Supreme Court No. 93818-1
COA No. 71559-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTTYE LEON MILLER,

Petitioner.

E

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

Federal Circuit Court Cases

Statutes

Other Authorities

A. IDENTITY OF PETITIONER/DECISION BELOW

Scottye Leon Miller requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Miller, No. 71559-3-I, filed October 3, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In United States v. Johnson, the United States Supreme Court held the void for vagueness doctrine of the Due Process Clause applies not only to statutes defining elements of crimes but also to statutes fixing sentences. Is review warranted to decide the important constitutional question of whether, in light of Johnson, the void for vagueness doctrine applies to statutory aggravating factors contained in Washington's Sentencing Reform Act (SRA)? RAP 13.4(b)(3), (4).

Are the "pattern of abuse" and "rapid recidivism" statutory aggravating factors impermissibly vague in violation of due process?

2. Under State v. Parker, when a court relies upon an improper aggravator in imposing an exceptional sentence, remand is required unless the record clearly shows the court would have imposed the same sentence anyway. Here, the Court of Appeals did not decide whether the "pattern of abuse" aggravating factor was improper but upheld the

exceptional sentence, reasoning the trial court would have imposed the same 126-month exceptional sentence based only upon the "rapid recidivism" factor. Does the Court of Appeals' opinion conflict with Parker, warranting review? RAP 13.4(b)(1), (4).

3. Is the court's reliance on the "pattern of abuse" aggravator improper where most of the prior offenses were already taken into account in calculating the offender score? RAP 13.4(b)(1), (4).

4. Was the court's improper comment on the evidence in the jury instruction regarding the "pattern of abuse" aggravator prejudicial?

5. Did the State fail to prove Miller committed the current offense "shortly after being released from incarceration"?

6. Was the erroneous admission of hearsay evidence prejudicial requiring reversal of the conviction?

7. Did cumulative error deprive Miller of a fair trial?

C. STATEMENT OF THE CASE

Scottye Miller was convicted of the premeditated murder of his girlfriend, Patricia Patricelli, for causing her death through multiple stab wounds. CP 154, 157.

At trial, the court admitted, over objection, multiple out-of-court statements made by Patricelli expressing fear of Miller. 11/20/13RP

26-30, 46-49, 56; CP 421. The Court of Appeals held Patricelli's statements of fear were admissible because Miller put her state of mind at issue by claiming she argued with him and provoked him on the morning of her death. Slip Op. at 5. But the court agreed with Miller that Patricelli's statements describing *Miller's conduct* were inadmissible hearsay. Slip Op. at 7. The court held the error in admitting the evidence was harmless. Slip Op. at 8-9.

The jury was instructed and found "the offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time," and Miller committed the offense "shortly after being released from incarceration." CP 158-59, 167, 170. Miller's standard range sentence was 338 to 450 months. CP 206. The court imposed an exceptional sentence of 576 months. CP 208, 213.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted to decide the important constitutional question of whether the void for vagueness doctrine applies to Washington's statutory aggravating factors in light of the United States Supreme Court's decision in United States v. Johnson. RAP 13.4(b)(3), (4).

The vagueness doctrine of the Due Process Clause rests on two related principles. First, penal statutes must provide citizens with fair

notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); U.S. Const. amend. XIV.

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation marks, citation omitted).

In State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003), the Court held "the void for vagueness doctrine should have application only to laws that proscribe or prescribe conduct," and it is "analytically unsound to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences." (quotation marks and citation omitted). Baldwin concluded that because exceptional sentence statutes "do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature," the void for vagueness doctrine "ha[s] no application in the context of sentencing guidelines." Id. at 459.

That holding is called into question by the United States Supreme Court's more recent decision in Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). In Johnson, the Court plainly announced that the principles underlying the void for vagueness doctrine "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id. at 2557.

In Johnson, the Court invalidated the Armed Career Criminal Act's (ACCA) residual clause as unconstitutionally vague. Id. The ACCA increases sentences for offenders who have three previous convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The definition of "violent felony" includes specific enumerated crimes as well as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." Id. at § 924(e)(2)(B). This is known as the ACCA's "residual clause." See Johnson, 135 S. Ct. at 2556.

The Johnson Court observed that "[t]wo features of the residual clause conspire to make it unconstitutionally vague": first, the clause "leaves grave uncertainty about how to estimate the risk posed by a crime" by tying "the judicial assessment of risk to a judicially

imagined 'ordinary case' of a crime, not to real-world facts or statutory elements"; and second, it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2557-78. Moreover, the Court observed that its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." Id. at 2558. The ACCA's residual clause thus "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." Id.

