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Court of Appeals
Division I
State of Washington

NO. 71559-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SCOTTYE LEON MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In this homicide case, did the trial court properly exercise its discretion to admit out-of-court statements of the deceased victim because they were either relevant to prove the defendant's premeditation or because they constituted res gestae of the homicide? If the statements were improperly admitted, was any error harmless in light of the minimal significance of the statements viewed in the context of the evidence as a whole, and because there was overwhelming evidence that the defendant premeditated the murder?

2. Has the defendant failed to establish that the cumulative effect of the court's evidentiary rulings regarding the deceased victim's out-of-court statements denied him a fair trial?

3. During the sentencing aggravator portion of the trial, the State introduced evidence of the defendant's 15 prior convictions for felony and misdemeanor domestic violence, which spanned ten years and involved two victims. Did the trial court properly rely on the ongoing pattern of domestic abuse sentencing aggravator when it imposed an exceptional sentence above that standard range?

4. Has the defendant failed to establish that State v. Baldwin,[1] the Washington Supreme Court case barring a vagueness challenge to sentencing aggravators, should be overruled as "incorrect and harmful"?

5. Has the defendant failed to show that the ongoing pattern of domestic abuse sentencing aggravator is unconstitutionally vague as it relates to the term "psychological" abuse?

6. The trial court used the pattern jury instruction defining a "prolonged period of time" as "more than a few weeks," which has subsequently been deemed erroneous. When the State introduced evidence that the defendant's pattern of abuse spanned an entire decade, was the use of the pattern instruction harmless in this case?

7. The defendant was imprisoned for threatening to kill his girlfriend. He made good on his threat just two weeks after his release. Has the defendant failed to show that no reasonable juror could have found the evidence sufficient to support the sentencing aggravator that he committed the murder shortly after his release from incarceration? Did the trial court properly conclude that the jury's factual finding constituted a substantial and compelling reason to impose an exceptional sentence?

[1] 150 Wn.2d 448, 78 P.3d 1005 (2003).

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The King County Prosecutor's Office charged appellant Scottye Leon Miller with Murder in the First Degree for the slaying of his ex-girlfriend, Tricia Patricelli. CP 14. The State alleged that the crime was one of domestic violence and that Miller committed it with a deadly weapon, a knife. CP 14. Furthermore, the State charged the following aggravating sentencing factors: 1) the crime was a domestic violence offense that was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims; and 2) that Miller committed the offense shortly after being released from incarceration. CP 14-15. The State gave notice that it would seek an exceptional sentence. CP 16.

A jury found Miller guilty as charged, and found in favor of the deadly weapon sentencing enhancement and both aggravating sentencing factors. CP 154, 156-59. Based on the jury's finding of the sentencing aggravators, the court imposed an exceptional sentence of 600 months, 126 months above the standard range of 362 to 474 months. CP 206, 208. In imposing sentence, Judge Linde stated, "I've been around a long time, I've seen a lot of cases, I've sentenced a lot of offenders. I have not seen this kind of intentional, systematic, repetitive devotion to terrorizing

women. . . . Those [aggravating] factors, which the jury found for purposes of sentencing, really compel absolutely no other conclusion here in this case for the Court. And it's not the passion, or tears, or pictures, or anything else that's operating for the Court's decision here, but rather that the 600 months is clearly, in the Court's view, the appropriate sentence." 1/10/14RP 267-68. Miller now appeals his conviction and sentence. CP 428-29.

2. SUBSTANTIVE FACTS

Tricia Patricelli dated Appellant Miller for approximately four years. 11/26/13RP 147. On December 30, 2011, Miller assaulted and threatened to kill Patricelli; he was convicted and incarcerated until October 15, 2012.[2] 12/5/13RP 166-76; 12/16/13RP 92. Upon his release, he came back to stay with Patricelli and her two daughters. 12/2/13RP 7; 12/11/13RP 10. Patricelli's friend Rayford Varnado, who went by the nickname "Jun," or "June," was also staying with her. 11/26/13RP 153; 12/2/13RP 4-6.

[2] Although the jury heard Patricelli's 911 call from the incident and heard that Miller was convicted of assaulting and threatening her, it was not told of Miller's imprisonment or his release date until the aggravated sentencing portion of the trial. Ex. 278A; 11/20/13RP 60; 12/11/13RP 9-10; 12/16/13RP 92, 104-05, 207-08.

After Miller's release, his relationship with Patricelli quickly deteriorated. On October 21, 2012, Miller sent a text to a friend that said:

> Mane she been cheatin on me n I c all these nigguh'z in hur phone n she wanna get all mad like she ain't doin shyt like um dumb.

Ex. 349, pg. 1; 12/9/13RP 139-42, 146, 171-72.

On Thursday, October 25, 2012, Patricelli moved to an apartment in Auburn. 11/26/13RP 25-26; 12/2/13RP 10. On Friday night, Miller and Varnado went to a casino together. 12/2/13RP 11. Miller drove Patricelli's truck, and Patricelli and Miller got into an argument about Miller having her vehicle. 12/2/13RP 11-12. Miller threatened to harm Patricelli. Id. Patricelli went to stay the night at her mother's house, and appeared "scared" when she arrived. 12/11/13RP 23.

On Saturday, October 27, 2012, Miller texted Patricelli, telling her to "picc up the fuccin phone," and "[d]on't push me u buttah watch it." Ex. 349, pg. 1; 12/9/13RP 151-52. A few minutes later, Patricelli texted back, "U keep threatening me don't come back here I don't wanna deal wit the police I'm so tired of this shit." Ex. 349, pg. 1. Miller responded, "I don't give ah FUCC u did this." Id.

On Sunday, October 28, 2012, Miller texted his mother a goodbye of sorts, informing her that he was going to kill Patricelli:

> Um sorry i messed up again um bout tha kill tricia i luv u just know that n tell bridgett too.

Ex. 349, pg. 1; 12/9/13RP 153; 12/12/13RP 35.

On Monday morning, October 29, 2012, Miller and Patricelli argued at her Auburn apartment over Miller's belief that Patricelli was cheating on him; Miller left the apartment angry. 12/2/11RP 68; 12/11/13RP 25, 55, 119-21. However, unbeknownst to Patricelli, Miller did not actually leave the area. Instead, he secreted himself inside of the storage closet on Patricelli's balcony. 12/2/11RP 14-16. Later that day, Miller and Patricelli had another heated argument over the telephone. 12/2/13RP 68-69, 75-77; 12/11/13RP 27. Patricelli hung up on Miller and then declined to answer when he called her back multiple times. 12/11/13RP 27.

Patricelli and Varnado spent Monday evening at the Auburn apartment. 12/2/13RP 17. Miller, hiding in the storage closet on the balcony, could overhear them talking. 12/2/13RP 19-21; 12/11/13RP 124. Miller heard Patricelli telling Varnado about a man named "Nate," who he assumed Patricelli was seeing romantically. 12/11/13RP 123-26. Miller was angry and texted Varnado "crazy stuff . . . like he was going to hurt

[Patricelli]." 12/2/13RP 18. Miller told Varnado that he was going to kill Patricelli, and asked whether Varnado would help her:

> Cuzz when I cum in tha kill the bitch is u gon help tha hoe brah...She gon be dead ya ain't got tha worry bout hur saying shyt to u bout y u ain't help hur.

