70807-4

70807-4

NO. 70807-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES WILLIAM SCHUMACHER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant, James Schumacher, murdered his wife of 46 years, Jean Schumacher, by striking her in the head multiple times with a hatchet as she slept in her bed.[1] He was convicted of second-degree murder with a deadly weapon enhancement. The jury also found the sentencing aggravator that the murder was a domestic violence offense that was part of an ongoing pattern of psychological and physical abuse manifested by multiple incidents over a prolonged period of time.

1. In spousal murder cases, evidence of previous disputes is generally admissible under ER 404(b) to show premeditation, intent, motive, res gestae, and the nature of the relationship between the parties. Did the trial court properly exercise its discretion in admitting the defendant's prior abuse of his wife?

2. Did the trial court properly exercise its discretion in admitting statements by Jean Schumacher, made to her daughter, Susan Schumacher, that she feared the defendant?

3. Did the trial court properly exercise its discretion in admitting evidence of the defendant's prior abuse of his wife as told to a medical provider who was treating Jean after the defendant had assaulted her?

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[1] Because of the shared last name, James Schumacher will be referred to as the defendant. His wife will be referred to as Jean. His son will be referred to as Jim. His daughter will be referred to as Susan.

4. Has the defendant shown that State v. Baldwin,[2] the Supreme Court case holding that a vagueness challenge cannot be raised as to sentencing aggravators, is "incorrect and harmful," as required in order to overturn binding precedent?

5. Has the defendant shown that sentencing aggravator, RCW 9.94A.535(3)(h)(i), is unconstitutionally vague?

6. Has the defendant shown that no reasonable jury could have found evidence sufficient to support the sentencing aggravator?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with first-degree murder with a deadly weapon sentencing enhancement and the sentencing aggravator that the crime was a domestic violence offense that was part of an ongoing pattern of psychological, physical or sexual abuse of the victim. CP 1-2. A jury found the defendant guilty of the lesser-included offense of second-degree murder with the sentencing enhancement and sentencing aggravator. CP 73-76. Based on the jury's finding of the sentencing aggravator, the court imposed an exceptional sentence of 300 months, 56 months above the standard range of 147 to 244 months. CP 105-07, 118-19.

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

2. SUBSTANTIVE FACTS

On March 23, 2012, the defendant walked into the Bellevue Police Headquarters and confessed to murdering his wife of 46 years, Jean Schumacher. 6RP[3] 18, 34. He told the first officer he met that he and his wife had been arguing for 15 plus years and that a few days earlier he and his wife had been in an argument when his wife approached him with a hammer and threatened to divorce him. 6RP 35-36. She never struck him with the hammer; instead, the defendant said, she put the hammer away and said she was going to bed and did not wish to be bothered. 6RP 36. She then went to her bedroom and locked the door. 6RP 36.

The defendant told the officer that he stayed up all night "seething." 6RP 37. In the morning, he got up, retrieved a hatchet from the garage, defeated the lock on Jean's bedroom door using a nail or pointed implement, and while she was still sleeping, he struck her in the face with the hatchet five or six times. 6RP 37-38.

The defendant said that after killing Jean he feared what was going to happen to him so he hid her body, initially covering her body with a sheet and then putting her body under the bed. 6RP 39. After putting the hatchet back in the garage, the defendant packed up some clothing and

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[3] The verbatim report of proceedings is cited as follows: 1RP–5/13/13, 2RP–5/14/13, 3RP–5/15/13, 4RP–5/16/13, 5RP–5/20/13, 6RP–5/21/13, 7RP–5/22/13, 8RP–5/23/13, 9RP–5/28/13, 10RP–5/29/13, 11RP–5/30/13, 12RP–6/4/13, 13RP–6/5/13, 14RP–6/7/13, 15RP–7/26/13, 16RP–8/19/13, and 17RP–8/30/13.

toiletries with the thought of fleeing. 6RP 41. He then took two trips to the bank, withdrawing between 5 and 6 thousand dollars, and took the family dog to an animal shelter and paid to have the dog boarded for an extended period. 6RP 42-43.

The defendant told the officer that instead of leaving town, he drove to Bellevue Square with the thought of killing himself by jumping from the parking garage. 6RP 43. He then decided to eat at McDonald's and then turn himself in to the police. 6RP 43-44. The officer asked the defendant if he felt okay, to which the defendant responded that he felt fine, that he felt that by confessing that "a weight had been lifted." 6RP 45-46. The defendant then gave a full videotaped confession, detailing how he murdered his wife, the fact that he did so because he was fed up with her constant nagging, and everything he did after he murdered her. See Exhibit 214.[4] He said that when he got up in the morning he said to himself "I just can't take it anymore." Exhibit 214 at 19. He went and got a hatchet, and when he broke into her bedroom and she had her eyes closed in her bed, he "picked the son of a bitch up [and] hit her five or six times...to make sure it was done, that she was dead." Exhibit 214 at 20, 22, 24.

[4] Exhibit 214 is a transcript of the defendant's confession contained on two discs, exhibits 232 and 233.

Police later confirmed all of the details provided by the defendant in his confession. In responding to the defendant's home, officers found the house locked, as well as the door to Jean's bedroom. 6RP 77-78. Jean's body was found hidden under her bed. 6RP 79. The bed itself was neatly made. 8RP 27. There were signs that someone had tried to clean up the blood on the walls. 8RP 28. A bottle of 409 cleaner was found next to the bed. 8RP 139; 9RP 21. A bag with bloody paper towels was found in the kitchen, along with a receipt for 409 cleaner and mothballs, dated after the murder. 8RP 103-05. A pair of bloody latex gloves was found in the garbage. 8RP 140. A plastic bag containing bloody sheets and linens were found in the closet. 8RP 145.

The hatchet the defendant used to murder Jean was found in the garage where the defendant said he put it. 8RP 47. The hatchet was stained with blood and hair. 8RP 98-100. Forensic scientist, using DNA testing, confirmed the presence of Jean's DNA in the blood on the hatchet, and the defendant's DNA on the handle. 11RP 46-48.

A number of boxes were found in the defendant's car that were full of his personal effects, including his clothing and toiletries. 8RP 120-22, 129-31. Receipts for bank withdrawals, dated after the murder, were also found, along with the defendant's passport. 8RP 123-25. Over $6000 was found on the defendant's person. 6RP 97.

Security videos showed the defendant at McDonald's and Starbucks at Bellevue Square just as the defendant had said. 6RP 100-02, 105-06. In addition, persons from the animal shelter testified that the defendant dropped off the family dog and paid in cash to have the animal boarded. 10RP 74-78, 85-87. Although he seemed "preoccupied," his demeanor was otherwise normal. 10RP 78.

