No. 102772-9
Court of Appeals No. 83738-9

THE SUPREME COURT OF THE STATE
OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRENNARIS JOHNSON,

PETITIONER.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Constitution

United States Constitution

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Statutes

Court Rules

Other Authorities

A. Introduction

Brennaris Johnson's trial was as much about what he may have done before as it was about what he was charged with. His conviction rests upon the unfair prejudice caused by the erroneous admission of evidence of other acts.

B. Relief Requested

Pursuant to RAP 13.4 the Court should accept review of the published decision of the Court of Appeals in *State v. Johnson*, 83738-9-I.

C. Issues Presented

1. In *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014) this Court rejected a suggestion that alleged victims of domestic violence are inherently less credible than any other participant in any other criminal case. And with that rejection, the Court rejected the notion that evidence of a person's other acts is routinely admissible in domestic violence cases: there is no domestic violence exception to ER 404(b). Yet, courts do routinely admit such evidence ignoring *Gunderson*. This Court

should reaffirm its ruling and reaffirm that complainants in such case are no less credible.

2. Two decades ago the Supreme Court declared Washington's exceptional sentence procedure violated the Sixth and Fourteenth Amendments. The Legislature resolved some of the constitutional infirmities. But the unconstitutionality persists. The statute still permits, and in fact requires, judicial fact finding in the imposition of an aggravated exceptional sentence without proper notice or proof beyond a reasonable doubt of every fact necessary to such sentences. It is time for this Court to bring sentencing practice in line with the dictates of the Sixth and Fourteenth Amendments.

3. This Court has made clear the that in assessing any request for a jury instruction a court must view the evidence in the light most favorable to the party requesting the instruction. In its published opinion in this case, the Court of Appeals refuses to apply that standard.

D. Statement of the Case

Mr. Johnson spent several days with his girlfriend, Nichole Trichler, at her apartment. One morning after Ms. Trichler used methamphetamine and drank rum, she had trouble standing and fell down several times. 12/6/21RP 451-52., 12/10/21RP 812. A short time later Ms. Trichler had a severe headache and Mr. Johnson called 911. *Id.* 813-14.

When paramedics first arrived, Mr. Johnson had to meet them outside as they could not locate the apartment. 12/8/21RP 443. The medics recommended Ms. Trichler take Tylenol and see a doctor and then left. *Id*. at 448.

A short time later, paramedics responded to a second call. *Id*. at 450. Ms. Trichler for the first time told them of her methamphetamine use and drinking that morning. *Id*. at 452. By the time of the second call Ms. Trichler was vomiting. *Id.* The medics took her by ambulance to the hospital. *Id*. at 545-55.

At the hospital, a CT scan revealed an acute subdural hematoma. 12/8/21RP 477. Ms. Trichler promptly went in to

surgery to repair the injury. The doctors who treated her did not see external signs of trauma to the head but each noted trauma is the most likely cause of a subdural hematoma. 12/8/21RP 485, 12/9/21RP 611, 12/13/21RP 868, 877, 890.

After her release from the hospital, Ms. Trichler contacted police. *Id.* at 704. Because of the lingering effects of her injury, Ms. Trichler could not recall how that contact occurred or whether she or someone else initiated it. *Id.*

She claimed on the day of her injuries, Mr. Johnson punched her several times in quick succession on the side of her head. 12/9/21RP 651-52. Ms. Trichler immediately felt a pain in the side of her head. *Id.* at 662-64. Ms. Trichler felt a buzzing and pressure in her head 15 minutes later. *Id.* at 664.

The State originally charged Mr. Johnson with one count of second degree assault and added an allegation of an aggravating factor as well as a charge of violating a no contact order, with two prior convictions. CP 368-70.

Prior to trial, the court denied the State's motion to admit evidence of other acts concluding finding the evidence irrelevant and simply propensity evidence. 9/29/21RP 53-54.

Although the decision to instruct the jury on a lesser offense can only be made after the court considers the evidence admitted at trial, the court determined before trial even began that it would instruct the jury on the uncharged crime of felony fourth-degree assault at the state's request. 12/7/21RP 256. Based upon that decision, the court then changed its ruling on other acts evidence concluding at least one of those acts would be evidence of the prior offense element of the uncharged offense. *Id*. at 264-69.

A jury convicted Mr. Johnson as charged. CP 52, 55-57. The court imposed an aggravated sentence. CP 32-33.

E. Argument

1. The trial court erroneously permitted the State to offer irrelevant evidence of other acts by Mr. Johnson.

a. The trial court improperly admitted propensity evidence.

The trial court originally rejected the State's effort to admit evidence of two other acts. 9/29/21RP 52-53. The court also properly found the jury would likely just use the evidence as propensity evidence. *Id*. at 52.

The court then unilaterally changed course. The court concluded evidence of both acts was relevant to establish Ms. Trichler's credibility. *Id*. 266, 269. At trial, the court instructed the jury it could consider the evidence of prior violence to assess Ms. Trichler's credibility. CP 164.

Mr. Johnson is entitled to a trial free of the improper and prejudicial propensity evidence.

b. Propensity is categorically inadmissible.

Evidence of other acts offered solely to prove propensity to commit an offense is not admissible. ER 404(a). "Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Other acts evidence may be admissible for another permissible purpose if the court: (1) finds by a preponderance of the evidence the misconduct occurred, (2) identifies the purpose for which the evidence is sought to be introduced, (3) determines whether the evidence is relevant to prove an element of the crime charged, and (4) weighs the probative value against the prejudicial effect. *Gunderson*, 181 Wn.2d at 923. But even then, the evidence's relevance cannot depend on its use as

propensity. The State as the proponent of the evidence "must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [the proffered prior offense], he therefore is more likely to have committed [the charged offense]." *United States v. Brown*, 765 F.3d 278, 292–93 (3d Cir. 2014) (Brackets in original); *see also*, *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999).

At trial and on appeal the prosecutor has not articulated how the evidence was relevant to any consequential purpose free of a propensity inference. The Court of Appeals opinion has the same deficiency and yet it affirms the trial court.

c. The other acts evidence did not have relevance to any purpose other than as propensity evidence.

At trial, both the State and the court posited the evidence was relevant to Ms. Trichler's credibility. But neither ever bothered to explain how so. The Court of Appeals too

concludes, with no analysis, the evidence of prior assaults is relevant to "credibility. Opinion at 16.

But Ms. Trichler's "credibility" is not itself an element of any charged crime. Thus, merely concluding the evidence is relevant to credibility is not sufficient for its admission. *See Gunderson*, 181 Wn.2d at 923 (other acts evidence must be relevant to prove an element of the crime).

Ignoring that problem, the other acts evidence does not make Ms. Trichler more or less credible except as propensity. Simply announcing a purpose of other acts evidence is not a "magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name]." *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982). The necessary question is "How does a prior assault make her more or less credible in this case?" As a matter of simple logic what another person has done has no bearing on another's credibility, unless the inference is one of propensity.