Ex. 349, pg. 2; 12/9/13RP 154-55. Varnado replied, "Nigga I won't be around we bout to leave in a second," to which Miller responded, "Good cuz I can say I was out wit u so they can't put me there at tha scene." Id.

Later, Miller texted Varnado, "She still talkin shyt she just don't know she bout tha die." Ex. 349, pg. 2; 12/9/13RP 155. Miller's anger and jealousy was evident from a text that he sent Patricelli:

> Nate nate nate c y I don't trust u... Keep thankin u can't be touched u gon hate when I cu u.

Ex. 349, pg. 2; 12/9/13RP 155; 12/12/13RP 40. Patricelli informed Varnado that she knew Miller must be lurking around outside the apartment listening to them talk, or otherwise he would not have known the name "Nate." 12/2/13RP 19-20.

Over the course of the evening, Miller continued to threaten Patricelli from the closet on her balcony. At 10:51 p.m., he texted her, "Watch how u gon ask me not tha hurt u just watch." Ex. 349, pg. 3; 12/9/13RP 156. Patricelli was afraid. She checked all of the windows and the doors. 12/2/13RP 22. Miller also continued to text Varnado, asking

him if Patricelli thought he was nearby and if Patricelli's daughters were asleep yet. Ex. 349, pg. 3. At one point, Patricelli saw Miller down by the trail outside of the apartment. 12/2/13 RP 27-28; 12/11/13RP 32. She was scared and tried to lock the back sliding door in her bedroom. Id. However, because the door had been installed backwards, a stick or rod at the base did not secure it. 12/2/13RP 27; 12/3/13(p.m.)RP 40-41; 12/4/13RP 21-24. The sliding door in the dining room was the same. 12/4/13RP 21-24. Instead, the only locking mechanism consisted of a metal "pin" that could be removed. Id.

At 11:02 p.m., Patricelli's 12-year-old daughter, K.M., texted Miller, "R u outside??" Ex. 349, pg. 3; 12/9/13RP 156-58; 12/10/13RP 169; 12/11/13RP 33. Miller lied to K.M. and told her that he was at his sister's house. Ex. 349, pg. 3; 12/9/13RP 159; 12/11/13RP 33-34. K.M. wanted to know how he had overheard Patricelli's conversation if that was true, and told him:

> Me and [K.M.'s sister] don't deserve ta go through this this. Bein scared u gonna do this every nyte mann go home its not worth it.

Id.

While he was simultaneously lying to K.M. about not being nearby, Miller texted Patricelli, "Nate can't help u bitch u played me n u

kelp lyin tha me." Ex. 349, pg. 3; Ex. 350; 12/9/13RP 160. He also threatened her with:

> I got u scared n I ain't even there I ain't gon get u there…
> Um gon get u in kent.

Ex. 349, pg. 4; 12/9/13RP 161; 12/12/13RP 41.

Varnado also saw Miller lurking outside – on the stairs leading up to Patricelli's apartment. 12/2/13RP 23-24. Varnado went outside and gave money to Miller to get him to leave. He also texted Miller, "She checking the doors and she gonna call ur cco tomorrow." Ex. 349, pg. 5; 12/9/13RP 161.

Shortly after midnight, K.M. texted Miller, "Just don't do nuthin dat ull regret thas all im tryna say." Ex. 349, pg. 5; 12/11/13RP 34. She told Miller, "Imma trust u on this don't let me down again." Id. However, instead of leaving, Miller stayed in the closet on the balcony the entire night, trying to get Varnado to unlock the door. Ex. 349, pgs. 6-9; 12/2/13RP 31; 12/11/13RP 126. In total, Miller texted Varnado 22 times and called his cell phone over 30 times. 12/2/13RP 32-33. Varnado did not respond to any of the texts or calls. 12/9/13RP 164.

Miller's anger did not subside overnight. At 7:16 a.m., Miller texted Varnado, "Um by hur mama house thankin bout doin sum to hur azz that will crush tha bitch." Ex. 349, pg. 9; 12/9/13RP 165. Miller also

texted Patricelli at 7:25 a.m. and told her that he would meet her at her job, claiming, "I ain't gon hurt u." Ex. 349, pg. 9; 12/9/13RP 166. Patricelli responded, "Don't come ta my job." Id. At 7:32 a.m., Miller texted Patricelli, "Um chillin in the bacc of ya job I ain't gon do shyt." Ex. 349, pg. 10; 12/9/13RP 166. However, Miller was not actually at Patricelli's job in Kent; rather, he was right by her apartment. Ex. 351 (Aerial Map with GPS location of Miller's phone). At 7:52 a.m., Patricelli told Miller, "I don't want u at my job." Ex. 349, pg. 10.

Then, at approximately 8:00 a.m., Patricelli took her daughters over to her mother's home, which was less than a mile from the Auburn apartment. 11/26/13RP 150, 154; 12/11/13RP 41-42. Varnado was still asleep on the couch when they left. 12/2/13RP 34; 12/11/13RP 41-42. Patricelli left her younger daughter at the bus stop by her mother's house between 8:15 and 8:17 a.m.; the bus arrived at 8:20 a.m. 11/26/13RP 155. After dropping the girls off, Patricelli was planning to return to her apartment and shower before work. 11/26/13RP 155; 12/11/13RP 37, 40.

Around 8:25 a.m., Patricelli spoke on the phone to her friend Breanna Capener. 11/26/13RP 36, 40. Patricelli told Capener that she was scared for her life. 11/26/13RP 37. She indicated that she was going to take a shower and get ready for work. Id.

Varnado was still sleeping on the couch when he heard a scream and a "thump on the floor." 12/2/13RP 34. He laid there for a moment before getting up and putting on his pants, calling out to Patricelli. 12/2/13RP 33-34. He then went looking for her and saw bloody footprints on her bedroom floor, leading into the tiny bathroom off her bedroom. He heard the shower running and found Patricelli lying on the bathroom floor covered in blood. Ex. 320 (crime scene video depicting Patricelli's body in her small bathroom); 12/2/13RP 34-36.

Varnado went back down the hallway and found Miller near the kitchen, holding several knives. Id. Miller told Varnado to say that a "tall white person" had been there. 12/2/13RP 37. Varnado told Miller to just leave, and tried to dial 911 on his cell phone, but got a blank screen. 12/2/13RP 37-38. After Miller left, Varnado followed him outside and told the downstairs neighbor, Raymond McKiddy, to call the police. 12/2/13RP 38-39.

