error. See Kirkman, 159 Wn.2d at 926. Because counsel raised the objection in a motion in limine, he was not required to object again at trial. Powell, 126 Wn.2d at 256.

Moreover, counsel *did* object several times at trial to admission of Ms. Patricelli's out-of-court statements expressing her state of mind on the basis of hearsay. See 12/02/13RP 20; 12/05/13RP 156, 169; 12/09/13RP 3-5, 104; 12/11/13RP 5, 9, 11. This was also sufficient to preserve Mr. Miller's objection to admission of the evidence as proof of Ms. Patricelli's state of mind.

Generally, an out-of-court "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)" is not excluded by the hearsay rule. ER 803(a)(3). But "[w]hile 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).

Courts have repeatedly held that a person's out-of-court statements were not admissible under the state of mind exception to the hearsay rule when the declarant's state of mind was not at issue, without requiring a separate "relevance" objection in order to preserve the objection. For instance, in Stubsjoen, the Court affirmed the trial court's decision to exclude Stubsjoen's out-of-court statement on the basis of hearsay because her state of mind at the time she made the statement "was not the relevant issue at trial." Id. at 147.

Similarly, in State v. Ammlung, 31 Wn. App. 696, 703, 644 P.2d 717 (1982), the Court upheld the trial court's decision to exclude the statement Ammlung made to police regarding her state of mind at the time of her arrest because "[h]er state of mind was not at issue and

the statement was therefore not admissible under the existing mental state exception to the hearsay rule." See also CHG International, Inc. v. Robin Lee, Inc., 35 Wn. App. 512, 516, 67 P.2d 1127 (1983) (out-of-court statements did not fall within "state of mind" exception to hearsay rule because declarant's state of mind was not at issue).

As our supreme court explained in Powell, "[u]nder Parr, the state of mind exception of ER 803(a)(3) is generally only applicable in instances where the state of mind of the deceased is at issue, such as in cases where the defense of accident or self-defense is interposed." Powell, 126Wn.2d at 266. In other words, the state of mind exception to the hearsay rule does not does not even apply to a decedent's out-of-court statements *if the decedent's state of mind is not relevant to a material issue in the case*. Thus, if a defendant challenges the admission of the decedent's out-of-court statements offered to prove her state of mind on the basis of hearsay, that objection is sufficient to preserve a relevance objection as well.

Here, defense counsel objected to admission of Ms. Patricelli's out-of-court statements offered to prove her state of mind on the basis of hearsay. Mr. Miller may therefore argue on appeal that the statements were not relevant or admissible.

b. Ms. Patricelli's out-of-court statements were not admissible to prove her state of mind or the res gestae of the crime.

As argued in the opening brief, in a murder case, the decedent's out of court statements are not admissible to prove her state of mind unless her state of mind is put at issue by the specific defense raised, such as in cases of alleged accident or self defense. See State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). Here, Ms. Patricelli's state of mind was not put at issue by the specific defense raised, which was that Mr. Miller did not premeditate an intent to kill. Ms. Patricelli's emotional reactions and perceptions were not relevant to *Mr. Miller's* state of mind. Her out-of-court statements were barred by the evidence rules and their admission was unfairly prejudicial because Mr. Miller never had an opportunity to cross-examine her.

Evidence tending to show the decedent's state of mind is not admissible in a murder case unless the defense places *the decedent's actions* at issue.[1] The decedent's statements are admissible only if they

[1] Thus, it does not matter whether any of Ms. Patricelli's out-of-court statements expressing her state of mind were admissible under other exceptions to the hearsay rule. See State's brief at 18 n.3 (suggesting trial court could have admitted Ms. Patricelli's statement to Officer Rankin, "Please don't tell him I called," as either non-hearsay or under the excited utterance exception to the hearsay rule). Under Parr and other authorities, Ms. Patricelli's state of mind was not relevant and therefore such evidence was not admissible under any of the evidence rules.

tend to show she would not have acted in the way claimed by the defense. See Parr, 93 Wn.2d at 103 ("courts have generally allowed the admission of evidence of the victim's fears, as probative of the question *whether that person would have been likely to do the acts claimed by the defendant*") (emphasis added). In Parr, for instance, the decedent's expressions of fear of the defendant were relevant and admissible to rebut his claim that she reached for the gun and the killing was the result of an accident occurring while he was attempting to defend himself. Id. at 106.

