Supreme Court No. _____
(COA No. 74745-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Bryan Eugene Streepy,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Bryan Streepy, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' published decision affirming his convictions pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4). A copy of this decision is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The Confrontation Clause bars the admission of out-of-court, testimonial statements made to police officers in the course of investigating a completed crime when the declarant does not testify at trial. In a remarkably similar factual situation to the present case, the United States Supreme Court held in the companion case to *Davis v. Washington* that statements are testimonial in circumstances indicating that the primary purpose of the interrogation is to establish past events potentially relevant to later prosecutions. Conversely, statements are nontestimonial if the circumstances objectively indicate that the primary purpose of the interrogation to is to meet an ongoing emergency.

Here, when the police interviewed the complainant's son, S.G., Mr. Streepy was handcuffed outside and under police supervision. Mr. Streepy remained separated from both the complainant and her son. S.G.'s statements were admitted at trial. Nevertheless, the Court of Appeals held

that S.G.'s statements during this post-incident interview were not testimonial. Should this Court grant review based on its conflict with *Davis*? RAP 13.4(b)(3).

2. In a published opinion, the Court of Appeals concluded that S.G.'s statements were nontestimonial because an ongoing emergency existed until the police obtained probable cause to arrest Mr. Streepy. Neither this Court nor the United States Supreme Court has ever reached this sweeping conclusion. Does the Court of Appeals' ruling impermissibly undermine the boundaries of the Confrontation Clause? RAP 13.4(b)(3).

3. In *Ohio v. Clark*, the United States Supreme Court held that the admission of a three-year-old's statements to his daycare teachers were not contrary to the Confrontation Clause because 1) statements made to non-law enforcement officers are much less likely to be testimonial; 2) the statements were made during an ongoing emergency because the teachers needed to identify the child's abuser to prevent further abuse; and 3) preschool aged children do not understand the criminal justice system. The Court of Appeals likened S.G.'s statements as analogous to the circumstances in *Clark*. However, unlike *Clark*, a uniformed police officer questioned S.G. while Mr. Streepy was handcuffed outside, and S.G. was seven-years-old rather than three-years-old at the time of his statements.

Did the Court of Appeals substantially and improperly extend the holding of *Clark* to apply to non-preschool aged children and children interviewed by a uniformed police officer? RAP 13.4(b)(3).

4. Both the United States Constitution and the Washington Constitution guarantee a defendant's right to cross-examine adverse witnesses. This includes a defendant's ability to cross-examine an adverse witness regarding the witness' motive or bias. The complainant in Mr. Streepy's case is an undocumented immigrant who possesses the ability to apply for and successfully obtain a U-Visa as the victim of a crime. Mr. Streepy was barred for eliciting any testimony about this, and the Court of Appeals concluded that the complainant's ability to obtain a U-Visa was irrelevant. Is the Court of Appeals' opinion contrary to a defendant's Sixth Amendment and article I, section 22 right to cross-examine the witnesses against him?

5. This court has never answered the following question: when can a criminal defendant impeach a witness regarding his or her ability to obtain a U-Visa? Does the Court's answer to this question involve a question of substantial public interest? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. The Confrontation Clause

On October 14, 2015, Bryan Streepy grabbed a backpack and decided to leave his apartment after an argument between himself and his ex-fiancée, J.G. RP 352. During the argument, Mr. Streepy told J.G. that he wanted her and her family to move out of his apartment. RP 318, 436. In fact, Mr. Streepy had requested that J.G. and her family leave his home as early as August of 2015, but despite this request, J.G. and her family remained in Mr. Streepy's home. RP 436. During this argument, J.G. called the police. RP 324, 344.

When Mr. Streepy got to the door, he was met by police officers. RP 318. Mr. Streepy admitted to acting "a lot like a person who was just told he was going to have the cops called on them so that they could get pulled out of their house." RP 436. The police who arrived at the scene heard yelling inside the house before approaching the door. RP 351. Officer Michael Clements, one of the police officers present during this incident, reported that Mr. Streepy appeared "irate." RP 352. Officer Clements instructed Mr. Streepy to set his backpack down and step out onto the apartment balcony, and Mr. Streepy complied. RP 352. But because another police officer, Officer Lolmagh, believed Mr. Streepy was getting "louder and more irate," the officer decided to put Mr. Streepy in

handcuffs. RP 352. Officer Lolmagh remained outside with Mr. Streepy while Officer Clements went inside of the apartment to "sp[eak] with the reporting party, [J.G.], her sister, and [J.G.'s] son." RP 352.

While Mr. Streepy remained handcuffed outside with Officer Lolmagh, Officer Clements asked J.G., "what happened[?]" RP 353. J.G. recounted that she argued with Mr. Streepy regarding where she was going to sleep that evening. RP 353. Eventually, J.G. went into Mr. Streepy's bedroom, bringing along her seven-year-old son, S.G. RP 354. J.G. claimed that when she rebuffed Mr. Streepy's attempts to try to cuddle with her, he started to call her names. CP 106. After Mr. Streepy allegedly called J.G. several names, J.G. claimed Mr. Streepy hit her and threatened to kill her. CP 106. J.G. claimed this alleged assault escalated, with Mr. Streepy purportedly attempting to choke her, which J.G. claimed to have thwarted. CP 106; RP 353. Mr. Streepy is 6'2 and weighs 250 pounds. CP 95. On the date of this incident, officers only observed a tangled necklace, an old bruise, and faint scratches on J.G.'s arms RP 235-39, 356. The scratches were so faint that a police officer could not take a good picture of them. RP 239.