McKiddy had been awoken to the sound of banging and a woman's scream. 11/26/13RP 86-87. He got dressed and went outside to find a distraught Varnado, who told him to call 911. 11/26/13RP 89-91. While McKiddy called the police, Varnado called K.M.'s phone and spoke to Patricelli's mother, Cathy Harper. 11/26/13RP 156; 12/2/13RP 39. Harper immediately rushed to Patricelli's apartment and found her

daughter's body in the bathroom. 11/26/13RP 158. Harper was in the apartment screaming and hysterical at 8:48 a.m. when the police first arrived. 11/26/13RP 116, 120; 12/3/13(a.m.)RP 26-27.

Earlier, around 8:30 a.m., another neighbor, Russell Betts, had been sitting at his kitchen table facing the window when he observed a man run down the stairs, hop over the fence, and head toward the river trail. 11/26/13RP 57-59. Five or ten minutes later, Betts saw McKiddy come out of his apartment, and saw Varnado come down the stairs on his phone. 11/26/13RP 59-60.

Later, while the police were talking to Harper, Betts went outside and told the police about the individual he had seen running away, providing them with a description. 11/26/13RP 160-61; 12/2/13RP 120-22; 12/3/13(a.m.)RP 79. Harper overheard Betts' description and told the police that it sounded like her daughter's ex-boyfriend, Scottye Miller. Id.

The police searched the route Betts said the man had fled and discovered three large knives, two of which were covered in Patricelli's blood. 12/2/13RP 125-30; 12/3/13(a.m.)RP 55-65, 80; 12/5/13RP 117-21. The police also discovered Patricelli's cell phone and a pair of gloves nearby. Id. Fibers discovered on the left glove were consistent with Patricelli's carpet fibers. 12/10/13RP 106-10. Also, animal hairs on the

gloves appeared consistent with animal hairs discovered on Patricelli's carpet. Id.

At 9:32 a.m., Miller texted his dad from a bus stop near Patricelli's apartment, saying "I killed hur dad please picc up." Ex. 349, pg. 11; Ex. 351; 12/12/13RP 64. At approximately 10:08, police discovered Miller at the bus shelter. 12/2/13RP 158-59; 12/3/13(a.m.)RP 32, 45. When he was told that he was being detained because his girlfriend was murdered, Miller responded, "I only threatened her. I never touched her." 12/3/13(a.m.)RP 35. Police noticed that Miller's socks were covered in what appeared to be blood. 12/3/13(a.m.)RP 36. Later, as Miller was led down the hallway of the police department, officers noticed that he left a trail of blood on the floor. 12/2/13RP 160-62; 12/3/13(a.m.)RP 37. When he disrobed at the precinct, Miller left bloody footprints on the butcher paper. 12/4/13RP 19. The blood on Miller's socks and shoes was Patricelli's. 12/5/13RP 113-17.

Betts was taken to the police station where, based upon clothing and physical characteristics, he positively identified Miller as the man he had seen fleeing the apartment. 12/3/13(p.m.)RP 37-38, 106-08.

The locking pin was missing from the dining room sliding glass door. 12/3/13(a.m.)RP 20; 12/10/13RP 141-42. A metal pin of the same type was found underneath Patricelli's bed, along with a cigarette lighter;

the cigarette lighter had Miller's DNA on it. 12/3/13(p.m.)RP 66-68; 12/5/13RP 122-23; 12/10/13RP 141.

Miller stabbed Patricelli 30 times, with five of the wounds each potentially fatal on its own. 12/10/13RP 58, 66, 71, 73-74, 79-80, 82. Miller pierced her heart. 12/10/13RP 80. He pierced her lungs, liver, and spleen. 12/10/13RP 80-85. One of the stab wounds nearly severed her aorta at the position of her left lung. 12/10/13RP 71. Miller stabbed Patricelli in the face. 12/10/13RP 94. Patricelli had sharp-force injuries to both forearms that were consistent with an attempt to fend off the attack. 12/10/13RP 93-95.

At trial, Miller admitted that he had repeatedly threatened Patricelli. 12/12/13RP 18-19, 35-36, 41, 62, 71, 81-82. He admitted that he was very angry and that he stabbed her to death. 12/11/13RP 151-53; 12/12/13RP 62. He admitted lying to the police and telling them multiple false versions of what had happened. 12/12/13RP 26-34, 63-64.

C. ARGUMENT

1. THE ADMISSION OF PATRICELLI'S OUT-OF-COURT STATEMENTS DOES NOT REQUIRE REVERSAL.

The State moved *in limine* to introduce prior bad acts of Miller under ER 404(b), arguing that they were admissible to show premeditation, intent, motive, res gestae, and the nature of his relationship

with Patricelli. CP 30-35; 11/20/13RP 32-45. The court allowed some of the evidence, but excluded a significant portion as too remote in time. CP 417-21; 11/20/13RP 51-59; 12/4/13RP 88-91. The admitted prior acts included threats to kill Patricelli and assaultive behavior toward her. CP 417-21. Miller does not challenge the court's ER 404(b) ruling on appeal.

Later during trial, as part of the ER 404(b) evidence, and as part of Miller's actions directly before the homicide, the trial court allowed six out-of-court statements made by Patricelli, relating to her fear of Miller or her then-existing thoughts about their relationship. Miller contends these statements were erroneously admitted under the "state of mind" exception to the hearsay rule, arguing that Patricelli's state of mind was not relevant.

Miller's argument fails. First, as to all but one of the statements Miller complains of, he objected at trial on hearsay grounds alone and did not properly preserve an objection as to relevance. Second, Patricelli's statements made to Varnado and her statements during a text message exchange with Miller the night before the murder were properly admitted to prove premeditation, as res gestae, and to provide context to Miller's own properly-admitted statements. Third, Patricelli's prior statements that she feared Miller were properly admitted because Miller placed her state of mind at issue when he denied that he premeditated her murder and

claimed that he killed her in the heat of the moment after she threatened and belittled him. Finally, even if one or more of the statements were erroneously admitted, any error was harmless in light of the minor significance of the statements and the overwhelming evidence that Miller premeditated the crime.

a. Relevant Facts.

The first out-of-court statement Miller complains of related to the properly-admitted ER 404(b) incident in which Patricelli called the police because Miller had scaled her apartment wall to get to her third-floor balcony. CP 418, 420. When the police arrived, Patricelli told them words to the effect of, "Please don't tell him that I called," "Please don't mention my name in the police report," and "I should not have called." 12/5/13RP 155-60.

Second, the trial court admitted a text from Patricelli to Miller the night before she was murdered in which she characterized Miller's behavior as "stalking, harassing and threatening." Ex. 349, pg. 4; 12/9/13RP 3-5.

Third, Varnado was permitted to testify that Patricelli told him the night before her murder that Miller must be nearby because he knew about "Nate" and must have overheard them talking. 12/2/13RP 21. Varnado

also testified that after she made the statement, Patricelli checked the window and door locks and was scared. 12/2/13RP 22.

Fourth, Tasha White, a co-worker of Patricelli's, was allowed to testify that Patricelli had sometimes asked White to accompany her home after work and walk through her apartment to make sure Miller was not hiding there. 12/9/13RP 116. White also testified that Miller sent threatening letters to Patricelli's job and that Patricelli said she was afraid. 12/9/13RP 125-26.