Forensic anthropologist confirmed that Jean suffered at least five chopping wounds to the cranium, consistent with being hit with a hatchet. 11RP 20-24. The medical examiner testified that Jean's carotid artery was completely severed, her jugular vein partially cut, and the muscles attaching her head to her body partially severed. 11RP 121-22. There were no defensive wounds on her body. 11RP 119, 130, 143-44.

a. The Defense Case

Psychologist Doctor Craig Beaver testified for the defense. He opined that around the time of the murder, the defendant was suffering from the flu and had poorly managed diabetes, something that could cause cognitive difficulties in a person. 7RP 22, 24, 62. He also opined that he believed the defendant suffered from "mild" dementia, which can cause cognitive difficulties in a person. 7RP 24-25, 54, 111. As a result of the confluence of these things, Doctor Beaver opined that the defendant did not have the capacity to intend or premeditate murder. 7RP 26.

Interestingly, however, Doctor Beaver testified that it wasn't that the defendant was not aware of what he was doing, it was whether he had the inhibitory control to stop himself once he engaged in the act. 7RP 26. When asked about the fact that the defendant's acts of going to the garage, obtaining the hatchet and picking the lock on Jean's door would indicate intentional acts, Doctor Beaver testified that "I'm not saying that he didn't have some idea of what was going on, but the issue was was he thinking ahead of time. I don't see any indication that that was his intention." 7RP 77. His thought process was "clouded," and he had a decreased ability to control his actions and emotions, according to the doctor. 7RP 78. "Could he have some appreciation that hitting her with an axe, that could lead to her death? I would say probably so. But in terms of him reflecting on I intend to go in there and kill her, so I am going to kill her because she's being this way, no, I don't think so." 7RP 80.

On cross, Doctor Beaver admitted that the defendant had no mental health history, had always managed his diabetes with oral medications, and that mental health evaluations conducted by others since the murder had ruled out a diagnosis of dementia. 7RP 95, 102. He also confessed that the defendant had a high IQ, his working memory tested at greater than 97% of all people, with his perceptual reasoning at 77% and his processing speed at 87%. 7RP 109.

In addition, Doctor Beaver testified that his analysis partly depended on the things the defendant told him, but that the defendant's story changed over time, including a version wherein he told the State's mental health expert that his wife was awake and threatening him when he killed her and that he acted in self-defense. 7RP 145, 148-52. Finally, Doctor Beaver testified that the defendant possessed the ability to form premeditated intent all the way up to the point where he struck the first blow to his wife's head. 7RP 155-58. During the first blow, he was "angry," "frightened," and "I believe that his judgment and cognition is clouded and that it was within that context that he first started to swing at her." 7RP 156. After that first blow, his "awareness and understanding" returned, according to the doctor. 7RP 157.

b. The State's Expert

Psychologist Doctor Brian Judd testified for the State. First, Doctor Judd could not rule out the possibility that the defendant might be suffering from mild dementia as Doctor Beaver opined, but at the same time, he saw no evidence to suggest that he was suffering from mild dementia. 12RP 29-37. However, he did testify that even if the defendant had mild dementia, he would not have any, and did not demonstrate any, significant cognitive impairment. 12RP 35-37. This was also true,

Doctor Judd testified, for someone with poorly controlled diabetes. 12RP 38. Of particular import, Doctor Judd testified that it is not appropriate, nor is it possible, to look back at a single instant in time – the first blow – as Doctor Beaver did, and say what a person's capacity was. 12RP 40-41. Even so, Doctor Judd testified, the defendant was able to articulate what was happening when he struck the first blow, showing that he was actively aware of what he was doing. 12RP 43-44. In sum, Doctor Judd testified that in his professional opinion, there was no evidence that the defendant was incapable of forming premeditated intent on the day the defendant killed his wife. 12RP 175.

C. ARGUMENT

1. EVIDENCE OF MARITAL DISCORD AND PRIOR ABUSE BY THE DEFENDANT WAS PROPERLY ADMITTED

At trial, despite raising a mental defense wherein he claimed that the murder of his wife was an aberration caused by his mild dementia, poorly treated diabetes and the flu, the defendant claimed that any evidence of his prior abuse of Jean that occurred more than a few weeks before he killed her was too remote in time to be relevant to any issue at trial or his mental state at the time of the crime. The trial court disagreed (as did the defendant's own expert witness). The defendant assigns error to the trial court's ruling.

This claim is without merit. Following existing Supreme Court caselaw, the trial court did not abuse its discretion in finding that the prior acts of the defendant were admissible to show the nature of the defendant's relationship with his wife, motive, intent, premeditation, and to combat the defendant's diminished capacity claim.[5] In any event, any error in the trial court's ruling was harmless.

a. The Prior Bad Act Evidence

Prior to trial the court conducted an ER 404(b) hearing on the admissibility of evidence regarding the marital discord between Jean and the defendant, and his abuse of her over the years. See 2RP 113-50, 3RP 57-77; 4RP 62-67, 109-19. The court did not take testimony on the issue. Rather, the State relied on pretrial exhibit 20 as an offer of proof.[6] In short, the offer

[5] While the evidence was also relevant to prove that the defendant engaged in a pattern of abuse as per the charged sentencing aggravator, the State does not rely on this fact because, at trial, the State indicated that the sentencing aggravator would be determined in a bifurcated trial proceeding if the court ruled that the prior acts of abuse were not admissible in the State's case in chief on the underlying charge. 3RP 8-9; 4RP 119.

[6] In ruling on the admissibility of prior bad acts evidence under ER 404(b), a trial court may rely on the State's offer of proof to determine that the acts occurred. State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). Pretrial exhibit 20 contains statements by Officer Eric Lee, Officer Darin Karosich, and Overlake Hospital medical records -- all created after Jean was assaulted by the defendant on November 4, 2010; a statement by Susan Schumacher, dated November 18, 2010, that she wrote in support of a petition for a protection order requested by Jean; a transcript of the protection order hearing, dated November 22, 2010; a transcript of a taped conversation between Jean and the defendant, dated March 23, 2003; and transcripts of interviews of Jim and Susan Schumacher, dated November 5, 2012.

of proof showed that for over 40 years, the defendant had verbally and emotionally abused his wife, while committing a number of relatively minor assaults, the worst of which occurred on November 4, 2010, wherein Jean suffered hip and head pain after being pushed to the ground.[7]