The Court of Appeals never asks that question and thus avoids the inevitable answer. Instead the opinion takes at face value the idea that prior acts is routinely admissible for credibility in domestic violence cases. Opinion at 16.

That starting point requires one to assume victims of domestic violence are categorically less credible than victims of other crimes. A problematic assumption to be sure, which is why *Gunderson* rejected it. As the Court explained "The blanket extension of [*State v. Magers*, 164 Wn.2d 174, 189 P.2d 126 (2008)] proposed by the dissent would create a domestic violence exception for prior bad acts that is untethered to the rules of evidence." *Gunderson*, 181 Wn.2d at 925, n. 3.

Pivoting, the Opinion below concludes Trichler's inconsistent reporting is what is relevant." Opinion at 13. But that is not what the trial court told the jury. The court's instruction told the jury they could consider "prior incidents of violence" for determining credibility. CP 164. The instruction says nothing of the reporting of those incidents or

inconsistencies. So the only question is how prior acts of violence make another person more of less credible.

Ignoring the jury instruction, the opinion points to articles opining on the inconsistencies in reporting domestic violence. Opinion at 16. Aside from the instruction identifying only the prior violence and not the inconsistent reporting, there was no evidence before the juror of the dynamics of domestic violence or reasons for minimization by victims. While the experiences of judges and others who are regularly engaged in criminal proceedings may allow them sufficient knowledge to come to that view, jurors have no such background. Jurors had no framework within which to analyze the evidence in the fashion the opinion suggest. Instead, the only inference they could draw from the evidence, the only one permitted by the court's instruction, was that Mr. Johnson's prior assault made Ms. Trichler more credible. At best, the opinion explains a basis on which the jury could have been instructed, ignoring that they were not.

Assuming, Ms. Trichler said conflicting things in the present case, Mr. Johnson punched her or Mr. Johnson did not punch her, the only way the other acts evidence makes either of those two statements more or less credible is as propensity evidence. To state the obvious, the prosecution offered the evidence so the jury can find the "he punched me" statement more credible. So what the State must show is that evidence of a prior assault made the claim "he punched me" more credible than a statement "he did not punch me" free of a propensity inference. The State has never even tried.

In fact, the only way the other acts evidence makes the claim "he punched me" more credible than "he didn't punch me" is by inferring he did it before he must have done it again so the statement "he punched me" is the more credible of the two. And that is exactly what the prosecutor argued in closing "when you've had enough you've had enough." Unless the prosecutor meant "he hit her before he hit her now and she's had enough" it begs the question had enough of what?

Propensity by another name is still just propensity and is categorically barred by ER 404(b).

By itself, there is no logical and propensity-free inference between evidence of one person's prior act and a second person's credibility.

Despite this Court's rejection of it in *Gunderson*, courts continue to treat prior acts of domestic violence as an exception to ER 404(b). As here, courts often offer the nebulous conclusion that such evidence is relevant to credibility without ever addressing how that is so. This Court should reject lower courts' efforts to circumvent *Gunderson* and reaffirm there is no broad exception to ER 404(b) in these cases. Review is warranted under RAP 13.4(b)(1) and (4).

2. Twenty years on from *Blakely* Washington courts continue to violate the Sixth and Fourteenth Amendments when imposing exceptional sentences.

a. Every finding which increases the permissible sentence must be pled and proven to a jury beyond a reasonable doubt.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment. *Hurst v. Florida*, 577 U.S. 92, 97-98, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013), U.S. Const. amend. VI, XIV; Const. art. I, §§ 21, 22. This is so because

> "[*Apprendi v. New Jersey*] concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime.'"

Alleyne, 570 U.S. at 111 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)) (Internal quotations omitted).

Blakely v. Washington concluded Washington's Sentencing Reform Act violated these tenets as it permitted a judge to increase a person's sentence, *i.e.*, impose an exceptional sentence, without notice or a jury finding beyond a reasonable doubt. 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As with any element, the State must provide notice prior to opening statements at trial. *State v. Recuenco*, 163 Wn.2d 428, 440-41, 180 P.3d 1276 (2008) (*Recuenco III*); *see also*, *State v. McEnroe*, 181 Wn.2d 375, 384, 333 P.3d 402 (2014).

The trial court's imposition of an exceptional sentence in this case violated these precepts.

b. Because the SRA does not permit a court to impose an aggravated sentence based solely upon a jury finding but instead requires the court independently find the facts are substantial and compelling, Mr. Johnson's aggravated sentence violates the Sixth and Fourteenth Amendments.

i. The imposition of an aggravated sentence under the SRA requires an impermissible judicial fact-finding.

Following *Blakely*, the legislature amended the SRA such that imposition of an aggravated sentence, in most cases, requires two steps. First, and excepting statutory factors which relate solely to prior convictions, a unanimous jury must find one or more of the aggravating factors set forth in RCW 9.94A.533 beyond a reasonable doubt. Second, and regardless of whether the aggravating factor was found by judge or jury, a court must find, considering the purposes of the SRA, the aggravating factors constitute a substantial and compelling reason justifying an exceptional sentence. RCW 9.94A.533; RCW 9.94A.535(6).

The Supreme Court held a similar sentencing scheme which required a jury to make a factual finding which permits, but does not require, a judge to impose a greater sentence violated the Sixth and Fourteenth Amendments. *Hurst*, 577 U.S. at 99. That Florida statute mirrors Washington's sentencing scheme.

A jury convicted of a crime for which the maximum sentence is life in prison. *Hurst*, 577 U.S. at 95. Following the conviction, the jury then determined the existence of an aggravating factor which could permit, but did not require, a court to impose the greater sentence of death. *Id.* at 96. Upon the jury's finding of an aggravating factor, Florida law required the jury to make a nonbinding sentence recommendation after considering the aggravating factor against any mitigation, and the jury recommended death. *Id.* The Florida statute then required the judge to weigh the evidence of aggravating and mitigating factors to determine what sentence to impose. *Id.* After weighing the evidence, the court sentenced Mr. Hurst to

death. *Id.* And as required by Florida law, the court entered written findings of fact detailing its decision. *Id.*

The Court explained "the Florida statute does not make a defendant eligible for death until a finding by the court that such person shall be put to death" 577 U.S. at 100 (Internal citations omitted). Because that additional judicial finding is a prerequisite to the sentence imposed, the sentence violated the Sixth and Fourteenth Amendments. 577 U.S. at 99

The jury in this case did find the existence of aggravating factors on each offense. CP 41-17. But those findings alone did not permit the exceptional sentence. Instead, both RCW 9.94A.535 and RCW 9.94A.537(6) required the judge to make an additional juridical determination before it could impose and aggravated sentence; the court must "find[], considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." If the court makes such a finding, the court is required to enter written findings of fact. RCW 9.94A.535;

State v. Friedlund, 182 Wn. 2d 388, 390–91, 341 P.3d 280 (2015).