Similarly, in State v. Athan, 160 Wn.2d 354, 381-83, 158 P.3d 27 (2007), evidence of the decedent's state of mind was relevant to rebut Athan's claim that she had consensual sex with him and was then later murdered by someone else. The decedent's out-of-court statements that she would not go out with Athan and that he "g[ave] her the creeps" were relevant and admissible to show she would not have acted in the way that Athan claimed. Id.

In this case, Ms. Patricelli's out-of-court statements expressing her state of mind were *not* relevant to rebut any material claim Mr. Miller made about her actions. Ms. Patricelli's actions were simply not at issue. Her perceptions of her relationship with Mr. Miller and her

expressions of fear were not relevant or admissible even if they tended to corroborate the State's allegations about how Mr. Miller treated her, or whether the dysfunction in their relationship was one-sided. There is no authority to support a decision to admit Ms. Patricelli's out-of-court statements on this basis.

Moreover, even if Ms. Patricelli's state of mind was somehow relevant, the court erred in admitting those portions of her statements describing Mr. Miller's conduct. It is well established that, even if the decedent's state of mind is relevant, the court may not admit her statements describing the actions of the defendant that incited her state of mind, regardless of the nature of the defense raised. See Parr, 93 Wn.2d at 104. Such statements are classic hearsay barred by the hearsay rule.

Finally, none of Ms. Patricelli's statements, even those she made during the days leading up to the incident, were admissible as part of the *res gestae* of the crime.[2] A decedent's out-of-court

[2] The State contends Mr. Miller agreed that Ms. Patricelli's statements made in the days leading up to the incident were admissible as part of the *res gestae* of the crime. See SRB at 25. But this is not correct. Counsel did not object to admission of evidence of *Mr. Miller's* actions during the days leading up to the incident. See 11/20/13RP 27. He did not agree to the admissibility of any of *Ms. Patricelli's* statements made during this time period.

statements made soon before her death are not admissible unless they fall under an exception to the hearsay rule. Powell, 126 Wn.2d at 266. In Powell, the decedent made statements during the days leading up to her murder. Id. at 253. The court held the statements were part of the *res gestae* of the crime but were nonetheless inadmissible because they were hearsay and did not fall under any exception to the hearsay rule. Id. at 263-64, 266.

Here, Ms. Patricelli's statements made in the days leading up to the incident were not admissible because they were hearsay and did not fall under any exception to the hearsay rule. Thus, the court should not have admitted the statements, including her text message accusing Mr. Miller of "stalking, harassing and threatening me." 12/09/13RP 3-5.

A decedent's out-of-court statements expressing fear of the defendant and describing his threatening behavior is inadmissible not only because it is irrelevant but also because it tends to be inflammatory and carries a great potential of unfairly influencing the jury. Parr, 93 Wn.2d at 100-03. The admission of such evidence is particularly damaging to the truth-finding function of the trial because the defendant has no opportunity to cross-examine the declarant. Id. Here, the court committed prejudicial error by admitting extensive

evidence of Ms. Patricelli's fear of Mr. Miller and her statements describing his menacing conduct. The conviction must be reversed.

2. The court erred in relying on the ongoing pattern of abuse aggravator.

a. The prior convictions were already taken into account in establishing the standard range.

Mr. Miller's criminal history was already taken into account by the Legislature in establishing the standard sentencing range for the crime. Therefore, the court erred in relying upon Mr. Miller's prior convictions—both the felony and the misdemeanor convictions—in imposing an exceptional sentence.