The majority of federal circuit courts to consider the question have concluded Johnson also applies to invalidate an identical "residual clause" contained in the United States Sentencing Guidelines. Courts reached that conclusion notwithstanding that judges have discretion under the Guidelines to deviate from the recommended sentencing range. See, e.g., United States v. Pawlak, 822 F.3d 902, 906-07 (6th Cir. 2016) ("the fact that the Guidelines are not mandatory is a distinction without a difference. In our view, Johnson's rationale applies with equal force to the Guidelines' residual clause."); United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015); United States v. Calabretta, 831 F.3d 128, 133-34 (3rd Cir. 2016); United States v. Hurlburt, __ F.3d __, 2016 WL 4506717 (7th Cir. 2016); United States

v. Maldonado, 636 Fed.Appx. 807, 810 (2d Cir. 2016); Ramirez v. United States, 799 F.2d 845, 856 (7th Cir. 2015); United States v. Taylor, 804 F.3d 931 (8th Cir. 2015) (per curiam).

Because "the Guidelines are the mandatory starting point for a sentencing determination," and "a district court can be reversed for failing to correctly apply them despite the ability to later deviate from the recommended range," due process vagueness principles apply. Madrid, 805 F.3d at 1211.

In light of these authorities, this Court's holding in Baldwin should be reexamined. Contrary to Baldwin, the void for vagueness doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." Johnson, 135 S. Ct. at 2557. Although Washington courts have discretion whether to impose an exceptional sentence once the jury finds an aggravating factor, statutory aggravators "are the mandatory starting point for a sentencing determination." See Madrid, 805 F.3d at 1211. A trial "court can be reversed for failing to correctly apply" an aggravating factor. See id. Therefore, aggravators should meet due process standards of certainty.

Criminal defendants and the public should have adequate notice of the potential punishment they may receive if they engage in certain

behaviors. The vagueness doctrine can also serve to prevent arbitrary, capricious, or discriminatory application of statutory aggravators. See Grayned, 408 U.S. at 108-09. Moreover, declining to permit vagueness challenges to statutory aggravators undermines a principal aim of sentencing under the SRA: promoting uniformity among similarly situated defendants. See RCW 9.94A.010(3); State v. Way, 88 Wn. App. 830, 835, 946 P.2d 1209 (1997) ("[E]xpanding the . . . scope of approved aggravating circumstances is potentially at odds with the underlying principles of proportionality and culpability.").

For the reasons given, this Court should grant review and hold the void for vagueness doctrine applies to statutory aggravators.

a. The "pattern of abuse" aggravating factor is impermissibly vague.

The jury was instructed and found "[t]he offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 170; RCW 9.94A.535(3)(h)(i). Neither the statute nor the jury instructions defined the term "psychological abuse." Under State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), the term is vague.

In Williams, the Court considered the constitutionality of the criminal harassment statute. The statute provided a person was guilty

if, without lawful authority, he or she knowingly threatened "[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," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.'" Id. at 203 (quoting former RCW 9A.46.020(1)(a)(i), (1)(a)(iv), (b) (1992)) (emphasis in Williams).

The term "mental health" was not defined in the statute. The Court concluded the term was impermissibly vague. Id. at 205-06. The term was inherently subjective and a person of reasonable understanding must guess at what conduct was prohibited. Id. at 204.

The statutory term "psychological abuse" is no less vague. A person of reasonable understanding must necessarily guess at what conduct the term encompasses. Also, it is inherently subjective. Each person's perception of what constitutes "psychological abuse" differs based on each person's subjective impressions. For these reasons, the aggravator is unconstitutionally vague in violation of due process.

b. The "rapid recidivism" aggravating factor is impermissibly vague.

The jury was instructed and found Miller committed the offense "shortly after being released from incarceration." CP 159, 167; see

RCW 9.94A.535(3)(t). The jury was not provided any guidance or instruction to help them understand what this aggravator means.

The dictionary defines "shortly" as "in a short time." Webster's Third New International Dictionary 2103 (1993). A "short" time is "of brief duration: lasting a little while only." Id. at 2102.

It is not clear what "shortly" means in the context of a criminal case. Is a "short" time a few hours, a few days, or a few weeks? Because the term is not sufficiently precise to allow a person of ordinary intelligence to understand it, and does not provide standards sufficiently specific to prevent arbitrary enforcement, it is unconstitutionally vague in violation of due process.

2. The Court of Appeals' opinion conflicts with State v. Parker. RAP 13.4(b)(1), (4).

Miller challenged both the "pattern of abuse" and the "rapid recidivism" aggravators. The Court of Appeals did not address the arguments regarding the "pattern of abuse" aggravator. The court held instead, "even if we were to vacate the jury's finding on the domestic violence aggravating factor, we would still uphold the exceptional sentence on the basis of Miller's rapid recidivism." Slip Op. at 13.