The critical point in both the Florida and Washington schemes is that the jury's verdict alone cannot support the greater sentence. Instead, each scheme requires the judge to make a factual determination beyond the jury's verdict before they may impose the greater sentence. In both systems, the jury's verdict is a prerequisite to the greater sentence but is on its own insufficient to impose that greater sentence.

The Florida scheme did not require a judge find the aggravating factor but did require the judge to independently weigh any aggravating factor against mitigation. "The trial court *alone* must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 577 U.S. at 100. Similarly, the SRA does not permit a judge to find the existence of the aggravating factor, but just as the Florida statute, the SRA requires the judge alone to "find[] .

. . the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). Both schemes require the judge to enter specific written findings of fact. *Hurst*, 577 at 96; RCW 9.94A.535. Both schemes hinge imposition of the greater sentence on the independent findings of a judge.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 303-04. Had the judge imposed an exceptional sentence in Mr. Johnson's case based solely on the jury's verdict without the additional determination required by RCW 9.94A.535 and RCW 9.94A.537(6) the sentence would be unlawful. There can be no dispute that the jury's verdict alone does not permit the sentence imposed. Thus, Mr. Johnson's sentence violates his rights under the Sixth and Fourteenth Amendments.

ii. The determination that facts are substantial and compelling in light of the purposes of the SRA is undoubtedly a factual determination.

As is clear from *Hurst*, the required weighing of facts by a judge to find if they are sufficiently substantial and compelling to warrant an exceptional sentence is a factual determination which requires a jury determination beyond a reasonable doubt.

With no analysis to speak of, *State v. Sage* brushed *Hurst* aside, opining the requirement that a judge "find" substantial and compelling reasons is a legal, not factual, determination. 1 Wn. App. 685. 709, 407 P.3d 359 (2017). The opinion here blindly follows *Sage*. Opinion at 24-25. *Sage*, and the opinion below, fall into the same trap as so many others before which tried to defend sentencing schemes by describing or labeling judicial findings as categorically different rather than focusing on the impact of that finding. Justice Scalia addressed these efforts in his concurring opinion in *Ring v. Arizona*: "all facts

essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." 536 U.S. 584, 610, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (Scalia, J., concurring). Or as the majority in that case put it, "the relevant inquiry is not one of form, but of effect." *Ring*, 536 U.S. at 604. Because an aggravated sentence is not permissible based upon the jury's verdict alone, but rather only after a judge weighs the facts to determine such a sentence is appropriate, that determination, whatever it is labeled, violates the Sixth and Fourteenth Amendments. *Hurst*, 577 U.S. at 99. Beyond the clear weight of *Hurst*, the conclusion in *Sage* is wrong for a number of other reasons.

First, the legislature has required a court "find," not "conclude," there are substantial and compelling reasons. The statute goes further and requires the court enter written findings of fact. RCW 9.94A.535. In fact, the court entered such

findings of fact in this case. CP 416-18. If a court is not making a factual finding how can it possibly enter findings of fact?

Ignoring that, *Sage* never explains what supposed legal standard a court is applying. Prior to *Blakely*, judicially-found factors were substantial and compelling so long as they were not contemplated in setting the standard range for the offense and differentiated the present crime from other crimes of the same category. *See, State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991). The later determination plainly involves a factual rather than legal assessment. The initial determination is rendered meaningless by the adoption, following *Blakely*, of an exclusive statutory list of aggravating factors. With that list the legislature necessarily found each of the listed aggravators were not considered in setting the standard range for an offense. Thus, all that remains of the preexisting standard is the threshold factual assessment of how different the current offense is from the typical offense.

While simply requiring a determination that facts are substantial and compelling, with nothing more, is plainly a factual determination, the statute goes further. The judge must consider whether the facts are substantial and compelling in light of the purposes of the SRA. RCW 9.94A.535, RCW 9.94A.537 (6). This Court and the Court of Appeals have already determined similarly worded requirements trigger *Blakely.*

This Court found a judicial determination that a standard range sentence was "clearly too lenient in light of the purposes of the [SRA]" violated the Sixth Amendment. *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overturned on other grounds*, *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Ose* 156 Wn.2d 140, 149, 124 P.3d 635 (2005). The Court reached the same conclusion with respect to a judicial finding that concurrent sentences were clearly too lenient. *In re the Pers. Restraint of VanDelft*, 158 Wn.2d 731, 733-34, 147 P.3d 573 (2006). The

Court of Appeals reached a similar conclusion addressing the language of RCW 9.94A.535(b) that a defendant's prior unscored misdemeanors or foreign criminal history resulted in a clearly too lenient sentence in light of the purpose of this chapter. *State v. Eller*, _ Wn. App. 2d __, (58050-1-II, January 17, 2024). Because they require a subjective assessment of relative culpability these must be made by a jury rather than a judge. The reasoning of these cases mirrors that of *Hurst* and must apply here.

An assessment of whether facts are substantial and compelling in light of the purposes of the SRA is a subjective and qualitative factual determination. There is no legal or objective standard that guides that determination. The finding required in RCW 9.9A.535 and RCW 9.94.537(6) is a factual finding the judge could not constitutionally make.

Twenty years after *Blakely*, Washington's sentencing scheme still violates the Sixth and Fourteenth Amendments. The statutes still permit, and in fact require, imposition of an

exceptional sentence based upon a judicial finding by less than proof beyond a reasonable doubt. That continued practice in the face of clear precedent from the United States Supreme Court merits review under every criteria in RAP 13.4.

3. The trial court deprived Mr. Johnson of due process by permitting the jury to consider an uncharged crime.

A person may only be convicted of the charged offense or those offenses which are either lesser included offenses, or inferior degrees of the charged offense. *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998); and RCW 10.61.003).

The factual inference required for both lesser included and inferior degree offenses is the same. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). For any lesser offense, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Id.* at 455-56. It is not enough that the jury might disbelieve the evidence presented. *Id*. Instead the affirmative evidence must

support the inference that only the lesser offense was committed. *Id*.

Before trial even began, the State asked the court to instruct the jury that it could consider felony fourth degree assault as a lesser offense of second degree assault. 9/29/21RP 46-47. Mr. Johnson objected noting the State could not satisfy the factual prong of the lesser offense inquiry. *Id*. at 254. Without having heard any trial evidence, the court granted the State's request. 12/7/21RP 256, 264-69.

a. The decision to instruct on a lesser included offense cannot be made before trial begins.

Before a court may instruct on a lesser included offense it must find the evidence at trial, viewed in the light most favorable to the requesting party supports the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. Because it requires examination of the trial evidence, that decision necessarily cannot occur prior to trial. The published here concludes otherwise.