The State argued that the evidence of prior abuse and marital discord was relevant to prove motive, intent, premeditation, and to counter the defendant's diminished capacity claim wherein he asserted that the murder was an aberration in his behavior caused by his mild dementia, poorly treated diabetes and the flu. 2RP 114-16. It was one thing, the State argued, for the jury to hear that "out of the blue," with no apparent motive, the defendant decided to kill his wife allegedly due to mental health issues, and quite another to hear that there had been 46 years of abuse and that the defendant had decided he had had enough of his wife's nagging behavior. 2RP 116, 132. The State noted that in his confession, the defendant himself claimed that his wife constantly nagged him, that the "bullshit [had] started again," and that's why he killed her. 2RP 118. The evidence, the State

[7] The State did not seek to admit all of the abuse outlined in pretrial exhibit 20. For example, the State did not seek to introduce evidence that the defendant had physically abused Susan and Jim. Further, admission of ER 404(b) evidence is still subject to the other evidence rules, such as the general rule that bars hearsay evidence. See State v. Powell, 126 Wn.2d 244, 265, 893 P.2d 615 (1995). The State did not seek to admit evidence that did not fit within an exception to the hearsay rules.

argued, also went directly to determining the defendant's state of mind – the only real issue in the case.[8] 2RP 117.

The defense agreed that abuse that occurred within a "few days or weeks" of the murder was relevant and admissible. 2RP 122, 127. "The month of March is relevant but nothing else," defense counsel told the court. 2RP 123. The defense claimed that evidence of abuse occurring prior to this small window of time was simply too remote and therefore the evidence was not relevant to any issue in the case. 2RP 125.[9]

The court stated that if jurors did not hear about the rocky nature of the relationship between the defendant and his wife, all they would hear was that the defendant was mentally ill and that after 46 years of marriage, with no evidence of marital discord, he suddenly bludgeoned his wife to death. 2RP 134; 3RP 64. The court ruled that the evidence of prior abuse was relevant to show that the defendant possessed a motive to kill his wife, that he could form the requisite *mens rea* for the charged crime, and to rebut the

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[8] In his opening statement, defense counsel told the jury, "On March 21, 2012, James Schumacher killed his wife just like the State said he did." 5RP 162. "In the end, the question is not what happened, we are not disputing that. The issue is not what happened, but why it happened. What was in his brain, what was in his mind, his irrational mind, when he walked into that room." 5RP 171.

[9] Defense counsel later expanded to six months the time period in which he agreed evidence of abuse was relevant. 3RP 69. This was due to the fact that the defendant had told the police that he stopped taking his diabetes medication and stopped going to the doctor six months prior to killing his wife. 3RP 69.

defendant's claim that the murder was an aberration caused by his alleged dementia. 2RP 134, 142-50; 3RP 64.

b. The Trial Court Did Not Abuse Its Discretion In Admitting The 404(b) Evidence

ER 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

The list of purposes for admissibility under ER 404(b) is non-exhaustive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The rule contemplates that evidence of other misconduct will be admitted if (1) the evidence sought to be admitted is relevant and necessary to a material issue and (2) the probative value of the evidence outweighs its potential for prejudice. Powell, 126 Wn.2d at 258. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Powell, at 259.

The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion exists only when the reviewing court concludes that no reasonable person would have taken the position adopted by the trial court. Powell, at 258. Where reasonable persons could take differing views

regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A reviewing court may affirm a trial court's ruling on any theory supported by the record even if the trial court did not consider it. State v. Dorenbos, 113 Wn. App. 494, 499 n.10, 60 P.3d 1213 (2002) (citing Lamon v. Butler, 112 Wn.2d 193, 200-01, 777 P.2d 1027 (1989)), rev. denied, 149 Wn.2d 1006 (2003).

Courts have historically admitted evidence of prior misconduct in domestic relationship murder trials. In 1916, the Supreme Court declared "the rule is well settled that in cases of marital homicide the State has the right to prove ill treatment or quarrels with his wife on the trial of the husband for her murder."[10] State v. Spangler, 92 Wash. 636, 159 P. 810 (1916).

In 1995, the Supreme Court reaffirmed this longstanding position in State v. Powell, supra. Powell's wife's body was found floating in Puget Sound. The cause of death was manual strangulation. At trial, witnesses were allowed to testify about six minor assaults committed by Powell against

[10] See also State v. Davis, 6 Wn.2d 696, 108 P.2d 641 (1940) (evidence of previous disputes between the accused and the deceased is generally admissible. Such evidence tends to show the relationship of the parties and their feelings towards each other, and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice and premeditation); State v. Americk, 42 Wn.2d 504, 256 P.2d 278 (1953) (in prosecution for placing a bomb in his ex-wife's car, evidence of prior assaults during course of the marriage properly admitted to show intent and motive).

his wife in the year preceding her death. The court agreed with the historical practice of admitting prior bad acts in marital homicide cases for the purpose of proving motive, intent, opportunity, premeditation, and res gestae. Powell, at 260-64.

The Court defined "motive" as the impulse, desire, or moving power that causes a person to act; "intent" as the state of mind with which the act is done;[11] and "res gestae" as the admission of acts necessary to complete the picture of the event. Id. at 259-63. "Premeditation" is defined as the "deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). While premeditation was not an issue in Powell, the Court recognized that evidence of prior bad acts is particularly relevant where premeditation is at issue -- like in the case at bar. Powell, at 261.[12]

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[11] In Powell, the court noted that in certain situations the manner of death itself, for example manual strangulation, may prove intent, and thus, prior misconduct evidence is not necessary to prove this element. Powell, at 626. Here, while the defendant confessed to bludgeoning his wife with a hatchet, an act that would normally in itself prove intent to kill, the whole defense theory was that because of the defendant's mental state, he could not form intent. Thus, intent and premeditation remained issues in the case despite the manner of death.

[12] See also State v. Millante, 80 Wn. App. 237, 248, 908 P.2d 374 (1995), rev. denied, 129 Wn.2d 1012 (1996) (prior threats or quarrels provide strong evidence of premeditation); State v. Neslund, 50 Wn. App. 531, 545, 559, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988) (the deterioration of a long marital relationship along with prior threats and quarrels provided evidence of motive and premeditation).

In this case, the *mens rea* issue was heightened by the fact that this was not a "who done it" case. Rather, the defendant confessed to the killing and placed his mental state at the heart of the case by raising a diminished capacity defense.