The court's opinion conflicts with State v. Parker, 132 Wn.2d 182, 189-90, 937 P.2d 575 (1997). Parker held that when a court relies

upon an improper basis to impose an exceptional sentence, "remand is the remedy unless the record clearly indicates the sentencing court would have imposed theame sentence anyway." Id. The SRA requires the end sentence be the result of "principled discretion." Id. at 190. If it is likely the judge relied, at least in part, on an incorrect aggravator, affirming the exceptional sentence would defeat the purpose of the SRA. See id.; State v. Ferguson, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271 (2001) (remand for resentencing required where sentencing judge imposed an exceptional sentence by placing significant weight on an improper aggravating factor).

Here, the sentencing court placed significant weight on the improper "ongoing pattern of abuse" aggravator. Most of the evidence presented was in support of this aggravator. See 12/16/13RP 94-105, 114-99. At sentencing, the court focused on Miller's pattern of "terrorizing women." 1/10/14RP 267, 267-69. The court imposed an exceptional sentence of 600 months—more than ten years above the top of the standard sentencing range. CP 206, 208, 213. Although the court found, in boilerplate language, that each aggravating factor was a "substantial and compelling reason justifying an exceptional sentence," CP 213, it is unlikely the court would have imposed such a lengthy

exceptional sentence based only on Miller's committing the offense shortly after his release from incarceration.

In upholding the exceptional sentence, the Court of Appeals relied on State v. Zatkovich, 113 Wn. App. 70, 52 P.3d 36 (2002). Slip Op. at 13. That case conflicts with Parker. Zatkovich holds, "[w]hen a trial court lists more than one justification for an exceptional sentence and each ground is an independent justification, we affirm the sentence if one of the grounds is valid." Zatkovich, 113 Wn. App. at 78.

Contrary to Zatkovich, a reviewing court may not affirm an exceptional sentence based upon an improper aggravator simply because one other aggravator was "valid." Instead, the court may affirm only if "the record clearly indicates the sentencing court would have imposed the same sentence anyway." Parker, 132 Wn.2d at 189.

Because the Court of Appeals' opinion conflicts with Parker, this Court should grant review. RAP 13.4(b)(1), (4).

3. The "ongoing pattern of abuse" aggravator is based upon prior crimes that were already taken into account in establishing the offender score. RAP 13.4(b)(1), (4).

An aggravating factor cannot support the imposition of an exceptional sentence if the Legislature necessarily considered that factor when it established the standard sentence range. State v. O'Dell,

183 Wn.2d 680, 690, 358 P.3d 359 (2015); State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Because criminal history is already taken into account in computing the offender score, and thus establishing the standard sentence range, it cannot justify the imposition of an exceptional sentence. Id.; Alexander, 125 Wn.2d at 725; State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995).

To support the "pattern of abuse" aggravating factor, the State presented evidence of multiple prior incidents of domestic violence for which Miller had already received criminal convictions. See 12/05/13RP 159-60, 176; 12/16/13RP 86-104, 135-36, 143-44, 223-27; Ex. 342, 344, 344A, 397A and B, 398, 399, 400, 401, 402A and B, 403, 404, 405.

This was improper because the Legislature already took Miller's criminal history into account in establishing his standard sentence range. O'Dell, 183 Wn.2d at 690 n.3. Therefore, the court was not permitted to rely upon those prior incidents in imposing an exceptional sentence. Id.

4. The "ongoing pattern of abuse" jury instruction was an impermissible comment on the evidence.

The jury was instructed that in order to find the "ongoing pattern of abuse" aggravator, it must find "the offense was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time." CP 170. The jury was further instructed that "[a]n 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks." CP 170.

In State v. Brush, 183 Wn.2d 550, 556-57, 353 P.3d 213 (2015), the Court held identical jury instructions constituted an impermissible comment on the evidence. The Washington State Constitution explicitly provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. VI, § 16. The jury instruction in Brush defining "prolonged period of time" as "more than a few weeks" was an unconstitutional comment on the evidence because it essentially resolved the factual issue of whether the abuse occurred over a "prolonged period of time." Brush, 183 Wn.2d at 557. The instruction essentially informed the jury

that, "[a]s long as the State showed that the abuse lasted longer than a few weeks, the jury was instructed to find that the abuse occurred over a 'prolonged period of time.'" Id. at 559.

Under Brush, the jury instruction regarding the pattern of abuse aggravator was an unconstitutional comment on the evidence.

5. The "rapid recidivism" aggravator was not proved beyond a reasonable doubt.

To prove the "rapid recidivism" aggravator, the State presented the testimony of Miller's community corrections officer, who said Miller was released from prison on October 15, 2012, 15 days before the current incident. 12/16/13RP 92.