The opinion suggests that although the court announced the decision prior to trial, the court did not in fact make its final decision until after the evidence was in. Opinion at 12. That conclusion is not supported by the facts of the case and endorses circular logic. But for the erroneous pretrial ruling determining the court would instruct on the lesser included, that evidence of Mr. Johnson's prior conviction could not have been admitted because it was not relevant to any charge. Once the court determined to instruct on the lesser, the prior conviction could be offered to prove an element of that offense. But had the court properly waited until the close of evidence to determine whether to give the instruction there would have been no evidence to support the prior conviction prong of fourth degree assault. As such the factual prong could not have been met and the court would have been unable to instruct on the lesser offense.

In short the pre-trial decision to give the instruction opened the door to the admission of the evidence which was the necessary foundation to give the instruction in the first place.

That is inconsistent with established case law.

b. A court may only instruct on lesser offense if the supports the instruction.

Viewing the evidence in the light most favorable to the State, as *Fernandez-Medina* requires, the evidence does not support the instruction. But the opinion here rejects that requirement, concluding it is enough that any evidence support the lesser instruction. Opinion at 10. That is not what *Fernandez-Medina* requires. 141 Wn.2d at 456. In the light most favorable to the state there is no evidence of an assault which did not result in substantial injury. The analysis must view evidence in the light most favorable to the party requesting the instruction,

Where the State is the party requesting the lesser instruction is the State, viewing the evidence in the light most

favorable to the State mirrors the appellate standard for finding sufficient evidence to sustain a conviction *Compare United States v. Jackson*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) **(**inquiry on review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Thus, if the evidence is sufficient to sustain the conviction of the greater offense on appeal, the evidence could not support the lesser. Here the evidence is sufficient to sustain the first degree assault conviction and thus could not have supported an instruction on the lesser. Proper application of this standard should provide few if any instances in which the prosecutor is entitled to lesser instruction.

The only way a juror could have concluded Mr. Johnson assaulted Ms. Trichler but did not inflict substantial injury, was by not believing the State's evidence. Disbelief of the evidence does not permit the instruction. *Fernandez-Medina*, 141 Wn.2d

at 456. An instruction on the uncharged offense was not supported by affirmative evidence and thus was not permissible.

The court's decisions to instruct on an uncharged offense opened the door for the prosecutor to admit prejudicial and otherwise irrelevant evidence. The published opinion endorsing this improper practice is contrary to this Court's cases and presents a significant public issue. Review is proper under RAP 13.4.

F. Conclusion

Mr. Johnson's conviction rests upon the unfair prejudice of the erroneous admission of evidence of other acts. He is entitled to a new and fair trial.

In addition, his sentence exceeds the limits imposed by the SRA and also rests on an unconstitutional judicial fact finding. Regardless of whether he has a new trial, he must be resentenced.

This petition complies with RAP 18.17 and contains 4896 words

Submitted this 1st day of February, 2024.

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FILED
1/2/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRENNARIS MARQUIS JOHNSON, Appellant.	No. 83738-9-I DIVISION ONE PUBLISHED OPINION

SMITH, C.J. — Brennaris Marquis Johnson appeals a jury verdict finding him guilty of second degree assault and felony violation of a no-contact order. On appeal, Johnson contends that the trial court erred by (1) instructing the jury that fourth degree felony assault was a lesser degree offense to second degree assault, (2) admitting evidence of prior assaults against the victim in this case, (3) imposing an exceptional sentence, (4) making an impermissible factual finding when it imposed an exceptional sentence, and (5) imposing a longer than statutorily permitted sentence on the no-contact order violation. Not finding his first four arguments persuasive, we affirm the convictions. However, we agree that Johnson's sentence for the violation of the no-contact order is longer than statutorily permissible and remand for the court to correct the sentence.

FACTS

Brennaris Marquis Johnson and Nicole Trichler began dating in early 2020. Following an incident in August 2020, Johnson was arrested and a

no-contact order protecting Trichler was entered. Despite the no-contact order, the parties stayed in contact.

In late January 2021, while the no-contact order was still in place, Trichler picked Johnson up from jail and the two spent a handful of days at Trichler's apartment. During this time, Johnson was "very argumentative" and accused Trichler of stealing his stimulus check[1] and cheating on him. When Trichler denied stealing the check, Johnson responded by hitting her under the jaw. Trichler asked Johnson why he had hit her, but Johnson just walked away before then turning around and punching Trichler repeatedly on her head, like he would hit a punching bag. Trichler again asked Johnson why he had hit her. In response, Johnson again struck Trichler on her temple. He then told Trichler that he could "do this and nobody would ever see a bruise." Trichler's head started to hurt and she asked Johnson if she could take some aspirin. Trichler testified at trial that at this point in time, she was trying not to get upset because she didn't want Johnson to accuse her of playing the victim. Trichler took four aspirin for the pain.

About 15 minutes later, Trichler described hearing a buzzing noise and feeling an intense pressure in her head. Trichler told Johnson to call 911 because she felt like she was "going to die."[2] By the time emergency personnel responded, Trichler was "crawling around" on her hands and knees. One of the

[1] During the COVID-19 pandemic, the federal government issued "Economic Impact Payments," commonly known as "stimulus checks" to eligible recipients as part of the pandemic relief.

[2] Johnson had taken Trichler's phones away from her at this point.

responding emergency medical technicians (EMTs) checked Trichler's vital signs, concluded she was not in danger of serious injury, and advised her to visit a walk-in clinic. Trichler did not report any assault to the EMTs or tell them that she and Johnson had been arguing.

Once the EMTs departed, Trichler's condition steadily deteriorated. She began to vomit and asked Johnson to call 911 again. When the EMTs returned, Johnson or Trichler[3] told them that Trichler had used methamphetamine and had been drinking rum that day. The EMTs changed their impression of the incident to one involving substance abuse, reasoning that Trichler's headache was from her drug and alcohol use. The EMTs then drove Trichler to the hospital.

At the hospital, Trichler told staff she had used methamphetamine and immediately developed a severe headache. She denied any assault or trauma. A CT[4] scan revealed Trichler had a subdural hematoma, a type of inner brain bleed. Trichler was transferred to the trauma and acute care surgery team for brain surgery to remove the hematoma. After the surgery, Trichler spent several days recovering in the hospital.

Trichler initially blamed the aspirin for her condition. But after talking with her mother, Trichler realized the severity of her injuries and decided to report the assault to police. Johnson was subsequently charged with second degree assault and felony violation of a no-contact order.

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[3] Trichler testified that Johnson relayed this information to the EMTs but EMT Galen Wallace testified that Trichler told him herself.

[4] Computerized tomography.

Before trial, during motions in limine, the State moved to admit evidence of Johnson's prior assaults against Trichler. The State argued that Trichler's credibility would be a primary issue because of her delay in reporting and general denial of the assault. After hearing pretrial testimony from Trichler, the court granted the State's motion, subject to a limiting instruction. The State also requested that the jury be instructed on fourth degree felony assault as a lesser degree offense of second degree assault. Johnson objected. The court noted that the jury could conclude Trichler's injuries were caused by something other than the assault, such as a fall, and preliminarily granted the State's request.