When a specific *mens rea* is an element of the crime charged, a defendant may present evidence that he did not possess the ability to form the particular *mens rea* at the time of the crime. State v. Greene, 92 Wn. App. 80, 106, 960 P.2d 980 (1998), aff'd in part, rev. in part on other grounds, 139 Wn.2d 64 (1999). Such a "diminished capacity defense" requires that evidence be presented of a mental condition which actually prevents the defendant from forming the requisite intent necessary to commit the crime charged. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Essentially, diminished capacity acts as a rule of evidence that allows the parties to introduce evidence relevant to a defendant's state of mind. State v. Stumpf, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992) (citing John Q. La Fond & Kimberly A. Gaddis, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L.Rev. 1, 22 (1989)).

Here, contrary to the defendant's position on appeal, his own expert witness testified that the nature of the marital relationship and prior abuse was relevant in determining the defendant's state of mind at the time he killed his wife. Doctor Beaver testified that the defendant had said he was

very unhappy in his marriage (7RP 113), that Jean always criticized him (7RP 113), and that there were many threats to kill going both ways (7RP 114). He testified that the November 2010 incident played a role in his analysis in that it showed that the marriage was a difficult one and that the defendant was already suffering memory problems and was not taking care of himself, evidence that supported his theory that the defendant suffered from dementia. 7RP 73. He readily agreed that understanding the nature of the marital relationship and history of abuse was helpful in understanding whether the defendant had the ability to form the requisite *mens rea* for the charged crimes (7RP 122). In fact, the increasing conflict in the relationship, Doctor Beaver testified, was "a factor" he felt contributed to the defendant's stress and inability to form the requisite intent. 7RP 62.

Along with Doctor Beaver testifying that the history of the marital relationship was relevant to the case, the defendant himself made the evidence relevant by confessing that disharmony in his marriage was his motive in killing Jean.

In confessing to the killing of his wife, the defendant said that the marital relationship had been poor since he and Jean moved to Washington in the 70's. Exhibit 214 at 7-9, 11. He said that for the last six years, Jean would "get on my case" and "bitch" at me for being lazy. 6RP 35-36, 53; Exhibit 214 at 7-9, 11. Jean would "threaten me," said the defendant, and

"she'd be a bitch two, three days, and it was back and forth, back and forth." Exhibit 214 at 11. He talked about having assaulted Jean in 2010, getting charged with a crime, having a protection order issued against him, having stayed away from the home for eight months until "I was allowed to go back home. And then, the bullshit started again." Exhibit 214 at 12-14. He confessed that in the last few weeks, "she really started pissing and moaning," and that he decided he'd "had enough. I could not take this anymore." Id. at 16.

The defendant said that the night before the murder he did not sleep at all and that in the morning, he said to himself, "this is it." Id. at 19; 6RP 139. He went downstairs and got a hatchet, went to her room to "scare the shit out of her" but she was asleep and when she did not respond to him, he "picked the son of a bitch up [and] hit her five or six times." Exhibit 214 at 20-22. After the first blow, he said, he hit her again and again because he "wanted to make sure that it was done...that she was dead." Id. at 24.

Despite what appears to be rather clear reasons why the evidence of marital discord was relevant to the issues in the case, the defendant seeks to create an artificial demarcation point, a point in time before which, he asserts, no evidence was relevant. But considering the issues in this case, the defendant's attempt to create this artificial demarcation point fails.

For example, the defendant's confession to police suggests that he and Jean had been arguing for many, many years, that Jean had been nagging him constantly and that this is what finally put him over the top. Thus, evidence of the marital discord corroborated and supported this apparent motive. Additionally, the whole defense was premised on the claim that the defendant was suffering from maladies of recent origin (mild dementia, poorly treated diabetes and the flu) and therefore his act in killing Jean was an aberration. The evidence of prior abuse and marital discord that occurred prior to the alleged maladies of recent origin directly rebutted the claim that he could not form the requisite *mens rea.* His behavior was not an aberration caused by the flu, etc., the defendant acted in an abusive manner well prior to the current event. In short, the evidence allowed the jury to better understand the full nature of the defendant and Jean's relationship and how upset and fed up the defendant was with his wife.

The defendant cites to a single case, State v. Acosta, for the legal principle that "[t]he state of mind that will permit the admission of an *unrelated crime* is the state of mind at the time of the commission of the offense as shown by the acts or words of the defendant so close in time to the alleged offense as to have bearing upon his state of mind at that time." Def. br. at 12 (citing Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004). Acosta is of no moment. First, the admission of prior bad act evidence is

governed by the dictates of ER 404(b) and whether the evidence is relevant to an issue in the case. There is no prophylactic rule related to timeliness contained in the rule. Second, Acosta involved a totally different situation than exists here.

In Acosta, a State's witness was allowed to read a list of 23 unsubstantiated and unrelated arrests and convictions of the defendant, from different states and dating back more than a decade, purportedly to refute a diminished capacity defense to current charges of robbery, TMV and possession of meth. The court appropriately held that being unrelated acts and unsubstantiated acts, the alleged prior arrests and convictions were not relevant to the defendant's state of mind during the current offenses. Acosta, 123 Wn. App. at 434.

Relevant evidence is that having any tendency to prove or disprove a fact that is material to the determination of the action. ER 401. Here, the trial court disagreed with the defense that there was an artificial demarcation point wherein abuse or discord occurring prior to a particular date was not relevant, while abuse or discord occurring after that date was relevant. In order to prevail on appeal, the defendant must show that the trial court abused its discretion, that no reasonable person would rule as the trial court did here. Powell, at 258. The defendant cannot meet this burden.

2. JEAN SCHUMACHER'S STATEMENTS TO MEDICAL PERSONNEL REGARDING PRIOR ABUSE WERE PROPERLY ADMITTED UNDER ER 803(a)(4)

The defendant contends that as a rule, statements made to medical treatment providers by a current domestic violence patient about ***past*** abuse by the same perpetrator are irrelevant to treatment and diagnosis of the patient, and therefore, the statements are not admissible under ER 803(a)(4). As applicable here, the defendant contends that statements Jean Schumacher made to an emergency room physician and a medical social worker about past assaultive behavior by the defendant were not admissible into evidence. However, the assertion that prior abuse history is not relevant to the treatment and diagnosis of a victim of alleged abuse defies logic and is not supported by any caselaw. Further, this issue has been waived because this was not the basis of the defendant's objection at trial.

a. Evidence Rule 803(a)(4)

As an exception to the general rule barring hearsay evidence, ER 803(a)(4) allows for the admissibility of statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or

general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

b. The Facts

Prior to trial, the court heard argument on the admissibility of statements made by Jean Schumacher to medical treatment providers who treated her on November 4, 2010, for injuries she suffered as a result of having been assaulted by the defendant. See 2RP 113-44. As an offer of proof, the State relied on three documents contained in pretrial exhibit 20 – a seven page medical report entitled Overlake Hospital Medical Center – Primary (hereinafter Primary), a one page medical report entitled Overlake Hospital Medical Center – Medication Reconciliation (hereinafter Medication Reconciliation), and a one page medical report entitled Overlake Hospital Medical Center – Discharge Instructions Receipt (hereinafter Discharge Instructions). While the defendant objected to the admission of the statements Jean made to the medical treatment providers, his objection was not based on a claim that the statements did not meet the foundational requirements of ER 803(a)(4). See 2RP 122-30. Rather, his objection was based on his assertion that evidence of abuse that occurred prior to the few weeks leading up to the murder was not relevant to any issue in the case. Id.