After gathering J.G.'s account of the alleged events, Officer Clements asked S.G. "what it was he saw." RP 354. S.G. allegedly stated that 1) Mr. Streepy said he was going to kill his mom; and 2) Mr. Streepy

punched his mom. RP 354. Officer Clements asked "how was he punching her?," and S.G. indicated how this allegedly transpired with his hands. RP 354. S.G. was the only other person present in the room when these events allegedly occurred. Officer Clements later recounted S.G.'s statements at Mr. Streepy's trial. RP 354. S.G. did not testify.

Mr. Streepy objected to S.G.'s statements being admitted at trial, arguing the statements were testimonial. RP 141. Nevertheless, the court admitted S.G.'s statements under the "excited utterance" hearsay exception under the Rules of Evidence. RP 141.

At trial, Mr. Streepy categorically denied J.G. and S.G.'s accusations. RP 433.

On appeal, Mr. Streepy again argued S.G.'s statements were testimonial and should have been excluded. But the Court of Appeals affirmed the trial court's ruling, holding that an ongoing emergency existed because "J.G. and S.G. were not safe, and the emergency was not resolved, until the officers *actually arrested* [Mr. Streepy]." *State v. Streepy*, No. 74745-2-I, slip op. at 9 (Wash. Ct. App. July 3, 2017) (emphasis added). The court reasoned, "the statements that S.G. made to Officer Clements contributed to the officer's knowledge of probable cause to arrest [Mr. Streepy] and thus prevented the assault from recommencing." *Id*. at 7.

Additionally, the Court of Appeals concluded, "S.G.'s age lends credence to the conclusion that his statements were nontestimonial." *Id*.

2. The complainant's ability to obtain a U-Visa.

J.G. is an undocumented immigrant. CP 273. At the time of the trial proceedings, she possessed a Deferred Action for Childhood Arrivals (DACA)[1] work permit. RP 273. DACA is a discretionary act of prosecutorial discretion that delays an undocumented immigrant's deportation. *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901, 906 (9th Cir. 2016). Unfortunately, DACA recipients enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows DACA recipients to receive federal [Employment Authorization Documents]. *Id.*

However, an undocumented immigrant may obtain a U Visa[2] if he or she is the victim of a serious crime and also assists law enforcement in investigating and prosecuting the crime. While DACA *does not* grant an undocumented immigrant a path towards obtaining permanent citizenship,

[1] *See generally* Frequently Asked Questions, U.S. Citizenship & Imm. Serv., https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited May 14, 2017)(answering frequently asked questions regarding DACA).

[2] *See generally* Victims of Criminal Activity: U Nonimmigrant Status, U.S. Citizenship & Imm. Serv., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last visited May 14, 2017) (describing the eligibility requirements for obtaining a U Visa).

a U-Visa *does* grant an undocumented immigrant to a path towards obtaining permanent citizenship.[3]

At trial, Mr. Streepy attempted to cross-examine J.G. regarding her ability to obtain a U Visa to demonstrate that she possessed an incentive, and therefore a motive or bias, to present herself as a crime victim. RP 30, 273-74, 285-88; CP 70-74. During an offer of proof, J.G. claimed she was "not really" aware of the U-Visa program at the time of the alleged incident but stated she learned about the U-Visa program during group therapy (prior to trial). RP 273-74.

J.G. also claimed she decided to not pursue a U-Visa, and also expressed that she believed she was lawfully in the United States. RP 275-76.

The trial court prohibited Mr. Streepy from eliciting this testimony. RP 284. The court concluded that a person's ability to obtain a U Visa is relevant because it may cause someone to embellish "[their] testimony to some extent" if he or she can show she is the victim of a crime. RP 286. However, the court opined that J.G.'s ability to obtain a U Visa was only of minimal relevance because it believed that under DACA, J.G. was

[3] *See* Frequently Asked Questions, *supra* note 1; Victims of Criminal Activity: U Nonimmigrant Status, *supra* note 2.

lawfully in the United States. RP 287-88. As previously explained, the court's understanding of the law was erroneous.

Ultimately, the trial court concluded the danger of unfair prejudice to J.G. outweighed Mr. Streepy's right to challenge his accuser's testimony under the Sixth Amendment. RP 288.

On appeal, Mr. Streepy argued that the trial court's ruling that prohibited him from eliciting this testimony violated his right to confront and cross-examine the witnesses against him. Nonetheless, the Court of Appeals affirmed, holding that J.G.'s immigration status was irrelevant "absent some indication that she planned to offer trial testimony that differed from the statements that she had made to the police upon Mr. Streepy's arrest." *Streepy*, No. 74745-2-I, slip op. at 12. The Court of Appeals also held that J.G.'s "subjective belief" that she was lawfully in the United States provided no motivation for her to provide a false of exaggerated report. *Id*. at 13.

E. ARGUMENT

1. This Court should accept review because the Court of Appeals' published opinion involves a significant question of law under the United States and Washington Constitutions.

This court should accept review because the Court of Appeals' multiple holdings regarding Mr. Streepy's challenge to S.G.'s testimonial statements present significant questions of law under the Sixth

Amendment of the United States Constitution and article I, section 22 of the Washington constitution. RAP 13.4(b)(3).

This is because the Court of Appeals' opinion 1) conflicts with *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); 2) reaches a conclusion the United States Supreme Court and this Court has never held concerning the boundaries of the Confrontation Clause; and 3) misinterprets and broadens the United States Supreme Court's ruling in *Ohio v. Clark*, __ U.S. __, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015).

In *Crawford v. Washington*, the United States Supreme Court held the Sixth Amendment's Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him. 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A person "bears testimony" against a defendant in circumstances where "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 823.

The Confrontation Clause bars such statements from being admitted at trial unless the witness was unavailable to testify and the

defendant had a prior opportunity to cross-examine him. *Crawford*, 541 U.S. at 53-54.

a. The Court of Appeals' opinion conflicts with *Davis v. Washington*

First, this case presents significant questions of law because the Court of Appeals' opinion conflicts with *Davis v. Washington*.