The jury found Johnson guilty as charged, and the trial court sentenced him to a total of 168 months of confinement and 30 months of community custody. Johnson appeals.

ANALYSIS

Lesser Degree Offense

Johnson contends that the court violated his due process rights by instructing the jury on fourth degree felony assault as a lesser degree offense of second degree assault, denying that it is a lesser degree offense. He maintains that even if fourth degree felony assault is a lesser degree offense, the evidence did not support such an instruction. He also argues that, although the jury did not convict him of fourth degree felony assault, he suffered substantial prejudice because the State introduced evidence to support that instruction. We conclude that the instruction was not given in error.

Criminal defendants are generally entitled to notice of the charges they are to meet at trial and may be convicted only of the crimes charged in the information. State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). But when a defendant is charged with an offense consisting of different degrees, the jury may find the defendant guilty of a lesser degree[5] of the charged offense. RCW 10.61.003. A trial court may instruct the jury on a lesser degree offense when

> "(1) the statutes for both the charged offense and the proposed [lesser] degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is a [lesser] degree of the charged offense; and (3) there is evidence that the defendant committed only the [lesser] offense."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

"The standard of review applied to a trial court's decision to give a jury instruction depends on whether that decision was based on an issue of law or fact." State v. Loos, 14 Wn. App. 2d 748, 760, 473 P.3d 1229 (2020). The first two prongs of the Fernandez-Medina test are legal questions, which we review de novo. Loos, 14 Wn. App. 2d at 760. The third prong presents a question of

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[5] A lesser degree offense is a close cousin of a lesser included offense. A lesser included offense instruction is warranted where (1) each of the elements of the lesser offense are a necessary element of the offense charged and (2) the evidence in the case supports an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong of the Workman test is not implicated in a lesser degree analysis. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

fact that we review for an abuse of discretion. Loos, 14 Wn. App. 2d at 760. Only the first and third prongs are at issue here.[6]

1. Offense Proscribed

To determine whether criminal statutes " 'proscribe but one offense,' " Washington courts look to whether the statutes criminalize the same or different conduct. Tamalini, 134 Wn.2d at 732-33 (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). For example, in Tamalini, our Supreme Court concluded that first and second degree manslaughter were not lesser degree offenses of second degree felony murder because "the manslaughter statutes and the felony murder statutes proscribe significantly different conduct and thus define separate and distinct crimes." 134 Wn.2d at 732. The court examined the statutory elements of manslaughter and felony murder and reasoned that, although both statutes generally proscribe killing another human, they are "directed to significantly differing conduct of defendants." Tamalini, 134 Wn.2d at 733. Similarly, in State v. McJimpson, this court concluded that second degree felony murder and second degree manslaughter were not the same offense because "they prohibit significantly different conduct with regard to such killing" and the statutes involve different mens rea requirements. 79 Wn. App. 164, 171-72, 901 P.2d 354 (1995).

[6] Johnson does not appear to contest the second element of the Fernandez-Medina test, that the information charges an offense divided into degrees.

Here, Johnson was charged under RCW 9A.36.021(1), which provides:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

The jury instructions reflect this iteration of second degree assault.

Under RCW 9A.36.041(1), a person is guilty of fourth degree assault "if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."

Fourth degree assault is a class C felony if the defendant, within the preceding decade, has been convicted of two or more of the following offenses, for which domestic violence against an intimate partner was proved:

> (i) Repetitive domestic violence offense as defined in RCW 9.94A.030;
>
> (ii) Crime of harassment as defined by RCW 9A.46.060;
>
> (iii) Assault in the third degree;
>
> (iv) Assault in the second degree;
>
> (v) Assault in the first degree; or
>
> (vi) A municipal, tribal, federal, or out-of-state offense comparable to any offense under (b)(i) through (v) of this subsection.

RCW 9A.36.041(3)(b). Similarly, the jury instructions reflect this type of fourth degree felony assault.

Assault is undefined in our criminal code, and courts apply the common law definition. State v. Walden, 67 Wn. App. 891, 894, 841 P.2d 81 (1992). Here, the jury was instructed that an "assault" is "an intentional touching or striking of another person that is harmful or offensive regardless of whether any

physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive."

Comparing the conduct covered by each criminal statute, it is apparent that RCW 9A.36.021(1)(a) and RCW 9A.36.041(1) and (3) proscribe the same conduct. Both statutes proscribe acting with intent to achieve the same result: causing harmful contact to another. That the two crimes require the same mens rea is particularly relevant, since case law has often distinguished offenses because they require different mens rea. See Loos, 14 Wn. App. 2d at 762-73 (holding fourth degree intentional assault is not a lesser degree offense to third degree assault of a child when the latter was based on criminal negligence). We conclude that fourth degree felony assault is a lesser degree offense to second degree assault.

Still, Johnson attempts to distinguish the two offenses by arguing fourth degree felony assault is not the same offense because it "requires proof of an additional fact not required for second degree assault," that being proof of prior convictions. We disagree. Only in the context of lesser *included* offenses must the lesser offense contain all the elements of the greater offense. State v. Coryell, 197 Wn.2d 397, 411-12, 483 P.3d 98 (2021). Lesser degree offenses can have an element that is not an element of the greater offense. Coryell, 197 Wn.2d at 411.

2. Evidence of Lesser Offense

The third Fernandez-Medina prong is satisfied "only if based on some evidence admitted, the jury could reject the greater charge and return a guilty

verdict on the lesser." Coryell, 197 Wn.2d at 407. But it is not enough that the jury might simply disbelieve the State's evidence; some evidence presented must affirmatively establish the defendant's theory on the lesser degree offense. Fernandez-Medina, 141 Wn.2d at 456. When determining on appeal whether the evidence at trial was sufficient to support a lesser degree instruction, we "view[] the 'supporting evidence in the light most favorable to the party that requested the instruction.' " Coryell, 197 Wn.2d at 415 (quoting Fernandez-Medina, 141 Wn.2d at 455-56). Specifically, "a requested jury instruction on a lesser included or inferior degree offense should be administered 'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.' " Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Here, the evidence could have supported that Johnson assaulted Trichler but did not cause her substantial bodily harm. At trial, Detective Maiya Atkins testified that during a police interview, Johnson told the detective that he called 911 because Trichler had "been falling all over the place." Detective Atkins also relayed that Johnson mentioned Trichler had "been using methamphetamine and thought that might have been an issue [that caused her to fall]" and that Trichler's "use of aspirin . . . might have been a reason why" Trichler had fallen. Dr. Eric Kinder also testified that he believed Trichler's symptoms might have been caused by her methamphetamine use, which could have raised her blood pressure enough to trigger "a very rare kind of aneurysmal hemorrhage." Dr. Amy Walker's testimony further supported this view; she noted that Trichler

reported the headache's onset as coming immediately after using methamphetamine. And an emergency medical services (EMS) responder, Galen Wallace, testified that he changed his impression of Trichler at the second EMS visit to substance use because Trichler admitted to "using methamphetamine and to drinking rum that day."