The records in pretrial exhibit 20 show that after being transported by ambulance to the emergency room at Overlake Hospital, Jean made statements about present and past abuse in response to questions posed to her by Emergency Room Doctor Thomas Miller and Medical Social Worker Deborah Kunka in the course of providing her medical care. Jean told both Doctor Miller and Kunka that the defendant had pushed her and that she had fallen to the floor, striking her head and her hip. Primary at 1, 3 (this was the assault that led to her hospitalization). Jean also reported that the defendant had been abusing her for many years. Id. at 1, 3-4. The records indicate that Jean described a "hx of 43 years of verbal abuse, now escalating," that there is a history of domestic violence "increased in frequency" and that he has "shoved her and hit her before." Id. Jean said that she was "afraid of him" and believed that he "will kill her when he gets out of jail." Id.

Described as being "anxious," Jean reported that she suffered from a history of depression and anxiety. Id. at 2. Doctor Miller reported that "Pt has DV issues which will be addressed by MSW," who is "at bedside." Id. at 3. The social worker contacted an advocate from the Eastside Domestic Violence Program and had Jean talk to the advocate on the phone before her discharge. Id. at 4. Jean was also provided with a list of domestic violence resources, a safety plan and counseling services.

Id. at 4. As part of her discharge, Jean was instructed to follow up with the domestic violence program and with counseling services. Id. at 7; Discharge Instructions at 1.

At trial,[13] Doctor Miller testified that the ER Department at Overlake Medical Center uses a team approach that includes medical social workers, and that they all share information with the goal of making a proper diagnosis and prescribing a treatment plan that is based on all the information received. 9RP 107. Doctor Miller testified that this includes making sure that the patient is safe at the time of treatment and in the future. 9RP 109.

In regards to prior abuse, the extent of Doctor Miller's trial testimony was that Jean told him there was a 43 year history of verbal abuse, and that it was escalating.[14] 9RP 109, 113-14. Doctor Miller specifically referred Jean to the ER social worker. 9RP 110.

Medical Social Worker Deborah Kunka testified that she conducts psychiatric assessments in the ER for Doctor Miller. 9RP 119. Kunka testified that as part of her job, she assesses the emotional state of victims

[13] The facts recited from the trial testimony were not before the court when it made its ruling on the admissibility of Jean's statements. This is because the defendant never raised an ER 803(a)(4) foundational objection, and thus, these facts were not adduced at the pretrial hearing.

[14] Pretrial exhibit 20 was admitted for pretrial purposes as an offer of proof. The State did not introduce all of the statements Jean made to medical providers as documented in the exhibit. For example, the medical providers did not testify about Jean's fear that the defendant was going to kill her.

and makes sure any safety issues are addressed. 9RP 122. Kunka testified that Jean told her that she was afraid of the defendant, that there was a history of mostly verbal and emotional abuse, with some physical violence that including being hit, shoved and receiving a black eye. 9RP 122-23. Jean told Kunka that the abuse was increasing in severity and that the current incident was the worse yet. 9RP 123.

c. This Issue Has Been Waived

A party may only assign error in the appellate court on the specific ground of the evidence objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). An objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

State v. Sims,[15] is directly applicable here. Sims was convicted of second-degree assault for breaking the jaw of his girlfriend. His conviction was based primarily on statements made by his girlfriend to medical treatment personnel that attributed her injury to Sims' assault upon her. On appeal, but not at trial, Sims argued that her statements attributing her injury to him did not fall within the hearsay exception of ER 803(a)(4). This Court refused to consider the issue, stating that "[w]e will not consider this

[15] 77 Wn. App. 236, 890 P.2d 521 (1995).

argument for the first time on appeal." Sims, 77 Wn. App. at 241 (citing ER 103(a)(1), RAP 2.5(a), and State v. Walker, 121 Wn.2d 214, 218, 848 P.2d 721 (1993)).

Here, the defendant never raised an objection below based on ER 803(a)(4). Therefore, this issue has been waived.

d. Standard Of Review And Argument

The admission of evidence lies largely within the sound discretion of the trial court. Brown, 132 Wn.2d at 570. A decision of the trial court will not be disturbed absent an abuse of discretion, a standard met only upon a showing that no reasonable person would have taken the position adopted by the trial court. Powell, 126 Wn.2d at 258.

Out-of-court statements are admissible under ER 803(a)(4) if (1) the declarant's motive in making the statement was to promote treatment or diagnosis, and (2) the medical professional would reasonably rely on the statement for purposes of treatment or diagnosis. State v. Price, 126 Wn. App. 617, 640, 109 P.3d 27 (citing In re Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004), rev. denied, 155 Wn.2d 1018 (2005)). The rational underpinning of the rule is that a patient will convey trustworthy accurate information because they believe they have suffered injury and are seeking appropriate medical care. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989).

The law is well settled about the admissibility of the statements made for the purposes of medical diagnosis and treatment in domestic violence and sexual assault cases, a situation different than the usual medical treatment situation because the patient is in an intimate or family relationship with the abuser, may be suffering from emotional or psychological injury due to long-term abuse, and may be at risk of future harm from the same abuser. See, e.g., Sims, at 239-40 (victim's statements to ER doctor and social worker were admissible where victim identified her boyfriend as the person who broke her jaw); Butler, 53 Wn. App. 214 (two-year-old's statement to nurse identifying mother's boyfriend as his physical abuser admissible under ER 803(a)(4)); In re Dependency of S.S., 61 Wn. App. 488, 503, 814 P.2d 204 (statements made to social worker by five-year-old admissible under ER 803(a)(4)), rev. denied, 117 Wn.2d 1011 (1991); United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (emotional and psychological harm caused by domestic abuse makes identity of abuser pertinent for medical treatment purposes), cert. denied, 510 U.S. 1184 (1994).

In Sims, this Court cited the necessity for medical personnel to obtain a range of information in domestic violence situations:

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual assault case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere.