As argued in the opening brief, "criminal history" is already taken into account in calculating the offender score and may not be *re-counted* in imposing a sentence above the standard range. State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991). "Factors essential to the determination of the punishment, such as criminal history, cannot then be considered in enhancing the punishment." Id. at 707. Here, the court erred in relying upon Mr. Miller's prior convictions for domestic violence in imposing an exceptional sentence because the Legislature took those convictions into account in establishing the standard range. Mr. Miller has already been punished for those prior offenses.

The trial court was not only prohibited from relying upon the *fact* of the prior convictions, it was also not allowed to infer any additional facts from the *nature* of the prior convictions. The courts' decisions in State v. Bartlett, 128 Wn.2d 323, 907 P.2d 1196 (1995) and State v. Souther, 100 Wn. App. 701, 998 P.2d 350 (2000), are not controlling. In Bartlett, the defendant was convicted of felony murder after he assaulted his three-week-old son, causing his death. Bartlett, 128 Wn.2d at 327-28. Bartlett had a prior conviction for second degree assault of another infant son, who suffered brain damage. Id. at 328. He engaged in similar conduct on both occasions. Id. The trial court imposed an exceptional sentence, finding Bartlett exhibited callous disregard for human life indicative of "an especially culpable mental state." Id. The exceptional sentence was justified because Bartlett knew from personal experience involving his older son that infants are particularly vulnerable to head injuries when shaken or struck, yet he inflicted the same kind of injury on his younger son, causing his death. Id. at 334. Bartlett's "especially culpable state of mind," demonstrated by the nature of the prior offense, was a substantial and compelling reason justifying the exceptional sentence. Id.

Similarly, in Souther, the defendant was convicted of vehicular homicide after killing someone while driving with a high blood alcohol content. 100 Wn. App. at 705. He had an extensive history of alcohol and driving related crimes, including a prior conviction for involuntary manslaughter. Id. at 716. The trial court imposed an exceptional sentence, finding Souther's criminal history demonstrated he had special knowledge of the consequences of driving under the influence of alcohol. Id. Relying on Bartlett, the Court affirmed, concluding "the trial court properly relied on the aggravating factor of special knowledge or increased awareness and properly concluded that Souther exhibited an especially culpable mental state to an extent not considered in calculating his offender score." Id. at 718-19.

Bartlett and Souther do not apply to this case because they were decided before the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L Ed. 2d 403 (2004). Blakely made clear that any fact used to impose a sentence above the standard range must be found by a jury. Id. at 303-04. In this case, the jury made no finding regarding Mr. Miller's "especially culpable mental state." The jury merely 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 was not asked to find—nor did it find—that the alleged "pattern of abuse" had any relationship to Mr. Miller's current state of mind. For this Court to infer such a finding would be to usurp the role of the jury and violate Mr. Miller's constitutional right to a jury trial.

Finally, the court erred in relying upon Mr. Miller's history of misdemeanor convictions as well as felony convictions in imposing an exceptional sentence. As stated, "criminal history" may not be used as a basis to impose an exceptional sentence because it is already taken into account in calculating the offender score and establishing the standard range. Barnes, 117 Wn.2d at 707. "Criminal history" is defined by the SRA as "the list of a defendant's prior convictions and juvenile adjudications." RCW 9.94A.030(11). The statutory definition does not distinguish between prior misdemeanor and felony convictions. The State cites no authority for its argument that the court was authorized to rely upon Mr. Miller's prior misdemeanor convictions in imposing an exceptional sentence.

Prior misdemeanor convictions may not be used as a basis to impose an exceptional sentence because the sentencing statute accounts

for prior misdemeanors in establishing the offender score and standard sentence range.[3] First, under the washout rules, prior misdemeanor crimes that result in conviction interrupt the washout period for prior felony convictions and therefore have a direct effect on whether a prior felony conviction will be included in the offender score. RCW 9.94A.525(2).