This evidence affirmatively supported an inference that Johnson assaulted Trichler. But the conflicting testimony about the origin of Trichler's symptoms left it for the jury to determine whether it was Johnson's assault or, instead, Trichler's drug use, drinking rum, and falling that caused her subsequent brain injury. Viewing the evidence in the light most favorable to the State, the party requesting the lesser degree instruction, the evidence could have allowed the jury to reject the greater charge and return a verdict only on the lesser.

We briefly note that Johnson misconstrues the "light most favorable" standard. He contends that viewing the evidence in the light most favorable to the State, the jury would conclude that Johnson assaulted Trichler and that this assault was the sole cause of Trichler's injuries. In support of this conclusion, Johnson points to Trichler's testimony that Johnson punched her, her testimony that she did not fall, and medical testimony that head trauma likely caused Trichler's injuries. But because fourth degree felony assault does not require Johnson to have caused Trichler substantial injury, the proper inquiry is whether the evidence could support an inference that something other than Johnson caused Trichler's injuries. In this case, it can. As already noted, there were

many possible causes of Trichler's injuries that the jury could have believed as being the proximate cause of her injuries.

Johnson also contends that the court erred by granting the State's request for the lesser degree offense before hearing any evidence. This is inaccurate. During motions in limine, the State requested that the jury be instructed on fourth degree felony assault as a lesser degree offense of second degree assault. The parties then discussed what evidence they intended to proffer and whether that evidence could support the lesser degree offense. Johnson argued that the prior conviction evidence necessary to support the lesser degree offense violated ER 404(b) and that the court should first consider pretrial testimony from Trichler before making a ruling. The court then overruled the State's motion, finding that probative value of the prior offense evidence did not outweigh its prejudicial effect. The court noted that it was open to reconsidering its ruling.

The next day, the court heard pretrial testimony from Trichler. The court then acknowledged that it had erred in overruling the State's request for a lesser degree instruction because it had misunderstood the applicable law and asked both parties to reargue their positions. After the parties presented their positions, the court concluded that based on the facts presented, there was sufficient evidence for the lesser degree instruction and granted the State's request.

Later on, at the close of evidence, Johnson again objected to fourth degree felony assault as a lesser degree offense. The court overruled the objection and allowed the instruction.

Contrary to Johnson's contention, the court heard evidence before initially ruling on the jury instruction. The State also described the evidence it intended to offer to support the lesser degree instruction before the court made its ruling. The court then reconsidered its ruling at the close of trial and reaffirmed that the instruction was proper. The court properly determined on both occasions that an instruction on fourth degree felony assault was warranted. Such an instruction was not error.

3. Substantial Prejudice

Johnson maintains that the court's instruction on fourth degree felony assault resulted in substantial prejudice because (1) the jury was instructed on an uncharged offense and (2) this instruction permitted admittance of prejudicial evidence. We disagree.

Generally, a defendant is entitled to notice of the charges they will face at trial and may be convicted of only charges contained in the information. Tamalini, 134 Wn.2d at 731. But RCW 10.61.003 provides sufficient notice to defendants that they may be convicted of any lesser offense to the charged crime. Foster, 91 Wn.2d at 472. Thus, there is no prejudice and a jury may properly find a defendant guilty of any lesser degree crime of the crimes included in the original information. Peterson, 133 Wn.2d at 893.

In this case, the jury was instructed on a lesser degree offense to second degree assault, so the fact that the lesser offense was not charged is a nonissue. Johnson's argument that evidence related to the lesser degree offense was wrongly admitted is also unconvincing. That evidence—namely, that there were

two prior assaults—was subject to a limiting instruction: the jury was not permitted to consider evidence of Johnson's prior convictions if it found him guilty of second degree assault. The jury found him guilty of second degree assault, and we presume the jury followed instructions and did not consider the prior convictions as evidence. State v. Mohamed, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016) ("We presume that a jury will follow the instructions provided to it.").

ER 404(b)

Johnson asserts that evidence of prior assaults between him and Trichler was not relevant to Trichler's credibility and that the court erred by admitting it. Because this evidence helped explain Trichler's inconsistent statements and her conduct following the assault at issue here, we disagree.

We review the trial court's determination to admit or exclude evidence for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The appellant bears the burden of proving the court abused its discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But this evidence may be used for another purpose, such as proof of motive, plan, or identity. Foxhoven, 161 Wn.2d at 175. Evidence that a defendant previously assaulted a victim is generally inadmissible if the

defendant assaults the same victim on a later occasion. State v. Harris, 20 Wn. App. 2d 153, 157, 498 P.3d 1002 (2021), review denied, 199 Wn.2d 1016, 510 P.3d 1001 (2022). However, such evidence may be admissible to "assist the jury in judging the credibility of a recanting victim." State v. Magers, 164 Wn.2d 174, 1886, 189 P.3d 126 (2008) (plurality opinion). And the victim's credibility need not be an element of the charged offense. See, e.g., Harris, 20 Wn. App. 2d at 158 (evidence of prior assaults admissible to help jury determine recanting witness's credibility in case involving violation of a no-contact order charge). To determine if ER 404(b) evidence is admissible, Washington courts use a four-part test:

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "The party seeking to introduce the evidence has the burden of establishing the first, second, and third elements." State v. Ashley, 186 Wn.2d 32, 39, 375 P.3d 673 (2016). "This analysis must be conducted on the record." Foxhoven, 161 Wn.2d at 175. If the evidence is admitted, the court must give a limiting instruction to the jury. Ashley, 186 Wn.2d at 39. A court's decision to admit evidence of prior bad acts depends heavily on the facts of the case and the purpose for which the evidence is sought to be introduced. Ashley, 186 Wn.2d at 44.

In this case, the trial court conducted the appropriate four-step analysis on the record and gave a limiting instruction to the jury. However, neither party cites or addresses this four-part test on appeal. The State relies on an older, two-part test that concerns only relevance and prejudice, and Johnson argues generally that any evidence of past incidents of domestic violence is categorically impermissible, irrelevant, and unduly prejudicial. Johnson's argument largely tracks the second, third, and fourth prongs of the four-part test. Because neither party challenges or addresses the first prong, we address only the other three.

1. Second Prong: Purpose for Introducing Evidence

The State sought to introduce evidence of past domestic violence incidents and how Trichler responded to those incidents to help the jury assess Trichler's credibility. This clearly satisfies the second prong of the ER 404(b) inquiry, which only requires a party to identify a purpose for offering the evidence. See, e.g., Magers, 164 Wn.2d at 185-86 (prior acts of domestic violence admissible to support a witness's credibility after their testimony changed).