Sims, at 239-40 (citing Joe, at 1494-95). Beyond the physical injury, a "physician must be attentive to treating the emotional and psychological injuries" of victims of abuse. Butler, at 221 (citing United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985)).

Despite this caselaw, the defendant contends that the scope of ER 803(a)(4) does not extend to anything other than statements about the current offense in which the patient is seeking treatment. This novel proposition is neither supported by any caselaw nor supported by common sense.

First, it is axiomatic that in order to determine the level of emotion or psychological trauma suffered by a victim of domestic violence, it is necessary to determine not only the extent and causation of the current injury, but the existence and level of prior abuse as well.[16] For example, a doctor may be examining a woman suffering from a rather minor

[16] See, e.g. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996) (discussing the unique dynamics involved in relationships marked with domestic violence).

physical injury but the woman may be exhibiting severe signs of post-traumatic stress disorder due to having suffered from years of physical and mental abuse. According to the defendant, it is not relevant to a doctor's diagnosis of a patient's mental or emotional state, or the patient's needs for treatment of her mental or emotional problems, that she has been a long-term victim of domestic violence. This proposition simply defies logic and common sense.

Second, the defendant cites to a single case, People of the Terr. Of Guam v. Ignacio,[17] to support his proposition that prior abuse is not relevant to diagnosis and treatment because, he asserts, it merely goes to the safety of the victim and therefore it is not relevant to treatment or diagnosis. Def. br. at 25. However, a plain reading of Ignacio shows that it does not stand for this proposition.

Ignacio was convicted of molesting a three-year-old girl. The reviewing court upheld the determination that the girl's statements as to who hurt her and how, made to the doctor who initially examined her, were admissible as statements necessary for medical treatment and diagnosis. Ignaciao, at 613. However, ***after*** the girl was diagnosed and treated, the girl was referred to a social worker. Trial testimony established "that [the social worker] questioned the child to determine

[17] People of the Terr. Of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993).

whether he needed to notify Child Protective Services of a case of suspected child abuse." Id. Counsel for Guam conceded that the questioning was "aimed at ensuring the child's safety and ***were not aimed at treating or diagnosing the child's physical or psychological needs***." Id. (emphasis added). Thus, because the social worker was not involved in treating or diagnosing the child, the court correctly ruled that the child's statements to the social worker should not have been admitted under the medical treatment and diagnosis exception. That is all this case stands for, it is consistent with Washington caselaw, and the State agrees with its conclusion. See, e.g., State v. Lopez, 95 Wn. App. 842, 849 n.2, 980 P.2d 224 (1999) (statements made to social worker who was not conducting an interview for purposes of medical treatment, but for "purely forensic purposes," held inadmissible), and State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994) (statements made to medical social worker for purposes of diagnosis and treatment are admissible under ER 803(a)(4)), rev. denied, 126 Wn.2d 1010 (1995).

In short, even if the defendant had raised this claim before the trial court, his claim that Jean's statements do not fall within the scope of the rule is without merit.

3. JEAN'S EXPRESSION OF FEAR MADE TO SUSAN SCHUMACHER WAS PROPERLY ADMITTED

The defendant contends the trial court erred in admitting Jean's expression of fear of the defendant made to her daughter. This claim should be rejected. Jean's expression of fear was just further evidence that showed the jury the nature of the relationship between the defendant and Jean, a relationship that led to his motive to kill her, and a relationship that was a factor in determining whether the defendant could form the intent to kill.

Susan Schumacher attended a hearing on the defendant's criminal case arising from his assault of Jean that occurred on November 4, 2010.[18] 10RP 53-54. After the hearing, Susan called Jean and told her that the defendant was going to be released from jail. 10RP 54. Jean started crying and said, "Oh my god, what am I going to do? He is going to kill me." 10RP 55. Jean subsequently moved out of the house for a period of time until the defendant found an alternative place to live. 10RP 55.

Prior to trial, the defense objected to the admission of Jean's expression of fear made to Susan. He asserted that Jean's fear was not relevant to any issue at trial. See 3RP 57-72; 4RP 62-67, 109-19. The

[18] Susan testified that the hearing was about the defendant getting released from jail. 10RP 54. Although it is not completely clear from the record, this was likely the defendant's "first appearance" or "preliminary appearance," that would have occurred within 24 hours of his arrest. See CrRLJ 3.2.1, and 4RP 110 (defense counsel referring to the defendant as having spent a single night in jail).

court disagreed, stating that the degree of emotion felt by both Jean and the defendant showed the "dysfunctionality" of their relationship and it was therefore relevant to show the defendant's state of mind. 4RP 116-19.

Although not the basis of the defendant's claim on appeal, it is important to note that Jean's expression of fear would meet two hearsay exceptions. As a statement of the declarant's then existing state of mind, Jean's expression of fear would meet the hearsay exception of ER 803(a)(3) ("Then Existing Mental, Emotional or Physical Condition"). As a statement made while the declarant was under the stress of the excitement caused by a startling event, Jean's expression of fear would meet the hearsay exception of ER 803(a)(2) ("Excited Utterance"). Meeting these two hearsay exceptions, the statements are admissible if they are "relevant to a material issue in the case." State v. Johnson, 61 Wn. App. 539, 545-46, 881 P.2d 687 (1991).

In a homicide case, for example, the deceased's state of mind may be relevant where the defense is accident or self-defense. See, e.g., State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980) (where Parr claimed the victim died by accident when he was defending himself against her, testimony that the victim had feared the defendant was ruled admissible). In other cases, the deceased's fear may not be relevant. See, e.g., State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983) (the defendant stabbed his

mother-in-law over 70 times and was later found barefoot, with no shirt on and wearing women's spandex pants. The victim's prior statement that she feared the defendant was not relevant to the defendant's insanity defense).

In State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007), a second-degree murder case, the victim's nude body was found in a cardboard box in a neighborhood frequented by both Athan and the victim. A ligature was found around her neck. Semen was found in the victim's vagina, with DNA matching Athan. At trial, Athan's theory of the case was that he had consensual sex with the victim, but that she was murdered later by someone else. The State was allowed to introduce two hearsay statements of the victim. One of the victim's friends was kidding the victim about Athan's romantic interest in her, to which the victim responded "no way," indicating that it was a "joke" to think she would go out with Athan. Athan, at 381. Then, four days before she was murdered, the victim had told another friend, referring to Athan, that "this guy gives me the creeps. Id.