The Court of Appeals held this evidence was sufficient to prove beyond a reasonable doubt that Miller committed the current offense "shortly after being released from incarceration." Slip Op. at 10-12.

Contrary to the Court of Appeals' opinion, the evidence was not sufficient. The State was required to prove the aggravating factor beyond a reasonable doubt. State v. Rowland, 160 Wn. App. 316, 330, 249 P.3d 645 (2011), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012); Blakely v. Washington, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Const. amend. XIV. To assess the sufficiency of the evidence, the reviewing court views the evidence in the light most

favorable to the State and asks whether a rational trier of fact could have found the aggravating facts beyond a reasonable doubt. State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

A jury's findings in support of the "rapid recidivism" aggravating factor must be "distinguishable from mere criminal history." State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 876 (1994). An exceptional sentence is properly based on this factor when the circumstances show "a greater disregard for the law than otherwise would be the case" based on the "especially short time period between prior incarceration and reoffense." Id.

In Butler, the court held "Butler's immediate reoffense, *within hours of his release*, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense." 75 Wn. App. at 54 (emphasis added). Similarly, in State v. Cham, the court held, "Cham's commission of a crime *within one hour of release from jail* satisfies the statutory definition." State v. Cham, 165 Wn. App. 438, 450, 267 P.3d 528 (2011) (emphasis added).

Here, in contrast to those cases, Miller's commission of a crime *more than two weeks after release* from prison is not sufficient to prove beyond a reasonable doubt that he committed the crime "shortly after

release from incarceration." The facts are not "distinguishable from mere criminal history." See Butler, 75 Wn. App. at 54. Thus, the sentencing court erred in relying upon that aggravator in imposing the exceptional sentence.

6. The erroneous admission of hearsay evidence was not harmless.

The Court of Appeals held Patricelli's statements expressing fear of Miller were relevant because "Miller placed Patricelli's state of mind at issue by claiming that she had gotten into an argument with him and provoked him the morning of her death." Slip Op. at 5. The court agreed with Miller that Patricelli's hearsay statements describing *Miller's conduct* were not admissible. Slip Op. at 3, 7. But the court concluded the error in admitting those statements was harmless. Slip Op. at 8.

Patricelli's out-of-court statements were not admissible because her state of mind was not at issue. It is well-established that, in a murder prosecution, evidence of the decedent's state of mind is not relevant or admissible, unless her state of mind is put at issue due to the nature of the defense raised. State v. Parr, 93 Wn.2d 95, 100-03, 606 P.2d 263 (1980). In Parr, the defendant was charged with murdering his girlfriend by gunshot. Id. at 96-97. At trial, the girlfriend's brother

testified that six months before the incident, his sister told him Parr had threatened her with a gun and she was afraid of him. Id. at 98.

The Court explained that ordinarily a victim's expressions of fear of the defendant are ordinarily not relevant or admissible in a criminal case. Id. at 102-03. Such evidence does not tend to prove the defendant's intent or conduct and carries great potential of unfair prejudice, particularly in a murder case where the defendant has no opportunity to cross-examine the declarant. Id. at 100-03.

But evidence of the decedent's state of mind may be admissible if her state of mind is relevant to rebut the specific defense raised. If the defense is accident or self-defense, evidence regarding the decedent's state of mind may be probative of the question whether the victim was likely to act in the manner claimed by the defendant. Id. at 103. In Parr, for instance, the evidence was relevant and admissible to rebut Parr's claim that the gun went off accidentally during a struggle after the victim grabbed for the gun. Id. at 96, 106-07.

Here, Patricelli's state of mind was not relevant or admissible. Miller did not assert a defense such as accident or self-defense which would have put Patricelli's state of mind at issue. Her state of mind

was not relevant to the central issue in the case—whether Miller acted with a premeditated intent.

The Court of Appeals correctly held that, even if Patricelli's state of mind *were* relevant, the portions of her statements describing Miller's actions which caused her fear were inadmissible. The admission of this evidence was both highly prejudicial and unfair because Miller had no opportunity for cross-examination.

The improper admission of evidence is harmless only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Benn, 161 Wn.2d 256, 266 n.4, 165 P.3d 1232 (2007).

Miller admitted killing Patricelli but the evidence to support premeditation was not overwhelming. Miller testified he entered her apartment that morning in order to take a shower and collect his belongings before she returned from work, and not with any intent to kill. 12/11/13RP 139-41, 159, 164; 12/12/13RP 81. This explanation is plausible, as Tuesday was a regular work day for Patricelli and ordinarily she would not have returned to the apartment until later that afternoon. 12/11/13RP 67-68, 141-42. Miller routinely showered at

her apartment and kept his clothing there. 11/26/13RP 38; 12/02/13RP 63; 12/11/13RP 49, 51, 108, 141.