In *Davis v. Washington*, the complainant, Michelle McCottry, called 911 *during* a domestic disturbance with her former boyfriend, Adrian Davis. *Davis*, 547 U.S. at 817. Mr. Davis left Ms. McCottry's home in the middle of this call. *Id*. at 818. His location was unknown after her left her home.

In *Hammon v. Indiana*, the companion case to *Davis*, the police responded to a "reported domestic violence disturbance" at the defendant's home. *Davis*, 547 U.S. at 819. The police found the complainant, Amy Hammon, alone on the front porch, appearing "somewhat frightened." *Id*. The police separated Ms. Hammon from the defendant, Mr. Hammon and questioned Ms. Hammon in a separate room. *Id*. However, Mr. Hammon made multiple attempts to participate in the police officer's questioning of his wife and "became angry when [the police] insisted that he stay separated from Ms. Hammon." *Id*. Ms.

Hammon later told the police that Mr. Hammon assaulted her and her daughter. *Id*.

Presented with both cases, the Supreme Court crafted the following rule:

> Statements are nontestimonial when made in the course of police interrogation under circumstances *objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are nontestimonial when the circumstances objectively indicate that there is *no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.*

Id. at 822 (emphasis added).

Applying this rule, the United States Supreme Court held that Ms. McCottry's statements were not testimonial, but that Ms. Hammon's statements were testimonial and the Sixth Amendment barred these statements from admission at Mr. Hammon's trial. *Id.* at 826-87.

The court reasoned that Ms. McCottry's statements were not testimonial because 1) Ms. McCottry spoke about events as they were actually happening; 2) the 911 operator's statements were necessary to resolve the present emergency "rather than learn what had happened in the past," and 3) the 911 interview was informal. *Id*. at 827.

On the other hand, the court reasoned that Ms. Hammon's statements *were* testimonial because 1) once the assault ended, no

emergency was in progress at the time that the police elicited Ms. Hammon's statements; 2) no immediate threat to Ms. Hammon's person existed at the time of the questioning despite Mr. Hammon's agitation towards the police while they questioned his wife; and 3) the police did not attempt to determine what was happening but rather what previously happened. *Id*. at 829-30.

The circumstances in the present case are strikingly similar to the circumstances in Mr. Hammon's case, but the Court of Appeals reached the opposite conclusion reached in *Davis*. Similar to the circumstances in Mr. Hammon's case, no immediate threat to S.G. existed at the time of S.G.'s questioning because Mr. Streepy was handcuffed and under police supervision while the police questioned S.G. RP 228-29.

Additionally, like the police officers in Mr. Hammon's case, the police officer that elicited S.G.'s testimony clearly attempted to determine what occurred *in the past*. Officer Clements asked S.G. "what *happened*." RP 354 (emphasis added). When Officer Clements elicited S.G.'s testimony concerning what he purportedly saw and heard earlier that evening, Officer Clements asked S.G. "how [Mr. Streepy] was punching [J.G.]. RP 354.

b. The Court of Appeals' opinion reaches a conclusion about the Confrontation Clause that neither this court nor the United States Supreme Court has ever reached.

Second, this case presents significant questions of law under both the federal and state constitutions because the Court of Appeals' opinion contains a conclusion of law under the Sixth Amendment and article I, section 22 that neither this court nor the United States Supreme Court has ever held.

Here, the Court of Appeals concluded that S.G.'s statements were not testimonial, as an ongoing emergency existed *until* the police obtained probable cause to actually arrest Mr. Streepy. *Streepy*, No. 74745-2-I, slip op. at 9. Neither this Court nor the United States Supreme Court has ever concluded that an ongoing emergency only ends when the police take the alleged perpetrator into custody.

The Court of Appeals' opinion stretches the Confrontation Clause beyond the boundaries that this Court and the United States Supreme Court have previously established. Therefore, this Court should accept review to determine if the Court of Appeals' opinion accurately interprets the Sixth Amendment of the United States Constitution and article I, section 22 of our constitution.

c. The Court of Appeals' opinion misinterprets and broadens the United States Supreme Court's ruling in *Ohio v. Clark.*

Lastly, this Court should accept review because the Court of Appeals' opinion misinterprets and broadens the United States Supreme Court's ruling in *Ohio v. Clark.*

In *Clark*, the United States Supreme Court primarily considered "whether statements made to persons other than law enforcement officers are subject to the confrontation clause." 135 S. Ct. at 2181. The factual scenario in *Clark* was as follows: a preschool teacher noticed that one of her students, a three-year-old boy, had bloodshot eyes and red marks on his body. 135 S. Ct. at 2177-78. The preschool teacher asked the boy, "Who did this? What happened to you?" ***Id.*** The three-year-old responded, "Dee, Dee." *Id*. The preschool teacher went on to ask if Dee is "big or little," and the boy replied, "Dee is big." *Id*. This prompted the teacher to call a child abuse hotline and alert the authorities to the abuse. *Id*. The police discovered that the three-year-old child's mother's boyfriend went by the nickname of "Dee," and a grand jury indicted him on multiple counts of felony assault. *Id*. at 2177-78. The defendant moved to exclude the three-year-old's statements, arguing that the statements violated the

Confrontation Clause, but the statements were admitted at trial. *Id*. at 2178.