Fifth, K.M. testified that after the ER 404(b) incident, Patricelli told her she was afraid because Miller had climbed up to her balcony. 12/11/13RP 5.

Finally, Miller complains that K.M. was allowed to testify that Patricelli said she was "nervous and a little relieved" that Miller was coming home in October of 2012. 12/11/13RP 11.

b. Miller Has Failed To Preserve A Relevancy Challenge To Five Of The Six Statements.

First, Miller has failed to preserve a challenge to the relevancy of all of the statements (except for those made to Tasha White) because he failed to properly object at trial.

In order to challenge a trial court's admission of evidence, a party must raise a timely and specific objection at trial. State v. Gray, 134 Wn.

App. 547, 557, 138 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007). See also ER 103(a)(1) (error may not be predicated upon a ruling admitting evidence unless a timely objection is made, stating the specific ground of objection, if the specific ground was not apparent from the context); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review."). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Miller did not object at all when Officer Rankin testified that Patricelli said, "Please don't tell him I called." 12/5/13RP 155. Later, when Rankin repeated the testimony and said, "She indicated that she did not want the defendant to know that she had been the one who had called," Miller objected on the basis of hearsay. 12/5/13RP 156. He did object as to relevance. As such, he cannot assert on appeal that her statements (or her state of mind when she made them) were irrelevant.[3]

[3] It is far from clear that the court even admitted Patricelli's comments on the basis of ER 803(a)(3)'s state of mind exception. The court may well have believed that her requests to not tell Miller that she had called the police were not "assertions" offered as evidence to prove such assertion as fact, and thus not hearsay at all. See ER 801(a)(1), (c). Or, given Patricelli's demeanor at the time she made the statements, the court could have believed that they were excited utterances under ER 801(a)(2). See 12/5/13RP 156-57 (Patricelli was initially pleading with the officer and then became visibly upset and began to cry).

Likewise, Miller did not object to Patricelli's text about Miller's "stalking, harassing, and threatening" behavior on the basis of relevancy. Rather, he objected only on the basis of "hearsay." 12/9/13RP 3-4.

Further, Miller did not initially object to Varnado's testimony that Patricelli told him that Miller must have overheard her talking about "Nate." 12/2/13RP 20. Moments later, when the State elicited additional evidence about her statements, Miller objected, but again, the only basis he stated was that the evidence "calls for hearsay." Id.

When K.M. testified that Patricelli told her she was afraid because Miller had climbed up to her balcony, Miller only objected on the basis of "hearsay." 12/11/13RP 5. And finally, K.M.'s testimony about Patricelli's feelings about Miller returning home drew only a "hearsay" objection. 12/11/13RP 11.

Because Miller did not raise a concern about the relevance of Patricelli's state of mind regarding any of this evidence at trial, this Court should not consider his arguments for the first time on appeal.[4]

c. The Evidence Was Properly Admitted.

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Athan, 160 Wn.2d 354, 382, 158 P.3d

[4] Miller *did* argue that Patricelli's state of mind at the time she made the out-of-court statements to Tasha White was not relevant. 12/9/13RP 113. Thus, he has preserved his claim as it pertains to that evidence.

27 (2007). To constitute an abuse of discretion, a trial court's decision must be manifestly unreasonable or based on untenable grounds or for untenable reasons. Id.

Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible as hearsay unless they fall under a recognized exception to the hearsay rule. ER 801, 802. Statements pertaining to the declarant's then-existing state of mind are not excluded by the hearsay rule. ER 803(a)(3). However, evidence of the declarant's state of mind must be relevant to a material issue of fact before the jury. ER 401, 402; State v. Cameron, 100 Wn.2d 520, 531, 674 P.2d 650 (1983) (citing State v. Parr, 93 Wn. App. 95, 98-104, 606 P.2d 263 (1980) and United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973)).

For example, in a homicide case, the deceased's state of mind may be relevant where the defense is accident or self-defense. See e.g., Parr, 93 Wn.2d at 103, 106 (where defendant claimed the victim died by accident when he was defending himself against her, testimony that she had previously stated her fear of him was admissible). In other cases, the deceased's fear may not be relevant. See e.g., Cameron, 100 Wn.2d at 530 (defendant stabbed his mother-in-law over 70 times and was later found barefoot, with no shirt on and wearing women's spandex pants. The

victim's prior statement that she feared the defendant was not relevant to the defendant's insanity defense).

This is not to say that a homicide defendant must assert a claim of self-defense or accident in order for the victim's state of mind to be relevant. In Athan, supra, a homicide case, the trial court properly exercised its discretion to admit the victim's statements under ER 803(a)(3) because the defendant put her state of mind at issue. 160 Wn.2d at 383. There, the victim's nude body was found in a cardboard box in a neighborhood frequented by both Athan and the victim. A ligature was found around her neck. Semen was found in the victim's vagina, with DNA matching Athan. Id. at 362. At trial, Athan's theory of the case was that he had consensual sex with the victim, but that she was murdered later by someone else. Id. at 378-79. The State was allowed to introduce two hearsay statements of the victim that indicated she had no romantic feelings for Athan. Id. at 381. Athan argued that the victim's state of mind was not relevant because he was not raising a claim of accident or self-defense. Id. The Supreme Court disagreed and determined that by suggesting that he had a romantic relationship with the victim, Athan made the victim's "statements concerning her feelings toward Athan relevant." Athan, at 383.

Like the defendant in Athan, Miller placed Patricelli's state of mind at issue when he denied that he premeditated her murder and claimed that he killed her as an unplanned response to her threats and insults. See 11/26/13RP 16-17; 12/11/13RP 150-51; 12/12/13RP 64. Miller presented evidence that Patricelli insulted and threatened him, and attempted to paint a portrait of the dysfunction that existed in their relationship as two-sided. 12/11/13RP 58-61, 135-36, 149-51; 12/12/13RP 108-09, 117-18. As such, Patricelli's expressed fear of Miller was relevant to disprove his claim that the murder was an unplanned response to her provocation during the heat of an argument.

The trial court correctly recognized that the history of conflict and abuse in Miller's and Patricelli's relationship was relevant to prove his intentions and motives when he killed her. See 11/20/13RP 55. The court noted that this was especially true as it related to the testimony from Tasha White that Patricelli had previously asked her to accompany Patricelli home from work and walk through her apartment because she was afraid Miller might be hiding inside. See 12/9/13RP 8, 104-07, 111-12, 116. Despite the evidence found under Patricelli's bed that indicated Miller had let himself into the apartment and hidden there, Miller denied lying in wait for Patricelli, and claimed that he walked in the unlocked front door to take a shower.

As such, Patricelli's statements to White that she feared Miller would hide in her apartment, her statements to her daughter K.M. that she was afraid because Miller had scaled the apartment wall to get onto her third-floor balcony, and her statements to Varnado that she thought Miller was lurking outside the night before her murder, were all relevant to rebut Miller's claim that he did not lie in wait to kill Patricelli. And Patricelli's expressed fear of Miller generally, as demonstrated by the history of their relationship, was logically relevant to rebut his proffered defense that his threats were empty and that she provoked his rage.