Reversal is required because the highly prejudicial evidence regarding Patricelli's fear of him and his threatening actions which supposedly caused that fear likely influenced the jury's verdict.

7. Cumulative error deprived Miller of a fair trial.

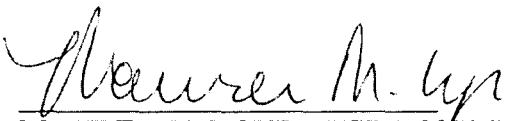
Under the cumulative error doctrine, reversal is required when several trial errors standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

Here, the cumulative effect of the trial court's evidentiary errors denied Miller a fundamentally fair trial, requiring reversal.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 2nd day of November, 2016.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SCOTTYE LEON MILLER, a.k.a. SCOTTYE MILLER MILLER, Appellant.	)	No. 71559-3-I DIVISION ONE UNPUBLISHED OPINION FILED: October 3, 2016

TRICKEY, A.C.J. — Scottye Miller appeals his conviction and exceptional sentence for first degree murder. He argues that the trial court erred by admitting hearsay testimony to establish the victim's state of mind, which Miller claims was irrelevant. Because Miller's account of the victim's conduct put her state of mind at issue, we disagree. But we agree with Miller that the trial court improperly admitted hearsay statements describing Miller's conduct. Nevertheless, we affirm Miller's conviction because any evidentiary errors were harmless. And, we affirm the trial court's imposition of an exceptional sentence on the basis that Miller committed the offense shortly after being released from incarceration.

FACTS

Miller and Tricia Patricelli dated for about four years. Miller was abusive throughout the relationship. In October 2012, Miller came to stay with Patricelli and her daughters. Patricelli and Miller's mutual friend, Rayford "June" Varnado, also lived there temporarily and slept on her couch.

On October 27, 2012, after an argument the night before, Patricelli texted Miller and told him not to stay with her. The next day Miller texted his mother that

he was going to kill Patricelli.

On October 29, 2012, without Patricelli's knowledge, Miller slept in a closet on Patricelli's balcony. Miller sent Patricelli threatening text messages. He texted Varnado that he was going to kill Patricelli and asked if Varnado would help him. Miller repeatedly called and texted Varnado between 2:00 a.m. and 7:00 a.m., insisting that he unlock the door to Patricelli's apartment.

That morning, Patricelli dropped her children off at her mother's house but returned home before going to work. Miller was at her apartment when she returned.

Miller stabbed Patricelli with a knife more than 30 times. Patricelli died from the wounds.

Later that morning, the police arrested Miller. Miller eventually admitted to stabbing her. He claimed he had not meant to kill her.

He was charged with murder in the first degree with enhancements for committing the crime with a deadly weapon and committing a crime of domestic violence. The State notified Miller that it would seek an exceptional sentence because the crimes were committed under aggravating circumstances. They alleged that the crime was an aggravated domestic violence offense and that Miller committed it shortly after being released from incarceration.

The case proceeded to a bifurcated jury trial. Several witnesses testified that Patricelli had told them she was afraid of Miller. The jury convicted Miller of first degree murder.

After that verdict, the trial for the two aggravating circumstances began.

The State introduced evidence that Miller had been released from incarceration just 15 days before he murdered Patricelli. The State also showed that Miller had many domestic violence convictions for abusing Patricelli and his former spouse.

The jury found that both aggravating circumstances were proved beyond a reasonable doubt. Based on those aggravating factors, the trial court imposed an exceptional sentence of 600 months. Miller appeals.

ANALYSIS

State of Mind Hearsay Exception

Miller argues that the trial court abused its discretion when it admitted Patricelli's out-of-court statements, often describing Miller's conduct, to establish Patricelli's state of mind. Specifically, Miller contends that Patricelli's state of mind was not relevant. We conclude that Miller's descriptions of Patricelli's conduct the morning of the murder made her hearsay statements relevant, but that it was error to admit the statements that described Miller's actions.

As an initial matter, the State claims that Miller failed to preserve this issue below. We disagree. Miller objected to the introduction of Patricelli's declarations on the grounds that they were hearsay at trial, and now objects on the grounds that they are irrelevant. To preserve an evidentiary issue for appeal, a party must object on the same grounds at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). But the relevance of evidence offered under the state of mind exception to the prohibition of hearsay evidence is essential to its admissibility.