The United States Supreme Court held that the Sixth Amendment did not bar the three-year-old's identification of his abuser for various reasons. First, the court held that although statements made to non-law enforcement officers may be subject to the confrontation clause, "such statements are much less likely to be testimonial *than statements made to law enforcement officers.*" *Id*. at 2181 (emphasis added). Second, the court held that the child's statements were made "in the context of an ongoing emergency" because the preschool teachers' questions were aimed at identifying the child's abuser and ending further abuse. *Id*. Third, at no point during the conversation in question did the child's teachers ever inform the child that the information "would be used to arrest or punish his abuser." *Id*. Fourth, the court held that the three-year-old child's tender age

> "fortifie[d] [its] conclusion that the statements in question were not testimonial" because "statements by *very young children* will rarely, if ever, implicate the Confrontation Clause. *Few preschool students* understand the details of our criminal justice system.

> Rather, "research on children's understanding of the legal system finds that young children have little understanding of prosecution."

Id. at 2181-82 (emphasis added) (quoting Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* at 7, n.5).

While the Court of Appeals concluded that it saw "little difference between the preschooler discussed in *Clark* and the terrorized seven-year-old at issue," many key factual differences exist. Critically, S.G. related his statements to a uniformed law enforcement officer, not a teacher. The same Amicus Brief the United States Supreme Court cited to in *Clark* concluded, "unless young children are questioned by a uniformed police officer or are explicitly told that their statements will be used by police, they are unlikely to believe that the statements will lead to criminal punishment." Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* at 9.

Additionally, one of the studies cited to in the amicus brief notes that children as young as five years old know that police officers put people in prison, and that "children appear to grasp at an early age that a principal function of the police is to apprehend bad people." Kevin Durkin & Linda Jeffery, *The Salience of the Uniform in Young Children's Perception of Police Status*, 5 Legal and Crim. Psych. 48-49 (2000). Thus, S.G. likely knew his statements could be used to "punish" Mr. Streepy or put him in prison. The ultimate goal in prosecuting a criminal defendant is

generally to put the defendant in prison or subject the defendant to other sanctions.

Second, for the reasons previously stated, no ongoing emergency existed at the time the police questioned S.G., which also distinguishes the circumstances in *Streepy* with the circumstances in *Clark*.

Third, the United States Supreme Court appears to have limited the sub-holding in *Clark* to very young, pre-school aged children. *Clark*, 135 S. Ct. at 2181-82. ("Statements by *very young children*…few *preschool students* understand the details of our criminal justice system).

Because the Court of Appeals' opinion extends *Clark* beyond its narrow parameters, this Court should accept review under RAP 13.4(b)(3).

2. This Court should accept review because the Court of Appeals' opinion presents another question of law under the United States and Washington constitutions and also contains an issue of substantial public interest.

This Court should accept review because the Court of Appeals' opinion presents a question of law under article I, section 22 of the Washington constitution and the Sixth Amendment of the United States

constitution. RAP 13.4(b)(3). The same issue presents an issue of substantial public interest. RAP 13.4(b)(4).

Both the federal and State constitution guarantees a defendant's right to confront and cross examine adverse witnesses. U.S. Const. amend. VI; Const. art. I, § 22; *Davis v. Alaska,* 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

The primary purpose of cross examination is to test the credibility of witnesses. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). Trial courts may only limit cross examination if the evidence sought is vague, argumentative, or speculative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Determinations on whether cross examination may be limited require a three prong approach: (1) the evidence must be of at least minimal relevance; (2) if relevant, the burden is on the State to show that the evidence is so prejudicial as to disrupt the fairness of the fact finding process at trial; and (3) the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought. *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Here, the Court of Appeals concluded that Mr. Streepy did not possess a constitutional right to cross-examine J.G. regarding her ability to

obtain a U-Visa because it deemed the testimony irrelevant. *Streepy*, No. 74745-2-I, slip op. at 12. The court reached this conclusion because J.G. indicated in her offer of proof that she was unaware of the program when she called 911 on the date of the incident and because it believed her trial testimony "was consistent with the statements she made to the police upon [Mr. Streepy's] arrest." *Id*.

The Court's conclusion is erroneous for several reasons. First, J.G.'s statements at the time of Mr. Streepy's arrest were not entirely consistent with her trial testimony. Though J.G. reported to police on the date of the incident that Mr. Streepy allegedly pushed her and tried to choke her, by the time of trial, J.G. reported that Mr. Streepy also allegedly tried to poke out her eye and pulled her hair. *Compare* CP 106 *with* RP 318, 321.

Second, even if the trial court believed that J.G. possessed no knowledge of the U-Visa at the time she reported this incident, this does not mean the jury would have believed it too. "Under the Sixth Amendment, the jury must remain 'the sole judge of the weight of the testimony and of the credibility of the witnesses.'" *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Because "a defendant must be permitted to expose the jury to the facts from which the jurors, as the sole triers of fact and credibility, could

appropriately draw inferences relating to the reliability of the witness. Davis, 415 U.S. at 318, this court should accept review under RAP 13.4(b)(3).

Additionally, this Court should accept review because a defendant's ability to cross-examine a complainant regarding his or her ability to obtain a U-Visa presents an issue of substantial public interest. RAP 13.4(b)(4). Judges and lawyers require guidance regarding when immigration status can be used to impeach witnesses in a criminal trial. *See Hart v. Dep't of Soc. & Health Serv*., 111 Wn.2d 445, 448-49, 759 P.2d 1206 (1988) (holding that this court can still reach the merits of even a moot issue when the court's answer of the issue presented will garner "future guidance to public officers").

Here, the Court of Appeals cited no authority in their determination to uphold the exclusion of J.G.'s immigration status as it related to her potential to gain a U-Visa.

Salas v. Hi-Tech Erectors is the only Washington Supreme Court case that discusses whether immigration is admissible. But this civil case narrowly holds that a high risk of unfair prejudice exists "in light of the low probative value of immigration status with regard to lost future earnings." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583, 586-87 (2010).