Like the defendant does here, Athan argued that the state of mind of the victim was not relevant because he was not raising a claim of accident or self-defense. Id. The Supreme Court disagreed. By suggesting that he had a romantic relationship with the victim, the Court

ruled, Athan made the victim's "statements concerning her feelings toward Athan relevant." Athan, at 383. The case at bar is similar.

In confessing to killing his wife, the defendant talked extensively about the volatile nature of his marital relationship. He suggested that this was his motive in his decision to kill her. He also raised a mental defense, a defense that his own expert testified made the nature of his relationship with his wife relevant to the case and his diagnosis. See, e.g., 7RP 73, 76 (Doctor Beaver states that there were threats to kill made between the two); 7RP 114 (the defendant told Doctor Beaver that he had threatened Jean but that she had also threatened him). The nature of a marital relationship marked by domestic violence can certainly be complicated. See, e.g., State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996) (prior assault evidence relevant to show why domestic violence victim allowed the defendant to continue to see her and why she minimized the degree of violence in the relationship); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (prior assault evidence admissible to show victim's fear and explain delay in reporting), rev. denied, 117 Wn.2d 1010 (1991).

Here, the trial court ruled that Jean's reaction to hearing that the defendant would be getting out of jail was relevant to showing the full dynamics of the defendant and Jean's dysfunctional acrimonious relationship. While the defendant may not agree with the trial court's

decision, he cannot show that "no reasonable judge would have made the same ruling"; the standard he must meet on appeal. State v. Ohlson, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

4. ANY ERROR WAS HARMLESS

All three of the above evidentiary issues relate to the same thing, the admission of evidence regarding the abusive relationship between the defendant and Jean. Even if all of the above challenged testimony was improperly admitted, the error was harmless. An evidentiary error is deemed harmless unless a defendant can demonstrate that there is a reasonable probability that the erroneous admission of the evidence materially affected the outcome of trial. State v. Greiff, 141 Wn.2d 910, 927-28, 10 P.3d 390 (2000). Here, the admission of the evidence, even if error, did not affect the outcome of the case.

This was not a "who done it" case. The defendant confessed to killing his wife. This was also not a case where the jury did not already know that the defendant had been abusive to his wife. Defense counsel admitted that evidence of the defendant's abuse was admissible, so long as it was not too remote in time. In addition, in his confession and in his interview with Doctor Beaver, the defendant talked about the abusive nature of the marital relationship. Therefore, the question is not whether the jury learning that the relationship was abusive was prejudicial; the jury

already knew that. The question is whether the jury learning that the abusive nature of the relationship extended for many years was so prejudicial that there is a reasonable likelihood that the outcome of trial would have been different. Under the facts of this case, the defendant cannot meet this burden. This is especially true when considering that the description of the abuse showed that the abuse was mostly verbal and that the physical nature of the abuse relatively minimal. Further, if the evidence was so damning, the jury would not have been inclined to return a verdict on a lesser charge of murder in the second degree as they did here.

5. THE DEFENDANT'S CHALLENGE TO HIS EXCEPTIONAL SENTENCE IS WITHOUT MERIT

Under RCW 9.94A.535(3)(h)(i), a court may impose an exceptional sentence upon a jury finding that the current offense involved domestic violence and that "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."[19] The defendant contends this sentencing aggravator is unconstitutionally vague

[19] Here, the court imposed an exceptional sentence based on the jury's finding that "[t]he offense was part of an ongoing pattern of psychological or physical abuse of a victim manifested by multiple incidents over a prolonged period of time." CP 76, 82, 118-19. The statute includes "sexual abuse," in the list of types of abuse that can support the aggravator. However, because there was no evidence of prior sexual abuse in this case, the State proposed, and the court gave, an instruction that removed the term "sexual abuse" from the definition. CP 76; CP 144.

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

a. A Defendant May Not Raise A Vagueness Challenge To A Sentencing Aggravator

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Supreme Court has previously held that sentencing aggravators are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459.

"A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

The defendant argues that in light of Blakely v. Washington,[20] and Apprendi v. New Jersey,[21] the Court's decision in Baldwin is wrong. However, the defendant fails to explain why the fact that a jury, rather than a judge, decides whether the facts exist to support an exceptional sentence, compels the result that Baldwin is wrong. The change in the finder of fact, and the burden of proof from "by a preponderance," to "beyond a reasonable doubt," are the only pertinent changes that resulted from Blakely and Apprendi.

Prior to Blakely, upon a conviction for a felony offense, a trial court could impose an exceptional sentence above the standard range based on a judge finding that the "current offense that involved domestic

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[20] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[21] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

violence and which 'was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time' was an aggravating circumstance." State v. Zatkovich, 113 Wn. App. 70, 81, 52 P.3d 36 (2002) (citing former RCW 9.94A.390(2)(h)). In 2005, the legislature amended the Sentencing Reform Act (SRA) to comply with Blakely's requirement that a jury, not a judge, must find the facts used to support an exceptional sentence. The statutory amendments were designed to codify the existing common-law aggravating factors. Laws of 2005, ch. 68, § 1.

The Court's analysis in Baldwin remains valid after Blakely and Apprendi. The sentencing aggravators in RCW 9.94A.535 do not purport to define criminal conduct. As the Supreme Court has stated, "an aggravating factor is not the functional equivalent of an essential element." State v. Siers, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). Instead, the statute lists accompanying circumstances that *may* justify a trial court's imposition of a higher sentence. But a jury's finding of a sentencing aggravator does not mandate an exceptional sentence. The trial court still has discretion in deciding whether the sentencing aggravator is a

substantial and compelling reason to impose an exceptional sentence.[22] RCW 9.94A.535.

Additionally, while the defendant asserts that a sentencing aggravator changes the maximum penalty that can be imposed (a sentence above the standard range), this was true at the time the Court decided Baldwin. One thing and one thing only is different post Blakely and Apprendi, and the resulting statutory amendments to the SRA: the jury now must decide beyond a reasonable doubt the facts supporting an exceptional sentence--a function that once belonged to the sentencing judge.

The Court in Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." Blakely, 542 U.S. at 301. Thus, post Blakely and Apprendi, the sentencing court could not find facts, not otherwise admitted, in imposing an exceptional sentence. As a result, the legislature amended the statutory sentence provisions of the SRA to provide for the jury to find the facts beyond a reasonable doubt that *could* support imposition of an exceptional sentence. The trial court could then impose an exceptional sentence "if it finds, considering the purpose of this chapter, that there are

[22] For example, in Siers, the jury found the existence of a sentencing aggravator but the trial court declined to impose an exceptional sentence. Siers, at 272-73.

substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Thus, the only consequence of Blakely and the resulting statutory amendments was to shift the fact finding function of an exceptional sentence proceeding from the sentencing judge to the jury.