In State v. Parr, the defendant objected to the admission of state of mind evidence on the grounds of hearsay. 93 Wn.2d 95, 98, 606 P.2d 263 (1980). The

court held that a person's out-of-court statements were admissible as an exception to the hearsay rule when the person's state of mind "is in question" *and* there is some need for the evidence. Parr, 93 Wn.2d at 98-99. Accordingly, unless the evidence is relevant, it is not admissible to show state of mind. We conclude that objections on the grounds of hearsay were sufficient to preserve the issue.

Hearsay, or an out-of-court statement admitted to prove the truth of the matter asserted, is generally inadmissible. ER 801(c), 802. But there is an exception to that rule for statements that establish the declarant's state of mind. ER 803(a)(3). The statements are admissible only when there is "some degree of necessity to use out-of-court, uncross-examined declarations," and "circumstantial probability of . . . trustworthiness." Parr, 93 Wn.2d at 98-99. We review evidentiary rulings for an abuse of discretion. State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). A trial court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds. State v. Thurlby, 184 Wn.2d 618, 624, 359 P.3d 793 (2015).

In homicide cases, an accused's defense, such as accident or self-defense, can place the decedent's state of mind at issue. Parr, 93 Wn.2d at 103. Still, even when the deceased's state of mind is relevant, "testimony which describes conduct or words of the defendant" is not admissible under this exception. Parr, 93 Wn.2d at 104.

In Parr, the victim's brother testified that the victim had told him she feared the defendant and that the defendant had threatened her. 93 Wn.2d at 98. The court determined that the victim's fear of the defendant was relevant to rebut the

defendant's claim that the victim had reached for a gun while they argued. Parr, 93 Wn.2d at 106. The court acknowledged that the probative value was slight but that it "was within the province of the jury to determine what inference should be drawn from [the] evidence." Parr, 93 Wn.2d at 106-07. But the court held it was error to admit the testimony about the threats the defendant made against the victim. Parr, 93 Wn.2d at 104. In State v. Athan, the defendant claimed he had consensual sex with the victim the night she died. 160 Wn.2d 354, 378-79, 158 P.3d 27 (2007). The court admitted evidence that the victim had said she was not romantically interested in the defendant to counter that claim. Athan, 160 Wn.2d at 381.

Here, Miller placed Patricelli's state of mind at issue by claiming that she had gotten into an argument with him and provoked him the morning of her death. Miller testified that when Patricelli saw him in the bedroom, she asked him "what the hell [he was] doing there."[1] When he told her he was going to take a shower and then leave, she ordered him to leave right away, and they got into an argument. He claimed that she was walking toward him when they were arguing and pushed him out of the way. While they continued to argue, she went into the bathroom, leaving Miller in the bedroom.

Patricelli's fear of Miller is relevant to their interactions that morning. It may have helped the jury evaluate how Patricelli would have responded upon unexpectedly finding Miller in her home, including whether it is likely that she would have gotten into an argument with him or initiated a physical confrontation.

[1] Report of Proceedings (RP) (Dec. 11, 2013) at 147.

Most of the testimony Miller argues was erroneously admitted falls within the state of mind hearsay exception. It shows Patricelli's fear of Miller but does not incorporate or describe any of Miller's conduct. Thus, the trial court did not abuse its discretion by admitting any of the following testimony.

First, a police officer testified about his interaction with Patricelli when he responded to a 911 call she had made. He described her as nervous and scared. He testified about her repeated request that he not let Miller know that she had called the police.

Second, Varnado testified that, the night before the murder, Patricelli received a text message or call from Miller about another man, named Nate. Based on the fact that Miller knew the man's name was Nate, Patricelli was concerned that Miller might be around the house. Varnado testified that Patricelli seemed scared by the possibility that Miller was nearby and started "checking all of the windows and the doors."[2] The only conduct by Miller described in this interaction was his text message to Patricelli. That text message was admitted separately. Varnado's other testimony describes Patricelli's fears.

Third, Patricelli's coworker testified that she sometimes accompanied Patricelli home and helped her check her apartment to make sure that Miller was not hiding inside. The court carefully instructed the State not to have the coworker say or imply that Patricelli had told her that Miller had hidden in her apartment before.

Finally, Patricelli's daughter also testified that her mother had told her that

[2] RP (Dec. 2, 2013) at 22.

she was "nervous and that she was kind of relieved" about Miller coming home.[3]

The other hearsay statements the trial court admitted describe Miller's behavior. The night before she died, Patricelli texted Miller to complain about him "stalking, harassing and threatening" her.[4] Patricelli's coworker also testified that she had seen threatening letters that Miller wrote to Patricelli, and that Patricelli had told her that the letters scared her. Patricelli's daughter testified that her mother had told her she was afraid of Miller after he climbed onto their balcony. Because these statements incorporate Miller's conduct, the trial court erred by admitting them.