To gain clarity, several groups submitted a proposal to adopt a new Rule of Evidence 413 which outlines situations in which immigration status may be introduced. The proposed rule "provides that immigration status is inadmissible" unless certain requirements are met. ER 413(a) (proposed June 2017) (pending, currently in comment period). The proposed rule states that it "shall not be construed to prohibit cross-examination regarding immigration status if doing so would violate a criminal defendant's constitutional rights." *Id*. This court should also weigh in.

This court should rule that in criminal proceedings, a witness's immigration status is admissible only if relevant to an essential aspect of the case, including motive. A specific motive that should be deemed highly relevant is the witness's U-Visa status. On the other hand, this court should disallow the introduction of immigration status if introduced in bad faith. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 719-20, 904 P.2d 324 (1995).

But where immigration status is relevant as to motive or bias, mechanisms exist to ensure that any prejudicial effect is minimal. First, effective voir dire can reduce the risk of prejudice. Potential jurors should be questioned regarding beliefs about immigration and undocumented immigrants to ensure the jury is composed of individuals less likely

predisposed to bias based on immigration status. Second, unfair prejudice of immigration status can also be limited with a jury instruction. *See State v. Acacio*, -- P.3d -- , SCWC-13-0000132, 2017 WL 2591322 (Haw. June 15, 2017).

F. CONCLUSION

For the reasons stated in this petition, Mr. Streepy asks this court to accept review.

DATED this 2nd day of August, 2017.

Respectfully submitted,

/s Sara S. Taboada
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. BRYAN EUGENE STREEPY, Appellant.	DIVISION ONE No. 74745-2-I PUBLISHED OPINION FILED: July 3, 2017

DWYER, J. — Bryan Streepy appeals from the judgment entered on a jury's verdict finding him guilty of attempted assault in the second degree, harassment based upon threats to kill, four counts of unlawful possession of a firearm in the second degree, and assault in the fourth degree. On appeal, Streepy contends that the trial court erred by admitting testimony setting forth out-of-court statements of the victim's son and by declining his request to cross-examine the victim regarding her immigration status. We disagree and, accordingly, affirm the convictions.

Streepy also contends, and the State concedes, that the trial court erred by failing to treat the convictions for attempted assault and felony harassment as constituting the same course of criminal conduct for sentencing purposes. We accept this concession and remand for resentencing.

I

Streepy and his ex-fiancé, J.G., lived together in Oak Harbor, Washington. J.G.'s sister, her two children, and J.G.'s seven-year-old son, S.G., also resided in the apartment. Streepy was emotionally and physically abusive toward J.G. throughout their relationship.

In September 2015, Streepy became irate and began screaming at J.G., punching walls, and ordering her to leave the apartment. J.G. moved out but later agreed to return to the apartment after Streepy apologized and offered to let J.G. stay in the apartment by herself while he looked for another accommodation. Although Streepy initially left the apartment, he moved back in shortly after J.G. returned.

After the two resumed living together, Streepy became convinced that J.G. was cheating on him. On October 5, 2015, J.G. rebuffed Streepy's attempt to have sex with her. Streepy began screaming at J.G., calling her a "lying little cheating whore." J.G. then laid on the couch, where upon Streepy began punching her shoulder and the pillow behind her head. Streepy told J.G. that he "was a Marine and that if he really wanted to he could really hurt [J.G.] like he hurt his enemies at war."

On October 14, 2015, J.G. returned from work and fell asleep on the couch with S.G. Shortly thereafter, Streepy awakened J.G. and commanded her to sleep in the bedroom. J.G. refused and Streepy became upset. J.G. brought S.G. into the bedroom with her—hoping that S.G.'s presence would placate Streepy—and tried to fall asleep. Streepy came into the room, pinned J.G. down,

and asked her to explain why she would not be intimate with him. J.G. told Streepy that she was afraid of him. Streepy became upset and began screaming at J.G. that she was a cheating whore and a slut and that she needed to pack her stuff. J.G. told S.G. to go into the other room.

J.G. and Streepy argued and Streepy threw himself at J.G., pulling her hair, screaming at her, and trying to gouge out her eye. Streepy began to choke J.G., shouting at her that he was going to kill her. S.G. returned to the bedroom and starting screaming. Streepy yelled at S.G. to "shut up, bitch!" J.G.'s sister started calling out for J.G. J.G. ran into her sister's bedroom and told her sister that Streepy was trying to kill her. Streepy then began to argue with J.G.'s sister, yelling at her to get out of the apartment. J.G. ran into the bathroom and called 911. J.G. could hear Streepy coming toward the bathroom so she abruptly ended the 911 call and ran back into the bedroom. Streepy found J.G. in the bedroom, shoved her against the dresser, threw her on the bed, and began trying to choke her again.

Two police officers arrived while the struggle was still ongoing. From outside of the apartment, the officers could hear Streepy shouting. The officers knocked on the door. Streepy answered, wearing a backpack. The officers asked Streepy to step outside and place the backpack on the ground. Officer Michael Clements went inside to check on J.G. while Officer Mel Lolmaugh stayed outside with Streepy. Streepy continued to be aggressive and hostile toward Officer Lolmaugh and Officer Lolmaugh was forced to handcuff Streepy for the officer's own safety.

Inside the apartment, Officer Clements found J.G. shaking and obviously upset. Officer Clements asked J.G. what had happened. J.G. told Officer Clements that she and Streepy had an argument and that Streepy had tried to choke her. Officer Clements then asked S.G., who was standing nearby, what he saw. S.G. was terrified and crying. S.G. told Officer Clements that Streepy was punching his mom and saying that he was going to kill her.

Based on the statements made by J.G. and S.G., the officers found probable cause to arrest Streepy. After the arrest, Officer Clements searched Streepy's backpack and found a handgun inside. Several other firearms were later discovered in Streepy's bedroom and inside of Streepy's vehicle. A third police officer arrived at the apartment shortly after the arrest and that officer conducted a formal interview of J.G., her sister, and S.G.