2. Third Prong: Relevance

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Evidence of prior incidents of domestic violence is probative of a witness's credibility in cases where a witness gives conflicting statements about the defendant's conduct. State v. Gunderson, 181 Wn.2d 916, 923-25, 337 P.3d 1090 (2014); cf. Ashley,

186 Wn.2d at 47 (trial court improperly admitted prior assault evidence where victim's trial testimony was consistent with prior statements to police).

Here, the trial court found that, "with regard to [Trichler's] credibility and her allegation in this case," evidence of prior domestic abuse was "relevant as to how she behaves in this relationship." The State contends that evidence of prior assaults and Trichler's response to those assaults were relevant to explain her inconsistent statements and conduct. We agree.

Johnson contends that the prior assaults are not relevant because they show only that "sometimes [Trichler] reports alleged assaults and sometimes she does not." But Trichler's inconsistent reporting is exactly what is relevant. As is reflected in this case, victims of domestic violence often minimize, deny, or lie about abuse in an effort to protect themselves and avoid repeated violence from their batterer. Anne L. Ganley, Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases, in DOMESTIC VIOLENCE MANUAL FOR JUDGES ch. 2, at 41 (2016), https://www.courts.wa.gov/content/manuals/domViol/chapter2.pdf [https://perma.cc/UA2L-STVU]. This is particularly true when domestic violence issues go public, such as in court proceedings, and batterers try to increase their coercive control over the abused party. Ganley, supra, ch. 2 at 41. And sometimes, the abused party's minimization or denial is actually a survival mechanism: when asked by others if they were injured, they may honestly answer no because they have been so successful in blocking out the event. Ganley, supra, ch. 2, at 42. This is not to say that victims of domestic violence are less credible. We merely acknowledge

the tremendous emotional toll that a relationship plagued by domestic violence may have on a person.

These dynamics are present in this case. The State offered evidence of two prior assaults to demonstrate that Trichler had a pattern of inconsistently reporting past abuse and later recanting. After the first prior assault, Trichler decided not to report it to authorities, despite Johnson having strangled her until she was "out cold." And after the second prior assault, Trichler reported the incident to police but "ran off" before they arrived. She later wrote a letter to the trial court recanting her earlier report of assault.

Trichler's conduct in this case mirrors her past conduct. After the present assault, Trichler denied repeatedly to emergency medical personnel and hospital staff that she had been assaulted or suffered any trauma. But at trial, Trichler testified repeatedly that Johnson had hit her. Trichler also waited several days to report the assault, and testified that she did not initiate the reporting—her mother called the police for her. Moreover, once Trichler was discharged from the hospital, she continued to communicate with Johnson and even went to his apartment. Trichler's inconsistent statements before and at trial, along with her actions after the assault, undercut her credibility at trial. Contrary to Johnson's assertion that evidence of past abuse "does nothing" to assist the jury, this evidence allows the jury to evaluate Trichler's credibility in the context of a relationship marked by domestic violence.

Johnson also argues that our Supreme Court announced a domestic violence exception to ER 404(b) in Magers that was later rejected in Gunderson.

We disagree. Magers did not announce a "domestic violence exception" and Gunderson did not reject the Magers plurality holding. Rather, Gunderson clarified the Magers plurality holding. The Gunderson court explained:

> In State v. Magers, we took great care to specifically establish that "evidence that [the defendant] had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of [the complaining witness] *who gave conflicting statements about* [*the defendant's*] *conduct*."

181 Wn.2d at 923-24 (alterations in original) (quoting Magers, 164 Wn.2d at 186). The court noted that unlike in Magers, the victim in Gunderson did not give any conflicting statements—there was only evidence from other sources that contradicted the victim's account. 181 Wn.2d at 924. The court then explained the effect of Gunderson on Magers: "Accordingly, we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements." Gunderson, 181 Wn.2d at 925. And in a footnote, the court clarified that it was not announcing a domestic violence exception and rejected Johnson's assertion that Magers stood for such a proposition: "The blanket extension of Magers proposed by the dissent would create a domestic violence exception for prior bad acts that is untethered to the rules of evidence." Gunderson, 181 Wn.2d at 925 n.3. In another footnote, the court clarified that its opinion "should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness." Gunderson, 181 Wn.2d at 925 n.4.

Here, there was evidence of injuries to Trichler and Trichler also contradicted her previous statements at trial. The rule set forth in Magers and Gunderson applies here; evidence of prior assaults was properly admitted for the jury to judge Trichler's credibility in light of her inconsistent statements about the assault.

3. Fourth Prong: Probative Value versus Prejudicial Effect

Finally, Johnson argues that the probative value of the prior assault testimony is outweighed by its prejudicial effects. He also contends the jury relied on Trichler's testimony as propensity evidence.

This prong implicates ER 403. Ashley, 186 Wn.2d at 43. In domestic violence cases, "courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts . . . because the risk of unfair prejudice is very high." Gunderson, 181 Wn.2d at 925. "To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events." Gunderson, 181 Wn.2d at 925.

Here, the State succeeded in showing the overriding probative value of the evidence for credibility purposes because Trichler gave inconsistent statements about the abuse. She denied any abuse to various medical personnel but then later testified at trial that Johnson had assaulted her. Therefore, the court did not err in admitting the domestic violence evidence for credibility purposes. Cf. Gunderson, 181 Wn.2d at 925 (court erred in admitting

past domestic violence evidence where victim's testimony before and at trial was consistent); Ashley, 186 Wn.2d at 47 (court erred in admitting domestic violence evidence where trial testimony was consistent with prior statements to police).

Johnson's contention that the jury improperly relied on the evidence as propensity evidence is similarly unavailing. Johnson overlooks a limiting instruction that prohibited the jury from considering Trichler's testimony for anything other than determining her credibility. Again, we presume juries follow instructions. Mohamed, 186 Wn.2d at 244.

Exceptional Sentence

Johnson contends that the court relied on an invalid factor in imposing an exceptional sentence and that it is unclear whether the court would have imposed the same sentence based on the remaining valid factors, requiring reversal. The State concedes that the court relied on an invalid factor, but asserts that the record makes clear that the court considered two other factors as independent bases for an exceptional sentence. We conclude the sentence is valid because, based on the court's written findings, at least one other valid factor provided an independent basis for the exceptional sentence.

A trial court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Whenever the court imposes an exceptional sentence, it must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. However, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis omitted). Thus, any exceptional sentence that exceeds the statutory maximum is subject to the two Blakely requirements.