The State argues that, because all of Miller's conduct was admitted under ER 404(b), the statements describing that conduct are admissible. We reject this argument for two reasons. First, the fact that Miller's conduct is admissible does not mean that all evidence establishing that conduct is admissible. ER 404(b) is not an exception to the hearsay rule. State v. Powell, 126 Wn.2d 244, 265-66, 893 P.2d 615 (1995).

Second, when the State moved in limine to introduce Miller's history of domestic violence under ER 404(b), it did not seek to use Patricelli's statements about Miller's conduct as evidence of that conduct. Similarly, the court did not rely on ER 404(b) when it overruled Miller's objections to the testimony. The parties discussed the court's ER 404(b) rulings in relation to the relevancy of Patricelli's fear and Miller's conduct, but the trial court specifically cautioned the State not to

---

[3] RP (Dec. 11, 2013) at 11. This statement includes that Miller was coming home, which could be considered his conduct. Even if it were, Patricelli's daughter testified about him coming home from her personal knowledge. RP (Dec. 11, 2013) at 10-11.
[4] RP (Dec. 9, 2013) at 3-5,

elicit any testimony about what Patricelli had told her coworker about Miller's past behavior, because it would be hearsay.

Prejudice

Miller argues that these errors are prejudicial and require reversal. We disagree because the errors were minor and the evidence of Miller's guilt was overwhelming. They are harmless.

Evidentiary errors require reversal only if they result in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (July 19, 2002). Errors are prejudicial if there is a reasonable probability that they materially affected the outcome of trial. Neal, 144 Wn.2d at 611. "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Neal, 144 Wn.2d at 611.

Because Miller admitted killing Patricelli, the only real issue at trial was premeditation. A person kills with premeditation if, after deliberation, he forms the intent to take another life. State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995).

Miller's text messages alone are overwhelming evidence that the killing was premeditated. Two days before the murder, he sent his mother a text message saying that he was going to kill Patricelli. The next night he sent the following messages to Varnado, who was at Patricelli's apartment:

> Cuzz when I cum in tha kill tha bitch is u gon help the hoe brah... She gon be dead ya ain't got tha worry bout hur sayin shyt to u bout y u ain't help her
>
> Good cuz I can say I was out wit u so they can't put me there at tha scene

> She still talkin shyt she just don't know she bout tha die[5]

He also called Varnado dozens of times and texted him repeatedly to unlock the doors to Patricelli's apartment that evening and throughout the night.

Miller also sent Patricelli text messages before she went to bed that evening:

> Bitch I told u u was ah person that lie good luck u thank u gon have fun when ya baby get out u want get tha c him um gon show u that I can get u lol
>
> Watch how u gon ask me not tha hurt u just watch[6]

These messages reveal that Miller planned to kill Patricelli more than a day ahead of the murder. Even Miller's own account of the events implies some level of premeditation. He testified that after he argued with Patricelli he went to the kitchen, grabbed a knife, went back to the bathroom, and began stabbing Patricelli.

Given the strength of the premeditation evidence, it is unlikely that evidence of Miller's past threatening behavior influenced the outcome of the trial. Moreover, there was other, properly admitted evidence that, like the improperly admitted evidence, showed that Miller had threatened Patricelli and that he had climbed onto her balcony. Miller himself admitted that he had threatened Patricelli. He testified that he had threatened her in letters and text messages. The police officer who responded to Patricelli's 911 call testified that he personally witnessed Miller on the balcony that day.

Miller's argument that the errors were prejudicial relies primarily on his

---

[5] Exhibit (Ex.) 349 at 2.
[6] Ex. 349 at 2-11.

argument that the state of mind evidence was irrelevant. See State v. Cameron, 100 Wn.2d 520, 529-31, 674 P.2d 650 (1983). This argument is unpersuasive because Patricelli's fear of Miller was relevant.

Cumulative Error

Miller argues that the accumulation of evidentiary errors denied him a fair trial even if no individual error did. We disagree.

"The accumulation of errors may deny the defendant a fair trial and therefore warrant reversal even where each error standing alone would not." State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012). Cumulative errors do not require reversal when there is overwhelming evidence of the defendant's guilt. In re Pers. Restraint of Cross, 180 Wn.2d 664, 691, 327 P.3d 550 (2014). The defendant "bears the burden of showing . . . that the accumulated prejudice affected the outcome of the trial." Cross, 180 Wn.2d at 690.

The only errors Miller identifies are the evidentiary errors discussed above. Miller cannot meet his burden here for the same reasons we held the errors were harmless. The evidence of Miller's guilt was overwhelming.

We affirm Miller's conviction.