Prior to trial, the State moved to exclude evidence regarding J.G.'s immigration status and potential eligibility for a visa. The trial court granted the motion after hearing testimony from J.G. Counsel for Streepy then moved to exclude from evidence the statements that S.G. made to Officer Clements.[1] The trial court denied the motion. Streepy was found guilty of attempted assault in the second degree, harassment based upon threats to kill, four counts of unlawful possession of a firearm in the second degree, and assault in the fourth degree. He timely appeals.

[1] S.G. did not testify at trial.

II

Streepy first contends that the trial court violated the confrontation clause of the Sixth Amendment to the United States Constitution by ruling that S.G.'s utterances to Officer Clements were nontestimonial and thus admissible. This is so, he asserts, because the primary purpose of the exchange between Officer Clements and S.G. was to create an out-of-court substitute for trial testimony. We disagree.

We review de novo an alleged violation of the confrontation clause. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause bars the admission of "testimonial" hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The United States Supreme Court declined to define "testimonial" in Crawford[2] but an important factor is "'the declarant's awareness or expectation that his or her statements may later be used at a trial.'" United States v. Marguet-Pillado, 560 F.3d 1078, 1085 (9th Cir. 2009) (quoting United States v. Larson, 460 F.3d 1200, 1213 (9th Cir. 2006)).

Subsequent case law has determined that a statement is testimonial when, "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'"

[2] "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 541 U.S. at 68.

Ohio v. Clark, __ U.S. __, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) (alteration in original) (quoting Michigan v. Bryant, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)). "[T]he relevant inquiry *is not the subjective or actual purpose of the individuals involved* in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Bryant, 562 U.S. at 360 (emphasis added).

When "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." Bryant, 562 U.S. at 358. But "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." Bryant, 562 U.S. at 374. Rather, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." Bryant, 562 U.S. at 366. Additional factors include "'the informality of the situation and the interrogation,'" as well as the age of the declarant. Clark, 135 S. Ct. at 2180-82 (quoting Bryant, 562 U.S. at 377).

Here, neither party disputes that S.G. was unavailable to testify or that Streepy had no prior opportunity to cross-examine him. Thus, the sole issue is whether S.G.'s utterances to Officer Clements were testimonial.

Police arrived at the apartment while Streepy was actively assaulting J.G. The officers could hear Streepy yelling from outside of the apartment but could not physically see what was happening inside. The officers questioned Streepy

upon arrival but Streepy was irate in responding to the officers and had to be handcuffed for the officers' safety. When Officer Clements entered the apartment, he asked J.G. and her seven-year-old son what had happened. The statements that S.G. made to Officer Clements contributed to the officer's knowledge of probable cause to arrest Streepy and thus prevented the assault from recommencing. As ascertained from the statements that S.G. made and the circumstances surrounding the utterances, objectively viewed, a reasonable child in S.G.'s positon would not have made such statements for the *primary* purpose of providing an out-of-court substitute for trial testimony.

S.G.'s age lends credence to the conclusion that his statements were nontestimonial. Indeed, as the United States Supreme Court recognized in Clark,

> [The declarant's] age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Profession Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3-year-old child in [the declarant's] position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

135 S. Ct. at 2181-82.

For the purpose of viewing the encounter objectively, we see little difference between the preschooler discussed in Clark and the terrorized seven-year-old here at issue.

For his part, Streepy misapprehends the relevant inquiry and focuses solely on whether there was an ongoing emergency when Officer Clements first spoke with S.G. Streepy contends that there was no ongoing emergency because (1) S.G. was describing *past* events, rather than events *currently* unfolding, (2) police had already handcuffed Streepy by the time that S.G. spoke to Officer Clements, and (3) S.G.'s statements were not necessary to resolve any emergency.[3]

Streepy's assertions are without merit. Streepy was irate when police arrived at the apartment and his demeanor did not improve during the encounter. Officer Clements questioned S.G. mere moments after interrupting the ongoing crime and, although the questions and answers were grammatically in the past-tense, "the statements were made contemporaneously with the events described." State v. Ohlson, 162 Wn. 2d 1, 17, 168 P.3d 1273 (2007) (citing Davis v. Washington, 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). The fact that Streepy had already been placed in handcuffs likewise does not establish that the emergency had ended. Officer Clements testified that it was not until *after* questioning J.G. and S.G. that he had probable cause to arrest Streepy. Streepy was placed in handcuffs prior to being arrested solely for

[3] Streepy also inexplicably asserts that, because the questioning took place inside the apartment, "with his mother by his side," the exchange was a formal interrogation. Br. of Appellant at 18. He cites to our decision in State v. Reed, 168 Wn. App. 553, 564, 278 P.3d 203 (2012) ("[D]isorganized questioning in an exposed, public area that is neither tranquil nor safe tends to indicate the presence of an ongoing emergency."). Streepy's contention—that the scene of a violent assault interrupted by police presence somehow constitutes a tranquil and safe environment—is unavailing. Moreover, any secondary purpose that Officer Clements may have had in eliciting the statements from S.G. is immaterial so long as the primary purpose that a reasonable participant in S.G.'s position, considering all of the facts, would have had was other than to create an out-of-court substitute for trial testimony. Clark, 135 S. Ct. at 2180.

the officers' safety. J.G. and S.G. were not safe, and the emergency was not resolved, until the officers actually arrested Streepy.

Viewed properly, the primary purpose of the challenged utterances was other than to create an out-of-court substitute for trial testimony. Clark, 135 S. Ct. at 2180. Thus, the utterances were not testimonial. Accordingly, no confrontation clause violation is established.