On appeal, an exceptional sentence may be upheld "even where all but one of the trial court's reasons for the sentence have been overturned." State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Remand is necessary "where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld." Gaines, 122 Wn.2d at 512; see also State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Here, the court imposed an exceptional sentence based on three factors: (1) that Johnson reoffended shortly after being released from incarceration (the "rapid recidivism" aggravator); (2) that Johnson's prior unscored criminal history resulted in a sentence that was clearly too lenient; and (3) that Johnson had committed multiple current offenses and his high offender score resulted in some of the current offenses going unpunished.[7] RCW 9.94A.535(3)(t), (2)(b), (c). Of

[7] Though the State argues that the court did not conclude the sentence was "too lenient," the court's written conclusions of law say otherwise: "This court has discretion under RCW 9.94A.535(2)(b) & (c) to impose a sentence outside the standard range where the prior unscored criminal history results in a sentence that is clearly *too lenient*." (Emphasis added.)

the three factors, the first and the second require either a jury finding or a stipulation from the defendant. See RCW 9.94A.535(3)(t) (rapid recidivism factor must be considered by jury); State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007) (RCW 9.94A.535(2)(b) subject to Blakely requirements); cf. State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529 (2008) (RCW 9.94A.535(2)(c) does not require courts to look beyond facts reflected in jury verdict or admitted by defendant).

Johnson asserts, and the State concedes, that the second factor—whether unscored crimes rendered the sentence "too lenient"—is invalid because the jury did not consider it and Johnson did not stipulate to facts supporting it.[8] Thus, the crux of the matter is whether, absent the invalid factor, the court clearly intended to impose an exceptional sentence. The record indicates that it would have. The court's conclusions of law for an exceptional sentence list the first factor separately from the other two:

> 1. The court has discretion under RCW 9.94A.535 to impose a sentence outside the standard range because the aggravating circumstance under *RCW 9.94A.535(3)(t)* has been pled and proved.

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[8] Johnson also contends that the court did not make a finding that the presumptive sentence would be too lenient. Rather, he claims the court impermissibly invented a new aggravating factor based on the following finding:

> There are three prior unscored misdemeanor domestic violence court order violation convictions from 2011. These convictions are similar in character to the conduct alleged in count two, but do not alter the standard range for either count.

Though the court did not use the words "too lenient" in this finding, it did use those words in its corresponding conclusion of law. And contrary to Johnson's assertion, it appears the court was describing the "too lenient" factor, not creating a new factor.

> 2. The court has discretion under *RCW 9.94A.535(2)(b)&(c)* to impose a sentence outside the standard range where the prior unscored criminal history results in a sentence that is *clearly too lenient* and where the defendant has committed multiple current offenses and the high offender score results in *some offenses going unpunished*.

(Emphasis added.) The second conclusion of law does, admittedly, blur the lines between the second and third factors. But even absent these factors, the court's first conclusion of law, determining that RCW 9.94A.535(3)(t) provides an independent basis to impose an exceptional sentence, and its division into a separate conclusion supports that the trial court would have relied on it alone.

The court's oral ruling at sentencing also supports this outcome. The court delineated factors one and three as bases for an exceptional sentence:

> The State has requested for an exceptional upward [sentence] based on, *A*, rapid recidivism, and *B*, the three crimes argument that the offender score is so high that the maximum doesn't go up that high, and that he would be allowed basically to get away with a crime without some sort of punishment. Having taken all of this into consideration, I do find that there is grounds for an exceptional upward sentence.

(Emphasis added.) We affirm the imposition of an exceptional sentence.[9]

Constitutionality of Exceptional Sentences

Johnson argues that the imposition of *any* exceptional sentence under the SRA (Sentencing Reform Act of 1981, ch. 9.94A RCW) violates the Sixth and Fourteenth Amendments to the United States Constitution because it requires the court to make a factual determination that facts found by the jury are

[9] Johnson also contends that the State failed to provide him notice of the "too lenient" aggravating factor. But as the court's oral ruling makes clear, the State did not ask for this aggravating factor to be imposed—the court did it sua sponte.

substantial and compelling reasons justifying an exceptional sentence. We disagree. This court previously addressed this same issue in State v. Sage, 1 Wn. App. 2d 685, 407 P.3d 359 (2017), and determined that this secondary inquiry is a legal one, not a factual one.

The Sixth Amendment provides criminal defendants with a right to a jury trial. This right, in conjunction with the due process clause of the Fourteenth Amendment, requires that each element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (plurality opinion). As previously noted, "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to the jury." Hurst v. Florida, 577 U.S. 92, 97, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (alteration in original) (quoting Apprendi, 530 U.S. at 494).

The imposition of an exceptional sentence under the SRA is a two-step process prescribed by statute. First, the jury must find "unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence" exist. RCW 9.94A.537(6). Then, the court may impose an exceptional sentence "if it *finds*, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6) (emphasis added).

This court previously addressed the constitutionality of the SRA's exceptional sentencing scheme in the context of the Sixth and Fourteenth

Amendments and concluded that it met due process requirements. Sage, 1 Wn. App. 2d at 710.

Like Johnson, the defendant in Sage argued that the trial court engaged in prohibited fact-finding, in violation of his Sixth Amendment right to a jury trial, by concluding an exceptional sentence was warranted. This court disagreed, concluding that, despite the statute's imprecise word choice,

> [t]he only permissible "finding of fact" by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has been prove[d] beyond a reasonable doubt. Then it is up to the judge to make *the legal, not factual, determination* whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

1 Wn. App. 2d at 709 (emphasis added) (footnote omitted).

Johnson's argument that the SRA is akin to the Florida sentencing scheme deemed unconstitutional by the Supreme Court in Hurst is also rejected in Sage:

> But the Florida statute at issue expressly state[d] that the jury findings were "advisory." [Former] FLA. STAT. § 921.141 (2010). By contrast, under Washington procedure here, the jury exclusively resolves the factual question whether the aggravating circumstances have been prove[d] beyond a reasonable doubt.

1 Wn. App. 2d at 710 n.86.

We reject Johnson's constitutional argument and conclude that the court did not engage in impermissible fact finding by determining the jury's findings supported an exceptional sentence.

No-Contact Order Sentence

Johnson argues the court erred by sentencing him to more time than statutorily permitted on the no-contact order violation. The State concedes that the court erred. We agree that the court erred and remand for the court to correct the sentence.

RCW 9.94A.505(5) provides that, except in limited circumstances, the court may not impose a sentence that exceeds the statutory maximum for a given crime. Here, the statutory maximum on Johnson's no-contact order violation was 60 months. RCW 7.105.450(5) (no-contact order violation is a class C felony); RCW 9A.20.021(1)(c) (statutory maximum for class C felony is 5 years). Despite this, the court sentenced Johnson to 60 months of confinement and 12 months of community custody. This sentence clearly exceeds the statutory maximum and remand is warranted.

We affirm Johnson's convictions but remand for the court to resentence Johnson on the no-contact order violation conviction.

Smith, C.J.

WE CONCUR:

Birk, J.

Chung, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83738-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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