Second, many prior misdemeanor convictions *are* included as points in the offender score. For example, if the present conviction is for felony driving while under the influence, all predicate crimes, including prior misdemeanors, are included in the offender score. RCW 9.94A.525(e). Similarly, if the present offense is for a felony domestic violence offense, certain prior misdemeanor domestic violence convictions are included in the offender score. RCW 9.94A.525(21). Likewise, if the present conviction is for a felony traffic or watercraft offense, prior serious misdemeanor traffic or

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[3] The statute does provide that a court may impose an exceptional sentence based on the aggravator that "[t]he defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(2)(b). But before a court may rely upon this factor, the aggravator must be pled, and the jury must specifically find that the prior unscored misdemeanor history results in a presumptive sentence that is "clearly too lenient." State v. Saltz, 137 Wn. App. 576, 583, 154 P.3d 282 (2007); RCW 9.94A.537(1).

watercraft convictions, respectively, are included in the offender score. RCW 9.94A.525(11), (12).

These offender score rules demonstrate the Legislature took account of prior misdemeanor convictions in establishing the offender score and standard sentence range for every kind of offense, even if some misdemeanor convictions are not ultimately included as points in the offender score. Thus, a sentencing court may not rely upon prior misdemeanor criminal history in imposing an exceptional sentence. See Barnes, 117 Wn.2d at 701-06.

Precluding a court from relying upon a person's prior criminal convictions when imposing an exceptional sentence under the "pattern of abuse" aggravator conforms to the policy reasons for creating this aggravator. As discussed in the opening brief, the "pattern of abuse" aggravator was developed to deal with those cases where the offender has engaged in a pattern of abusive conduct that he will otherwise not be punished for. Here, by contrast, Mr. Miller has already been punished for his prior offenses—first, at the time of the convictions, and second, when the prior offenses were taken into account in establishing the offender score for the current conviction. Imposing still more punishment for those offenses is not authorized by the

sentencing statute, nor is it consistent with the policy underlying the "pattern of abuse" aggravator.

b. The "pattern of abuse" aggravator is unconstitutionally vague.

Sentencing aggravators are subject to vagueness challenges under the Due Process Clause.

In Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the United States Supreme Court applied a vagueness challenge to a federal sentencing statute, the Armed Career Criminal Act. The Court explained the Due Process Clause prohibits the Government from taking away a person's life, liberty, or property "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Id. at 2556. The prohibition of vagueness in criminal statutes is "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." Id. (internal quotation marks and citation omitted). The Court noted, "[t]hese principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id. at 2557.

The Washington Supreme Court's decision in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) is contrary to these principles and should not be followed. Moreover, the court's holding in Baldwin is untenable in light of the United States Supreme Court's later decision in Blakely, 542 U.S. 296.[4,5]

In Baldwin, the court held "the void for vagueness doctrine should have application only to laws that proscribe or prescribe conduct," and 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

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[4] 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)).

[5] In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013), the petitioner similarly argued that Baldwin did not survive Blakely. The Washington Supreme Court did not decide the issue and instead assumed without deciding that the vagueness doctrine applied to the petitioner's challenge to the aggravating factor. Id. at 296-97. The court concluded that even if the vagueness doctrine applied, the aggravating factor at issue was not impermissibly vague. Id.

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 United States Supreme 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 no longer 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 are not matters that merely direct judicial discretion.

Baldwin also concluded there was no liberty interest 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 United States Supreme Court's opinions in Blakely and Apprendi. Those cases concluded the Due Process Clause *does* apply to aggravating factors.

Blakely concluded 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). In concluding the Sixth Amendment jury trial right applies in state criminal trials, the Court first determined that the 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). The Court reasoned "the 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 it applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

In Apprendi, the Court stated:

> As we made clear in [In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)], the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S. at 363, 90 S. Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." Id. We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. Id.