III

Streepy next contends that the trial court violated his right to confrontation when it prohibited him from cross-examining J.G. regarding her immigration status. This is so, he asserts, because such evidence was relevant to J.G.'s motivation as a witness. Streepy is wrong.

We review a trial court's limitation of the scope of cross-examination for an abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We may affirm a trial court's decision as to the admissibility of evidence on any basis supported by the record. State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

Both the federal and state constitutions guarantee a criminal defendant the right to confrontation, including the right to conduct a meaningful cross-examination of adverse witnesses. U.S. CONST. amend VI; CONST. art. I, § 22; Darden, 145 Wn.2d at 620. But the right to cross-examine adverse witnesses is not absolute. Darden, 145 Wn.2d at 620-21 ("The confrontation right and

associated cross-examination are limited by general considerations of relevance." (citing ER 401, ER 403)). "Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, Streepy sought to cross-examine J.G. regarding her immigration status and knowledge of a U visa. A U visa provides undocumented immigrants who are victims of certain crimes with temporary protection from removal.[4] Streepy argued that J.G.'s immigration status was relevant to her motivation as a witness.

The trial court allowed Streepy to make an offer of proof in the form of testimony from J.G. J.G. testified that she was not a U.S. citizen or a lawful permanent resident. J.G. testified that she was granted deferred action for childhood arrivals (DACA) status. J.G. testified that she was informed of the U visa in group therapy. J.G. testified that she was aware that by alleging a criminal offense she may be eligible for a U visa. J.G. also testified that she had not started filling out paperwork for the U visa, had not contacted immigration to go forward with a U visa application, and had decided to not apply for the U visa in light of her DACA status.

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[4] See *Victims of Criminal Activity: U Nonimmigrant Status,* U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying%20for%20U%20Nonimmigrant%20Status%20(U%20Visa) [https://perma.cc/J9BG-KYU7].

The trial court then directly asked J.G. when she first learned of the U visa program. J.G. testified that she heard of the U visa at her first group therapy meeting, after Streepy's arrest. J.G. testified that she obtained DACA status in 2013 and that, based on her understanding of the DACA program, she was lawfully in the United States.

Based on J.G.'s testimony, the trial court found that J.G. was not aware of the U visa program at the time of the incidents that gave rise to the charges against Streepy. The trial court found that J.G. had decided against pursuing the U visa program and that "the inference would be that she already has lawful status here for the present time under the DACA program."

The trial court found that evidence of J.G.'s immigration status was minimally relevant. The trial court found that the U visa program was not something that would have affected the way in which J.G. interacted with the police, so it was not relevant in that regard. The trial court found that the evidence was minimally relevant because "theoretically this could possibly affect the testimony that she gives here at trial and could possibly have some effect with regard to the issue of bias." Nevertheless, the trial court ultimately determined that the risk of prejudice far outweighed the relevancy of the evidence.

The trial court's characterization of the evidence as "minimally relevant" was generous. To the contrary, evidence of J.G.'s immigration status was not at all relevant under these circumstances.

The only evidence in the record relating to J.G.'s knowledge of the U visa program establishes that J.G. was unaware of the program when she telephoned 911 and—minutes later—made statements to the police. Accordingly, J.G. could not—at that time—have been motivated to make false allegations against Streepy in order to obtain a U visa.

J.G.'s immigration status remained irrelevant absent some indication that she planned to offer trial testimony that differed from the statements that she had made to the police upon Streepy's arrest. Because no such indication existed—and because J.G.'s testimony at trial *was* consistent with the statements that she made to the police—there was no logical connection between J.G.'s testimony and her learning of the U visa program. Thus, J.G.'s immigration status does not make the existence of any fact that is of consequence to the jury's determination more probable or less probable than it would be without the evidence. ER 401. Accordingly, the evidence was not relevant and was, thus, properly excluded.

Moreover, the fact that J.G. honored her obligation to testify, and told the jury the same things that she told the officers at the scene, did not provide fodder for impeachment. There was nothing in the offer of proof that would have tended to prove that J.G. would have absconded from trial or recanted her testimony had she been unaware of the U visa program.

Nevertheless, Streepy contends that the trial court misapprehended the nature of J.G.'s DACA status and would have ruled differently had it fully

understood that J.G. could still face deportation.[5] Streepy asserts that the trial court should have taken judicial notice of the DACA so as to better understand how the program functions.

This contention abjectly fails. Whether J.G. *actually* resided in the United States lawfully was immaterial. Rather, it was J.G.'s *subjective belief* that was determinative. Because J.G. herself *believed* that she resided in the United States lawfully, she had no motivation to provide false or exaggerated testimony for purposes of avoiding deportation or securing a U visa. Thus, it is immaterial how the trial court would have ruled had it possessed a different understanding of the DACA program.

We may affirm the trial court's ruling on any basis supported by the record. Norlin, 134 Wn.2d at 582. Because evidence of J.G.'s immigration status was not relevant, we conclude that the trial court did not abuse its discretion by excluding the evidence.[6]

IV

Streepy next contends that he received ineffective assistance of counsel because his counsel failed to request an Old Chief[7] stipulation.

Constitutionally ineffective assistance of counsel is established only when the defendant shows that (1) counsel's performance, when considered in light of

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[5] The trial court remarked that "if we were dealing with a situation where the alleged victim was illegally in this country, was in danger of deportation, I would permit this cross-examination to occur."

[6] Streepy also contends that he received ineffective assistance of counsel because his counsel failed to request that the trial court take judicial notice of the DACA. Because taking judicial notice of the DACA would not have changed the relevancy of J.G.'s immigration status, this contention also fails.