Miller also complains about Patricelli's text message the night before the homicide, in which she characterized his behavior as "stalking, harassing, and threatening." But the text was admissible because it was relevant to show Miller's state of mind preceding the murder (premeditation), and provided context to the text message conversation that Miller and Patricelli had shortly before he killed her. 12/9/13RP 5-6. Patricelli's entire text read:

> Got me fucked up ain't no 1 cheated on u ur stupid as fuck I was Tryin ta make it Work but ur crazy Stalkin, harassin n threatenin me I'm not doin shit n u know that n ya heart ur just Tryin ta make problems out of nothing so go fo it idc ne mo.

Ex. 349, pg. 4. Indeed, Miller replied to her text with a direct threat:

> I got u scared n I ain't even there I ain't gon get u there... Um gon get u in kent.

Ex. 349, pg. 4. This text message exchange was relevant, admissible evidence to prove Miller's premeditation.[5] The trial court did not abuse its discretion in allowing the evidence.

In sum, the trial court properly determined that Patricelli's out-of-court statements were relevant to show the full dynamics of her dysfunctional and acrimonious relationship with Miller, and was logically relevant to the issue of premeditation. While Miller may not agree with the trial court's decision, he cannot show that "no reasonable judge would have made the same ruling," the standard he must meet on appeal. State v. Ohlson, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

Finally, Miller claims that even if Patricelli's state of mind was relevant, the portions of her statements describing his actions which caused her fear were still inadmissible. Brf. of App. at 18. However, Miller ignores the fact that all of his actions that were referred to in Patricelli's statements were properly admitted by the court, either as

[5] Even if the court did not specifically indicate that the text message was admissible as *res gestae* of the crime, it noted that it was sent within 12 hours of Patricelli's death, 12/9/13RP 5, and the court would have been justified in finding it admissible on that basis. See State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615, 626 (1995) (evidence regarding events or statements that were made involving either the victim or defendant within the 48 hours preceding the murder were relevant and necessary to establish that the hostilities between them continued until the murder).

ER 404(b) evidence to prove his intent and premeditation, or as *res gestae* of the crime itself. CP 417-21; 11/20/13RP 51-59; 12/4/13RP 88-91. See also 11/20/13RP 27 (Miller stated he had no objection to the admissibility of any of his actions from the date of his release from incarceration until the date of the homicide, and indicated that he believed it was properly admitted as *res gestae* of the crime). Miller did not assign error to the court's ER 404(b) ruling. Patricelli's statements should not have been excluded on the basis that they improperly referred to Miller's behavior.

d. Any Error Was Harmless.

Even if this Court concludes that one or more of Patricelli's statements should not have been admitted, any error was harmless. The statements were of minor significance in light of the evidence as a whole, and there was overwhelming evidence of Miller's premeditation.

Evidentiary error is grounds for reversal only if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The improper admission of evidence constitutes harmless error when the evidence is of minor significance in reference to the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Identity was not at issue in this case. Miller admitted to the jury that he intentionally murdered Patricelli and contested only the State's proof of premeditation. Due to the court's ER 404(b) ruling, the jury already knew that Miller had been abusive and threatening to Patricelli. The question is whether Patricelli's statements were so prejudicial that there is a reasonable likelihood that the outcome of trial would have been different had they been excluded. There is *no* probability of that.

First, the most prejudicial of the statements complained of – that Patricelli feared Miller – was of minor significance compared to the other properly admitted evidence of her fear. Evidence was presented to the jury that Miller assaulted and threatened to kill Patricelli in December of 2011. 12/5/13RP 169-70, 176. Her 911 call pertaining to that incident was played for the jury, during which a hysterical Patricelli can be heard shrieking that Miller had just punched her in the face in front of her children, and that "he's gonna fuckin' kill me." Ex. 278A. The terror in her voice is evident. Id.

Additionally, there was overwhelming, untainted evidence that Miller had given Patricelli plenty of reason to be afraid of him. Indeed, Patricelli's text message to Miller, characterizing his behavior as "stalking, harassing, and threatening," was not an inaccurate assessment of his actions given the evidence properly presented to the jury.

Further, Patricelli's remark to Varnado that Miller "must be hiding outside" was of minimal significance given the other undisputed evidence that Miller was in fact, hiding outside.[6] Varnado saw Miller outside and gave him money in an attempt to get him to leave. 12/2/13RP 23-24. Miller's text message exchange with K.M., where she stated that she knew that he was outside and asked him to stop lying about it was admitted without objection. Ex. 349, pgs. 3-4; 12/9/13RP 160-61; 12/11/13RP 33-34. Finally, Miller himself admitted being outside Patricelli's apartment all night, listening to her conversation with Varnado. 12/11/13RP 123-24.

Moreover, it is abundantly clear that Patricelli's out-of-court statements in no way affected the outcome of the trial in light of the overwhelming evidence that Miller premeditated the crime.

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995). A wide range of proven facts have been found to support an inference of premeditation. Id. at 599. For example, motive, procurement of a weapon, stealth, and method of killing are "particularly

[6] Varnado's testimony that Patricelli looked scared and that he saw her checking the locks is not challengeable as hearsay because it is not an out-of-court statement at all. ER 801, 802.

relevant" factors in establishing premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Additionally, longstanding animosity between the victim and defendant[7] and statements made by the defendant both before and after the murder[8] are facts which can lead a jury to believe the defendant premeditated the crime.

Miller killed Patricelli early Tuesday morning. On Sunday, he had texted his mother that he was sorry but he was about to kill Patricelli. Ex. 349, pg. 1. He also texted a friend on Sunday, telling her that something kept telling him to "kill the bitch," and that his family was telling him to "chill," because "they know me and they know that I will do what I say I will do." Ex. 349, pg. 1; 12/12/13RP 35-36.

On Monday, Miller and Patricelli argued again over Miller's belief that Patricelli was cheating on him. Patricelli refused to answer Miller's repeated phone calls the rest of the day. 12/11/13RP 25-27. In the twelve hours preceding Patricelli's murder, Miller hid outside of her apartment and repeatedly threatened her by text message, telling her "to keep thinking that you can't be touched," and that she would "hate when she saw him." Ex. 349, pg. 2. He told her, "Watch how you're going to ask me not to hurt you, just watch." Ex. 349, pg. 3. He told her that her new

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[7] State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988).

[8] State v. Finch, 137 Wn.2d 792, 833, 975 P.2d 967 (1999).

boyfriend "can't help you." Id. He told her that he "had her scared" because she thought he was outside her apartment, but that he "wasn't going to get her there," he was going to get her in Kent, where she worked. Ex. 349, pg. 4. He informed her that he would "have the last laugh." 12/12/13RP 60.