The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because the defendant fails to show that the Court's decision in Baldwin is incorrect and harmful, this Court must adhere to the holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.[23]

b. The Statute Is Not Vague

Even if the defendant could make a due process vagueness challenge to the statute, his argument would fail. The terms used in a

[23] The defendant also complains that if this Court does not rule in his favor, a person is left with no ability to challenge a sentencing aggravator on vagueness grounds. This is incorrect. If a defendant believes certain words of a sentencing aggravator are vague, he can always propose a jury instruction that clarifies the alleged vague term. See State v. Duncalf, 177 Wn.2d 289, 296-98, 300 P.3d 352 (2013); State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017 (2007). Here, the defendant neither objected to the court's instruction, nor did he propose any clarifying instruction.

sentencing aggravator are of common understanding.[24] Under the particular facts of this case, the defendant was on notice that his criminal conduct was aggravated where he spent the last 40 plus years physically and emotionally abusing his wife.

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

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." Douglass, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). Afterall, "[s]ome measure of vagueness is inherent in the use of language." Id. Thus, vagueness "is not mere uncertainty." State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test for vagueness is

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

whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

The defendant equates the language of the aggravator at issue here with certain language contained in the harassment statute that was found unconstitutionally vague in State v. Williams.[25] A person can commit misdemeanor harassment if the person knowingly threatens "[m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or ***mental health or safety***. RCW 9A.46.020(1)(a)(iv) (emphasis added). This provision of the statute was found to be unconstitutionally vague because the phrase "mental health or safety" did not contain a meaningful definition, offered law enforcement no guidance beyond subjective impressions of what constituted a violation, and the average citizen would have no way of knowing what conduct was prohibited by the statute because each person's perceptions of the law may be different. Williams, 144 Wn.2d 197. Such is not the case here; a person of "ordinary intelligence" would understand to what the statute pertains.

RCW 9.94A.535(3)(h)(i) provides that the current offense be a domestic violence offense that is "part of an ***ongoing pattern of***

[25] State v. Williams, 4 Wn.2d 197, 26 P.3d 890 (2001).

psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." (emphasis added). "Abuse" is defined as "a departure from legal or reasonable use; misuse [or] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." Black's Law Dictionary 10 (8th ed.2004). "Psychological," is defined as "relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind, esp. in its affected or cognitive functions." Webster's Third New Int'l Dictionary 1833 (1993). "Physical" is defined as "of or relating to the body." Id. at 1706. "Sexual" is defined as "of or relating to the male or female sexes or their distinctive organs or functions." Id. at 2082. Thus, an ordinary person of common intelligence would understand that the statute pertains to mental, bodily or sexual abuse, acts that are not legal or reasonable. For example, corporal punishment of a child is not unlawful when such physical discipline is objectively reasonable. State v. Singleton, 41 Wn. App. 721, 723-24, 705 P.2d 825 (1985). This is not difficult to understand or apply.

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

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

c. Evidence Supports The Aggravating Factor

The defendant claims that there was insufficient evidence for ***any*** rational trier of fact to have found the sentencing aggravator that his crime was a domestic violence offense that was part of an ongoing pattern of psychological or physical abuse of a victim manifested by multiple incidents over a prolonged period of time. This claim must be rejected.

The standard of review when raising a sufficiency of the evidence claim is as follows: Under a sufficiency of the evidence challenge, a reviewing court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of a sentencing aggravator beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007); State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced."

State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

The defendant claims that no rational trier of fact could have found he committed a pattern of abuse against his wife, "pattern," having a common meaning of "a regular, mainly unvarying way of acting or doing [behavior patterns]." State v. Russell, 69 Wn. App. 237, 248, 848 P.2d 743 (citing Webster's New World Dictionary 1042 (1976)), rev. denied, 122 Wn.2d 1003 (1993); see also State v. Madarash, 116 Wn. App. 500, 514, 66 P.3d 682 (2003) (to find Madarash committed the crime of homicide by abuse, a crime that requires a pattern or practice of assault, Madarash had to "regularly or habitually" assault or torture Jennifer).

Here, Jim Schumacher described his strongest memories of growing up with the defendant as his "anger." 10RP 10. He recalled that for "my entire life" the defendant would lose control and scream at his wife, calling her a "fucking bitch" and a derogatory term for Eastern European immigrants. 10RP 14-15. Susan said the defendant was always screaming at Jean, calling her a "whore," a "cunt" and a "bitch." 10RP 52.

Susan observed this behavior while she was living at home and after she moved out. 10RP 52.

Prior to her death, Jean told Jim that the abuse had been getting worse in the last five or six years. 10RP 15. When confronted by Jim, the defendant admitted being abusive to Jean, as he also admitted at a hearing for a protection order in 2010 where he said that he had been physically and verbally abusive many, many times in the past. 10RP 16, 19. Jean told medical staff in 2010 that the defendant had been physically and verbally abusive to her for 43 years. 9RP 108-09, 114, 122-23. She said that the defendant had hit, shoved and pushed her in the past, and that the abuse was increasing in severity. 9RP 122-23. She admitted to being deathly afraid of him. Id. The defendant himself admitted that he had threatened to kill Jean multiple times in the past. 7RP 114; 12RP 68. He admitted to arguing with Jean 1 to 2 times a week for 40 years. 12RP 65.

Under the proper standard of review, the truth of the State's evidence is admitted and all reasonable inferences are drawn in favor of the State. Salinas, 119 Wn.2d at 201. It is not for a reviewing court to actually weigh the evidence; rather, a claim that there is insufficient evidence to support a charge requires the court to look at the facts that were before the jury, and based on those facts, determine whether any rational trier of fact could have found the defendant guilty. Tilton, 149

Wn.2d at 786. While the one person who could provide a full description of the abuse was killed by the defendant, based on the facts that are in the record, a rational trier of fact could find that the defendant committed physical and emotional abuse of Jean for over 40 years.

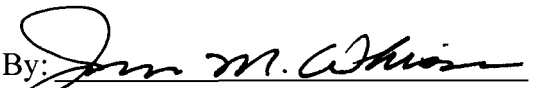
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 20th day of August, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  for:
DENNIS J. McCURDY, WSBA #21975
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, a properly stamped and addressed envelope directed to Maureen Marie Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the **Brief of Respondent** in **STATE V. JAMES WILLIAM SCHUMACHER.**, Cause No. 70807-4, in the Court of Appeals, Division One.

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

08-20-14

Name Date

Done in Seattle, Washington