[7] Old Chief v. United States, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

all the circumstances, fell below an objectively reasonable standard of performance, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 690, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hassan, 151 Wn. App. 209, 216-17, 211 P.3d 441 (2009). The burden is on the defendant to demonstrate deficient representation and prejudice. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015). Failing to satisfy either part of this analysis ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

"Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "[T]he presumption of adequate representation is not overcome if there is any 'conceivable legitimate tactic' that can explain counsel's performance." Hatfield, 191 Wn. App. at 402 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

In Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), the United States Supreme Court recognized the prejudicial effect that evidence of a defendant's prior conviction may have on the trial. Accordingly, the Court announced that a trial court abuses its discretion when it fails to accept a defendant's stipulation to a prior conviction upon the defendant's request. State v. Humphries, 181 Wn.2d 708, 717, 336 P.3d 1121 (2014) (citing Old Chief, 519 U.S. at 174). "The most the jury needs to know is that the

conviction admitted by the defendant falls within the class of crimes that [the legislature] thought should bar a convict from possessing a gun." Old Chief, 519 U.S. at 190-91.

Here, the State charged Streepy with four counts of unlawful possession of a firearm in the second degree. Pursuant to RCW 9.41.040(2)(a)(i), a person is guilty of unlawful possession of a firearm in the second degree if that person owns a firearm and has been previously convicted of assault in the fourth degree committed by one family or household member against another. Streepy had one such conviction.

Counsel for Streepy initially intended to offer an Old Chief stipulation as to the prior conviction. However, before trial began, the trial court asked counsel to confirm that Streepy was stipulating to the prior conviction. Counsel for Streepy then expressly declined to stipulate to the prior offense.

> [Defense counsel]: Your Honor, I think at this point I would not be making such—I'm not going to be requesting an Old Chief stipulation. I think that, based on what the jury has already heard, I don't think that it would serve any purpose from our perspective so I'm not going to be requesting that. [8]
>
> The Court: Just for purposes of clarification, by an Old Chief instruction, you're referring to an instruction that would simply tell the jury that it is agreed or stipulated that Mr. Streepy has the assault fourth degree-domestic violence conviction, or something to that effect, so that the state would not need to present the certified copy of the Judgment and Sentence in that regard?
>
> [Defense counsel]: That's correct, Your Honor. I see no purpose from my perspective in requesting such a stipulation.

[8] It is not clear from the record "what the jury has already heard." This exchange occurred outside of the presence of the jury before voir dire had been completed. No reference to the prior conviction had been made to the prospective jurors.

Because Streepy declined to stipulate to the prior offense, the State was forced to prove that the offense had been committed. To do so, the State obtained a certified copy of a judgment and sentence document—from the neighboring county in which the offense was committed—and offered that document at trial to prove the prior conviction. The judgment and sentence document was admitted, over Streepy's objection. The trial court issued a proper limiting instruction. No other details of the prior offense were elicited.

After the State rested its case in chief, the prosecutor noticed that the judgment and sentence document did not list the date of the offense—a crucial element of the State's case.[9] This fatal flaw in the State's evidence forced the State to move to reopen its case in chief, a request granted by the trial court over Streepy's objection.

The State proposed obtaining a certified copy of the statement of defendant on plea of guilty for the prior offense in order to prove the date of the offense. The trial court then asked defense counsel if Streepy would stipulate to the date of the offense so that the State did not have to go through the process of obtaining the certified document. Streepy declined to so stipulate. The trial court recessed the trial and the State soon obtained a certified copy of the document from the neighboring county and sought to admit the document at trial. Again, Streepy objected. The trial court overruled the objection and admitted the document into evidence.

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[9] The jury instruction required the jury to find that the prior offense was committed on or after July 1, 1993.

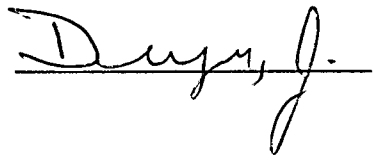
Taking all of this into consideration, there was a conceivable strategic reason for Streepy's counsel to decline to stipulate to the prior conviction. The record establishes that the judgment and sentence document initially relied on by the State was incomplete and therefore insufficient to prove a crucial element of the charged crimes. The record also establishes that defense counsel interposed challenges to the State's reliance on this document, objecting to its admission. Because the evidence relied on by the State failed to satisfy a crucial element of the charged crimes, the State was required to obtain a certified copy of the statement of defendant on plea of guilty during the trial court's recess. Had the State failed to do so, Streepy would have argued that the State had failed to prove every element of the charged crimes. Streepy's attorney chose to put the State to its proof, having a reasonable belief that the prosecution might fail to properly prove the prior conviction. The fact that this tactic did not, in the end, succeed does not make it any less tactical. Streepy did not receive ineffective assistance of counsel.[10]

V

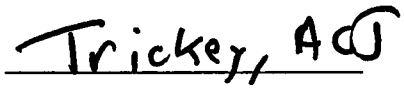
Finally, Streepy contends, and the State concedes, that resentencing is necessary because the trial court erroneously concluded that attempted assault in the second degree and felony harassment did not, in these circumstances, encompass the same criminal conduct for purposes of calculating his offender score. We accept the State's concession and remand for resentencing.

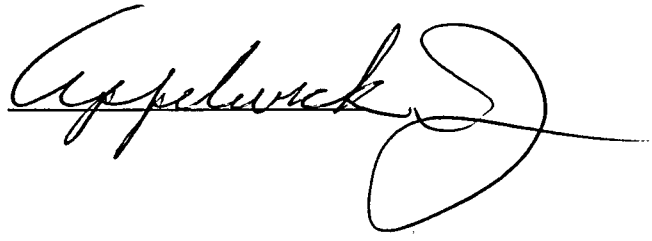
[10] Streepy also contends that cumulative error deprived him of a fair trial. Because we find no error, Streepy's claim fails.

Remanded for resentencing, affirmed in all other respects.



We concur:





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Washington Appellate Project

Date: August 2, 2017

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