Rapid Recidivism Aggravating Factor

The jury found that Miller committed this crime shortly after his release from incarceration. Miller argues that the court erred by relying on this factor when it imposed an exceptional sentence. There was evidence that Miller committed the crime just 15 days after his release. We conclude that the jury may find that

"shortly after" can be as long as 15 days.[7]

One aggravating factor on which a judge may base an exceptional sentence is that the defendant committed "the current offense shorty after being released from incarceration." RCW 9.94A.535(3)(t). It is also described in the case law as rapid recidivism. State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994). Ordinarily, the trial court may not consider a defendant's criminal history when imposing an exceptional sentence because that history is factored into the standard range sentence. Butler, 75 Wn. App. at 54. But this aggravating factor focuses on the short time period between a defendant's release from incarceration and his commission of a new offense. Butler, 75 Wn. App. at 54. Therefore, it is distinguishable from additional punishment based on "mere criminal history." Butler, 75 Wn. App. at 54.

Like a finding of guilt, the jury must find any facts necessary to support an aggravating circumstance beyond a reasonable doubt. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). We review the jury's findings for a sufficiency of evidence. Stubbs, 170 Wn.2d at 123. Viewing all evidence in the light most favorable to the State, we must determine whether a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

Miller argues that a delay of over two weeks is too long to distinguish his release from incarceration from mere criminality. He relies on two cases where the court has upheld findings on this aggravating factor when the crime was

[7] Clerk's Papers (CP) at 159.

committed within hours of the defendant's release. See Butler, 75 Wn. App. at 54; State v. Cham, 165 Wn. App. 438, 450, 267 P.3d 528 (2011). Neither case establishes an outer time limit.

In State v. Combs, the court held that six months between a defendant's release and his new conviction was too long to support the aggravating factor in that case. 156 Wn. App. 502, 507, 232 P.3d 1179 (2010). Still, the court stated that "six months might constitute a short period of time" under different circumstances. Combs, 156 Wn. App. at 507.

In State v. Saltz, the defendant committed malicious mischief one month after being released from incarceration for violation of a no-contact order. 137 Wn. App. 576, 579, 585, 154 P.3d 282 (2007). The court upheld the trial court's exceptional sentence, imposed on the basis of rapid recidivism. Saltz, 137 Wn. App. at 586.

Here, Miller's correctional officer testified that Miller was released from prison on October 15, 2012. Miller killed Patricelli on the morning of October 30, 2012. A rational jury could reasonably find that 15 days was shortly after Miller's release.[8] The trial court did not err when it imposed an exceptional sentence based on this aggravating factor.

Domestic Violence Aggravating Factor

The jury also found Miller guilty of a crime of aggravated domestic violence. RCW 9.94A.535(3)(h), (i). To do so, the jury needed to believe beyond a

[8] As the State points out, Miller's argument is more easily understood to be that the sentencing court's reasons cannot justify an exceptional sentence. That would be a question of law that we review de novo. Saltz, 137 Wn. App. at 580. It does not change the outcome here.

reasonable doubt that the offense involved domestic violence, and "was part of an ongoing pattern of psychological or physical abuse of multiple victims manifested by multiple incidents over a prolonged period of time."[9] The court relied on this factor when it imposed an exceptional sentence.

Miller argues that, for several reasons, the trial court erred when it relied on this factor. He contends that the trial court improperly considered his criminal history, even though it was incorporated into his sentence through his offender score, that the phrase "psychological abuse" is unconstitutionally vague, and that the trial court improperly commented on the evidence. But, even if we were to vacate the jury's finding on the domestic violence aggravating factor, we would still uphold the exceptional sentence on the basis of Miller's rapid recidivism. Therefore, we do not address Miller's challenges to this factor.

We can uphold a sentence imposed for improper and proper grounds if the proper grounds independently justify the exceptional sentence. State v. Zatkovich, 113 Wn. App. 70, 78, 52 P.3d 36 (2002). As discussed above, the court properly relied on the rapid recidivism factor when imposing an exceptional sentence. The trial court explicitly concluded that "either aggravating circumstance standing alone is a substantial and compelling reason justifying the exceptional sentence."[10] The court's oral ruling likewise suggests that it found the recidivism factor as important as the aggravated domestic violence factor.

Miller argues that it is unlikely that the court would have imposed the same exceptional sentence on the basis of the rapid recidivism aggravating factor alone.

---

[9] CP at 170.
[10] CP at 213.

Miller's argument to the contrary is speculative and directly conflicts with the trial court's written order and oral ruling. We affirm the exceptional sentence on the basis of the rapid recidivism factor alone.

Affirmed.

Trickey, ACJ

WE CONCUR:

Becker, 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. 71559-3-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:

☒ respondent Amy Meckling, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[amy.meckling@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 2, 2016