While he lurked outside Patricelli's apartment, Miller asked Varnado if he was going to help Patricelli when Miller went "inside to kill the bitch," and that she would be dead and could not accuse Varnado of not helping her. Ex. 349, pg. 2. He told Varnado that if Varnado left, Miller could claim to be with him, so the police "can't put me there at the scene." Id. While listening to Patricelli talk about "Nate," Miller texted Varnado, "She still talking shit, she don't know she about to die." Id.

Miller also posted on his Facebook page while he lurked outside Patricelli's home on Monday night, telling the world that he was about to go back to prison for "10 or 15" because he was going to hurt somebody. Ex. 380; 12/12/13RP 35.

On Tuesday morning, Miller lied to Patricelli about where he was, claiming to be at her work. Ex. 349, pg. 10; Ex. 351. Instead, he entered her apartment while she went to drop off her children, took three large knives from her kitchen, hid under her bed until she returned, and then stabbed her over 30 times.

Miller gave multiple false statements of events, but even the version he told the jury demonstrated his premeditation – he admitted that after their "argument," he walked down the hall from Patricelli's bedroom to the kitchen, selected knives, returned to her closed bathroom door, opened it, and stabbed Patricelli over and over – 30 times. 12/12/13RP 48-53.

The State did not mention any of Patricelli's out-of-court statements or her state of mind in its closing argument. The statements were insignificant in light of the evidence as a whole. Evidence of Miller's premeditation was overwhelming, and error in admitting the out-of-court statements, if any, was harmless.

e. The Court's Evidentiary Decisions Did Not Deprive Miller Of A Fair Trial.

Miller also alleges that even if the admission of each of Patricelli's statements was not erroneous individually, the cumulative effect of the court's error in admitting them deprived him of a fair trial. This argument fails; Miller received a fair trial.

To seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and show that accumulated prejudice affected the verdict. The doctrine does not apply to cases where the defendant has failed to establish multiple errors, or

where the errors that have occurred have "had little or no effect on the outcome at trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

For all of the reasons stated above, there was no error, and if there was, there was no chance that it deprived Miller of a fair trial given the minor significance of the statements and the overwhelming evidence of his premeditation.

2. MILLER'S EXCEPTIONAL SENTENCE SHOULD BE AFFIRMED.

Miller challenges his exceptional sentence on numerous grounds, all of which should be rejected. The Court properly imposed an exceptional sentence above the standard range based on the jury's finding that the murder was part of an ongoing pattern of abuse of multiple victims over a prolonged period of time, and that the murder was committed shortly after Miller was released from incarceration.

a. Relevant Facts.

Following the jury's verdict in the guilt phase of Miller's trial, a brief penalty phase was conducted regarding the State's allegation that the murder was an aggravated domestic violence offense that was committed shortly after Miller's release from incarceration. The State presented, and the trial court admitted, evidence that Miller had been convicted of 15

domestic violence offenses over the preceding 10 years. Ex. 344A, 397A, 397B, 398-401, 402B, 403-05.

In addition, the State presented testimony from K.M. about the abuse she had witnessed her mother suffer at Miller's hands. K.M. told the jury how she watched Miller push Patricelli down a flight of stairs, 12/16/13RP 148-50, punch her in the face, 12/16/13RP 152-54, and violate a no-contact order. 12/16/13RP 155.

The State also presented evidence from the mother and sister of Miller's ex-wife, Angel Williams, detailing how Miller terrorized Williams throughout their four or five year relationship. On one occasion, Miller hid in a storage closet outside of their apartment, leaping out and chasing Williams back up the stairs into her apartment. 12/16/13RP 183, 198. When she managed to run back inside, he threw a rock through the glass door. Id. Williams and her mother fled the apartment, only to return later to find it destroyed, with their wedding cake smeared all over the walls and "you're next" written over a picture of Williams' mother's face. 12/16/13RP 184-85. Miller had also cut the vacuum cleaner cord from the vacuum and hidden it under the mattress. Id. Miller violated no-contact orders against Williams, poured gasoline all over their bedroom, and hid in the dryer, waiting for her to return. 12/16/13RP 188.

Williams' sister testified that Miller made multiple threats to kill Williams and the rest of her family, and that Williams was terrified of Miller. 12/16/13RP 193, 197. The State also presented testimony from a woman who lived in the apartment above Miller and Williams. The neighbor testified that she heard Williams screaming and asking Miller to "stop," 12/16/13RP 162, seeing Miller choke Williams while she was pregnant, 12/16/13RP 165, and seeing Miller drag Williams by the hair while holding their newborn child, 12/16/13RP 166. The neighbor also testified about an incident where she heard Williams telling Miller to leave, and then heard screaming and a loud "thud" against the wall. 12/16/13RP 167. The neighbor went downstairs and informed Miller that she was calling the police. When she went back upstairs and called 911, Miller followed her and punched her in the face. 12/16/13RP 167-70, 177. The 911 call was played for the jury. 12/16/13RP 170-75.

The State presented evidence that Miller was released from prison on October 15, 2012, just two weeks before he murdered Patricelli. 12/16/13RP 92.

Miller called no witnesses to testify in the penalty phase and declined to present an opening statement. 12/16/13RP 90, 212. In his closing argument, he contended simply that the State had not proven the aggravating factors beyond a reasonable doubt because Williams herself

did not testify and because the State's only proof of Miller's release date was through business records, not a prison officer who saw Miller in prison or being released from prison. 12/16/13RP 229-39.

At the conclusion of the evidentiary stage of the penalty phase, the trial court delivered several instructions to the jury. Instruction 6 listed the elements that needed to be proved beyond a reasonable doubt for the jury to conclude that the murder was an aggravated domestic violence offense. CP 170. Included among these elements was a requirement that the State prove an ongoing pattern of abuse consisting of multiple incidents over a "prolonged period of time," and the instruction further explained that "the term 'prolonged period of time' means more than a few weeks." Id. This instruction strictly followed Washington Pattern Jury Instruction 300.17 (hereinafter WPIC 300.17). See Washington Practice: Washington Pattern Jury Instructions (Criminal) 300.17 (3rd Ed. 2008). The jury found the murder was an aggravated domestic violence offense that occurred shortly after Miller was released from incarceration. CP 158-59.

b. The Trial Court Properly Relied On The "Pattern of Abuse" Aggravator.

Under RCW 9.94A.535(3)(h)(i), a court may impose an exceptional sentence upon a jury finding that the current offense involved domestic violence and that "[t]he offense was part of an ongoing pattern of

psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."

Miller argues that the court could not impose an exceptional sentence based on this aggravating factor because the State's evidence included Miller's prior convictions "that were already taken into account in establishing his standard sentencing range." Miller is wrong. The court did not rely on the fact of the convictions alone; rather it was the nature of Miller's prior convictions which justified imposition of the exceptional sentence.

This Court reviews *do novo* whether the trial court's reasons justify the imposition of an exceptional sentence. RCW 9.94A.585(4); State v. Fowler, 145 Wn.2d 400, 405-06, 38 P.3d 335 (2002).