Apprendi, 530 U.S. at 484. Thus, Apprendi, which the Court specifically extended to Washington's exceptional sentence statute in Blakely, applied the Due Process Clause's protections to sentence enhancements because of the loss of liberty associated with the finding. Apprendi also noted "we have made clear beyond peradventure that Winship's due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Id. (brackets in original, internal quotation marks and citation omitted). Thus, liberty

interests arise from factual determinations that establish the length of the sentence.

Apprendi and Blakely clearly 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. With the recognition that this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of Baldwin's underpinnings is lost.

Baldwin's reasoning is analytically unsound. Under Baldwin, a defendant may only raise a vagueness challenge to elements that require a particular result. Baldwin, 150 Wn.2d at 460. By that logic, no such challenge could ever be raised to the elements of an offense in jurisdictions that do not employ determinate sentencing, such as federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is always free

to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, and, for that matter, does not require the court to impose any sentence at all. Nor would Baldwin's reasoning permit vagueness challenges to conditions of community custody, as a violation of such conditions does not dictate an outcome. Yet, not only do Washington courts permit such challenges, they have struck several conditions as unconstitutionally vague. See, e.g., State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

Baldwin is incorrect and should not be followed. After Apprendi and Blakely, it is clear that the Due Process Clause applies to the factual finding of whether an aggravating factor exists. The vagueness doctrine of the Due Process Clause must also apply.

Finally, for the reasons provided in the opening brief, the term "psychological abuse" is just as vague and subject to arbitrary and subjective enforcement as the term "mental health," which the Supreme Court held was unconstitutionally vague in State v. Williams, 159 Wn.2d 298, 244 P.3d 1018 (2011).

c. *The court's comment on the evidence is reversible error.*

The State concedes that under State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015), the jury instruction informing the jury that "prolonged period of time" means "more than a few weeks" is an unconstitutional comment on the evidence. SRB at 43. The court's comment on the evidence is reversible error.

In State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006), the supreme court held the jury instruction stating the victim's apartment was a "building," which was an element of the offense, "improperly suggested to the jury that the apartment was a building as a matter of law." But the court held the unconstitutional comment on the evidence was harmless beyond a reasonable doubt because "the jury could not conclude that White's apartment was anything *other than* a building." Id. at 726.

Here, by contrast, the jury *could* have concluded that the alleged "ongoing pattern of abuse" did *not* occur "over a prolonged period of time." The court's instruction informed the jury that if the pattern of abuse lasted for "more than a few weeks," it took place over a "prolonged period of time" as a matter of law. But this was a determination for the jury to make. Whether *any* period of time

amounts to a "prolonged period of time" is subject to debate, unlike the question of whether an apartment building is a "building." The court took this question away from the jury in violation of its constitutional duty not to comment on the evidence. Because the record does not affirmatively show no prejudice could have resulted, the exceptional sentence must be reversed.

3. Any request that costs be imposed on Mr. Miller for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, __ Wn. App. __, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1).

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at *6. Here, the trial court did not require Mr. Miller to pay discretionary legal obligations. CP 207. The trial court found he is indigent and lacks the ability to pay any of the expenses of appellate review. Sub #77. Mr. Miller's indigency is presumed to continue throughout review absent a contrary order by the

trial court. Sinclair, 2016 WL 393719 at *7; RAP 15.2(f). His financial status is not likely to improve due to his lengthy prison sentence. See Sinclair, 2016 WL 393718 at *7. Given Mr. Miller's continued indigency and the likelihood he will not be able to pay appellate costs, this Court should exercise its discretion and disallow appellate costs should the State substantially prevail. Id.

B. CONCLUSION

For the reasons provided above and in the opening brief, Mr. Miller's conviction and exceptional sentence must be reversed. If the State substantially prevails, the Court should not impose costs.

Respectfully submitted this 4th day of March, 2016.

/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

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- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◉ Brief: Reply
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◯ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

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