Prior convictions that are already accounted for when calculating the defendant's offender score should not be counted again when imposing a sentence outside the standard range. State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995). "But while courts may not use the fact of a prior conviction alone to justify an exceptional sentence, there is no prohibition against drawing from the facts of a prior conviction, if they relate to the present case, to show extraordinary circumstances justifying a departure from the standard range." Id. "A reason offered by a sentencing court in imposing an exceptional sentence is acceptable if it considers

factors other than those already considered in calculating the standard range for the offense." Id.

In Bartlett, the defendant received an exceptional sentence for second-degree murder of his infant child. 128 Wn.2d at 327-28, 331. He appealed, contending that the court's reliance on the facts underlying his prior conviction for assaulting another of his children – to show a special knowledge of the vulnerability of infants – was improper because the prior conviction affected his offender score and was therefore already considered in establishing the standard range. Id. at 331, 336. The Supreme Court disagreed, saying that only the bare fact of the conviction was used in the offender score, not the nature of the offense as it related to the aggravating factor. Id. at 336.

This Court relied on Bartlett to reach a similar conclusion in State v. Souther, where a vehicular-homicide defendant complained that his exceptional sentence for "the special knowledge or increased awareness" aggravator was based on his prior alcohol-related convictions. Souther, 100 Wn. App. 701, 998 P .2d 350 (2000). This Court rejected his argument that the sentencing court had considered the fact of the convictions alone. Id. at 717-18. To the contrary, the sentencing court had explained that the prior crimes "demonstrate the defendant's special

knowledge of the consequences of driving under the influence of alcohol." Id. at 716.

There is little difference here, where Miller's string of domestic-violence convictions was relevant evidence of the aggravating factor that the crime reflected an "ongoing pattern of abuse" of multiple victims over a prolonged period of time. Miller's offender score reflects only the fact that some of his prior convictions were felonies; it does not reflect the *nature* of those offenses. As in Bartlett and Souther, the consideration of the nature of the offenses for purposes relevant to the aggravating factor falls directly within permissible uses.

Moreover, Miller's argument ignores altogether the fact that 10 of his 15 prior convictions admitted in support of the aggravating factor were misdemeanor convictions that were not included in his offender score and not considered when establishing his standard range. See CP 188-90, 206, 211; Ex. 397A, 397B, 398-99, 401, 403-05. Because the nature of Miller's prior convictions is irrelevant to the calculation of his offender score, the trial court properly considered them when relying on the "ongoing pattern of abuse" aggravator.

c. Miller's Argument That The Term "Psychological Abuse" Is Unconstitutionally Vague Must Be Rejected.

Miller contends that the "ongoing pattern of abuse" sentencing aggravator is unconstitutionally vague because it uses the term "psychological abuse." His argument should be rejected for two reasons. First, the Supreme Court has held that sentencing aggravators are not subject to a due process vagueness challenge because they do not define conduct or allow for arbitrary arrest and criminal punishment by the State. Miller has failed to show how the Court's analysis is incorrect and harmful. Second, the statute is not unconstitutionally vague. The terms used in defining the sentencing aggravator are ones of common understanding.

Under the Due Process Clause, a statute is void for vagueness if: 1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it; or 2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. Baldwin, 150 Wn.2d at 458.

The Washington Supreme Court has held that sentencing aggravators are not subject to vagueness challenges under the Due Process

Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the challenging party can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because Miller fails to show that the Court's decision in Baldwin is incorrect and harmful, this Court must adhere to its holding that exceptional sentence aggravating factors are not subject to a vagueness challenge.

Even if Miller could raise a due process vagueness challenge to the statute, his argument would fail. The terms used in the sentencing aggravator are of common understanding.[9] Under the particular facts of this case, Miller was on notice that his criminal conduct was aggravated when he spent the last decade physically and emotionally abusing his girlfriend and ex-wife.

A statute is presumed to be constitutional. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The party challenging a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." Douglass, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). After all, "[s]ome measure of vagueness is inherent in the use of

[9] Of note, the Washington State Supreme Court Instruction Committee does not suggest that any further explanatory instruction need be given in regards to the phrase "psychological, physical or sexual abuse." See 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.17 at 719-21 (3rd ed. 2008).

language." Id. Thus, vagueness "is not mere uncertainty." State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

Miller equates the language of the aggravator at issue here with certain language contained in the harassment statute that was found unconstitutionally vague in State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001). A person can commit misdemeanor harassment if the person knowingly threatens "[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*. RCW 9A.46.020(1)(a)(iv) (emphasis added). This provision of the statute was found to be unconstitutionally vague because the phrase "mental health or safety" did not contain a meaningful definition, offered law enforcement no guidance beyond subjective impressions of what constituted a violation, and the average citizen would have no way of knowing what conduct was prohibited by the statute because each person's perceptions of the law may be different. Williams, 144 Wn.2d 197. Such is not the case here; a person of "ordinary intelligence" would understand to what the statute pertains.

RCW 9.94A.535(3)(h)(i) provides that the current offense be a domestic violence offense that is "part of an *ongoing pattern of psychological, physical, or sexual abuse* of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." (emphasis added). "Abuse" is defined as "a departure from legal or reasonable use; misuse [or] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." Black's Law Dictionary 10 (8th ed.2004). "Psychological," is defined as "relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind, esp. in its affected or cognitive functions." Webster's Third New Int'l Dictionary 1833 (1993). Thus, an ordinary person of common intelligence would understand that the statute pertains to mental abuse involving acts that are not legal or reasonable. For example, corporal punishment of a child is not unlawful when such physical discipline is objectively reasonable. State v. Singleton, 41 Wn. App. 721, 723-24, 705 P.2d 825 (1985). This is not difficult to understand or apply.

While there may be "some possible areas of disagreement," or the "exact point" of defining a violation not completely evident, that does not make a statute unconstitutionally vague. Rather, Miller must prove beyond a reasonable doubt that a person of ordinary intelligence would be

unable to know what the statute proscribes. Douglass, at 179. He fails in that burden here.

d. Any Error Created By The Use Of A Pattern Jury Instruction Defining The Term "Prolonged Period Of Time" Was Harmless Beyond A Reasonable Doubt.

In July of 2015, the Washington State Supreme Court held that WPIC 300.17 is an erroneous statement of law insofar as it purports to define "prolonged period of time" as a period lasting "more than a few weeks." State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015). The court concluded that it is error to instruct or imply to a jury that a period of "more than a few weeks" is necessarily a "prolonged period of time," because it is strictly within the province of a jury to decide what a "prolonged period" is. Brush, 183 Wn.2d at 558. Five justices further held that the trial court's use of the pattern instruction in Brush's case amounted to an unconstitutional comment by that trial court on the evidence. Id. at 559.

This Court is obligated to review the trial court's use of WPIC 300.17, as embodied in Instruction No. 6, for harmlessness, notwithstanding Miller's failure to lodge a contemporaneous objection. See 12/16/13RP 80 (Miller stated he had no objection to the State's proposed instructions). Although judicial comments are presumed to be

prejudicial, that presumption may be rebutted where the record shows that no prejudice could have resulted. Brush, 183 Wn.2d at 559 (citing State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006)).

Under the circumstances present in Miller's case, this Court can comfortably conclude that he suffered no prejudice. In Brush, the court was specifically troubled by the fact that the defendant's prior abuse of his victim had occurred over a span of time "just longer than a few weeks" prior to her murder. Brush, 183 Wn.2d at 559. In light of this time period, the court concluded that a "straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" Id. Accordingly, the court concluded that the State could not meet its high burden of showing an absence of prejudice. Id. at 559-60.

In contrast, the court found no prejudice in State v. Levy, where the trial court altered a pattern instruction providing the elements of first-degree burglary in order to expressly instruct the jury that the targeted apartment in the case constituted a "building." Levy, 156 Wn.2d at 716. While finding that the trial court's tailoring of the pattern instruction amounted to an improper comment, the court declined to reverse Levy's burglary conviction because the question of whether the apartment was a building had never been challenged during the trial, and the absence of

any challenge – along with common sense – compelled the conclusion that the jury could not have found the apartment to be anything other than a building. Id. at 726.

Miller's case is far more aligned with Levy than with Brush. Unlike the evidence against the defendant in Brush, which showed no more than an eight-week period of abusive behavior, here the State presented evidence that Miller had been convicted of *15 crimes of domestic violence over the span of ten years*. Ex. 344A, 397A, 397B, 398-401, 402B, 403-05. Given the extreme length and extent of this ongoing pattern of abuse, the jury here, as in Levy, could have reached no decision other than that the aggravator applied to Miller's instant offense.

Finally, the trial court also imposed Miller's exceptional sentence on the basis of the aggravating factor that he committed the murder shortly after his release from incarceration. CP 212-13. The trial court clearly stated that either aggravating factor standing alone was a substantial and compelling reason justifying a 600-month exceptional sentence. CP 213. An exceptional sentence may be upheld on appeal even where one of the trial court's reasons has been overturned; remand is necessary only when it is not clear that the trial court would have imposed the same sentence on the basis of the remaining aggravator. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Because the trial court was clear that it would

have imposed the same sentence based on either of the aggravating factors, remand is unnecessary. Miller's sheer speculation aside, there is no support for his argument that "it is unlikely" the court would have imposed the exceptional sentence on the rapid recidivism factor alone.[10]

e. The Court Properly Relied On The "Rapid Recidivism" Aggravator.

Miller claims that the trial court erred by relying on the rapid recidivism aggravating factor to impose an exceptional sentence, arguing that his recent release from incarceration (fifteen-days before the murder) is "mere criminal history." Miller is wrong; sufficient evidence provided a factual basis for the jury to find that he committed the offense shortly after being released from incarceration and the court appropriately concluded that the jury's factual finding was a substantial and compelling reason to depart from the standard range.

RCW 9.94A.535(3)(t) allows the court to impose an exceptional sentence based upon a jury's finding that the defendant committed the current offense *shortly after being released from incarceration.* Once the jury makes such a factual finding, the court may properly conclude that

[10] Miller argues that "[m]ost of the evidence presented was in support of the 'ongoing pattern of abuse' aggravator." Brf. of Appellant at 38. But the mere fact that one aggravator may have required less evidence to prove makes it no less "substantial and compelling" a reason to impose an exceptional sentence.

such "disdain for the law" constitutes a substantial and compelling reason to impose an exceptional sentence. State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) (citing State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994). See also State v. Williams, 159 Wn. App. 298, 310, 244 P.3d 1018 (2011) (a short time period between prior incarceration and re-offense is a factor that is not contemplated in establishing the standard range, and can properly support an exceptional sentence).

When considering Miller's sufficiency of the evidence claim, this Court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the sentencing aggravator beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007); State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). This Court must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

Citing to two cases where the defendant committed his current offense within hours of being released from incarceration,[11] Miller appears to argue that, *as a matter of law*, 15 days is insufficient to support the jury's finding of the rapid recidivism statutory aggravator. However, this Court has refused to recognize an inflexible limitation on what constitutes "shortly after release."

In Combs, Division Three of this Court concluded that the defendant's eluding offense, committed six months after his release from incarceration for drug possession was insufficient to support the rapid recidivism aggravating factor. 156 Wn. App. at 506-07. The defendant had cited to Butler and State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007) to argue that the aggravating factor was limited to a period of time between 0 and 30 days, and that in addition, the State must prove some connection between the offenses. Combs, 156 Wn. App. at 506. The court rejected both arguments, but nevertheless concluded that six months under the given facts was insufficient:

> We do not set an outer time limit on what constitutes a short period of time. That period will vary with the circumstances of the crime involved. Some offenses require a lengthy period of time to plan or come to fruition. In other instances, an offender might not have immediate access to the means of committing a crime or might not have had the opportunity to reoffend before he did so.

[11] Butler, supra, and State v. Cham, 165 Wn. App. 438, 267 P.3d 528 (2011).

> Under different circumstances, six months might constitute a short period of time.

Combs, 156 Wn. App. at 506.

Miller has failed to establish that no rational juror could have concluded that he murdered Patricelli "shortly after being released from incarceration." In May of 2012, Miller was incarcerated for threatening to kill Patricelli. Ex. 344A. He was released from prison on October 15, 2012. 12/16/13RP 92. Just 15 days later, he turned his threats to action and murdered Patricelli in the early morning hours of October 30, 2012. Any rational juror could conclude that the murder occurred "shortly" after his release. Although Miller insinuates otherwise, the jury was not required to make any additional factual finding of "a greater disregard for the law than otherwise would be the case" or a connection between the offenses. Williams, 159 Wn. App. at 314.

Following the jury's properly supported factual finding, the trial court concluded that such finding was a substantial and compelling reason justifying an exceptional sentence. CP 213; RCW 9.94A.537(6). This determination was proper given that the justification for imposing an exceptional sentence where a defendant has rapidly reoffended is that the fact of rapid recidivism demonstrates a greater than usual disregard for the law. Butler, 75 Wn. App. at 54. Miller's murder of Patricelli barely two

weeks after his release from prison for threatening to kill her clearly demonstrated a greater than usual disregard for the law. And "the fact that a prior offense b[ears] some similarity to the current offense" also provided support for the trial court's decision to impose an exceptional sentence. Williams, 159 Wn. App. at 314 (citing Combs, 156 Wn. App. 502).

In the present case, there was sufficient evidence that Miller murdered Patricelli shortly after being released from incarceration and evidence of Miller's rapid recidivism constituted a sufficiently substantial and compelling reason to justify the imposition of the exceptional sentence.

D. CONCLUSION

For all of the above reasons, the State respectfully asks this Court to affirm Miller's convictions and sentence.

DATED this 19th day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Maureen Cyr, at maureen@washapp.org containing a copy of the Brief of Respondent, in STATE v. SCOTTYE LEON MILLER, Cause No. 71559-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

LuBrame — 1/19/15

Name — Date

Done in Seattle, Washington

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

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