

67238-0

67238-0

NO. 67238-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDWARD ALBERT THAVES,

Appellant.

2012 APR -2 PM 2:32
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in admitting the victim's statement to the police as an excited utterance and as a recorded recollection.

2. Whether this Court should interpret the statute codifying the "pattern of abuse" aggravating factor in domestic violence cases in a manner that is consistent with the plain language, effectuates the legislature's intent, and avoids absurd results.

3. Whether this Court should reject the defendant's vagueness challenge to the "pattern of abuse" aggravating factor because a) the Washington Supreme Court has held that aggravating factors are not subject to vagueness challenges, and b) because the aggravating factor is not unconstitutionally vague.

4. Whether this Court should affirm the defendant's sentence because the evidence establishing the aggravating factor was admissible and because the defendant did not object to its admission at trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Edward Albert Thaves, with assault in the first degree (count 1), assault in the second degree (count 2, as an alternative to count 1), unlawful imprisonment (count 3), felony harassment (count 4), tampering with a witness (count 5), and two counts of misdemeanor violation of a court order (counts 6 and 7) for conduct committed against Thaves's girlfriend, Erica Dawson, in early 2011. CP 1-6, 57-61. Each crime except witness tampering was designated as a domestic violence offense. CP 57-61. The State further alleged an aggravating circumstance as to counts 1 through 4, *i.e.*, that these crimes were domestic violence offenses that were part of "an ongoing pattern of . . . abuse of multiple victims manifested by multiple incidents over a prolonged period of time" in accordance with RCW 9.94A.535(3)(h)(i). CP 57-59.

During pretrial motions, the State argued that all of Erica Dawson's out-of-court statements should be admitted at trial under the doctrine of forfeiture by wrongdoing, based mainly on jail phone calls in which Thaves urged Dawson not to come to court and the State's subsequent inability to locate Dawson despite significant

efforts. CP 315-20; RP (4/11/11) 9; RP (4/13/11) 73-83, 86-87.

The trial court agreed with the State and made findings accordingly. CP 269-73; RP (4/13/11) 109-18. In addition, the trial court found in the alternative that Dawson's 911 calls and her recorded statement to Kent Police Officer Scott Rankin were admissible as excited utterances under ER 803(a)(2).¹ RP (4/13/11) 90-93.

After Dawson's 911 calls and her recorded statement to Officer Rankin had already been admitted at trial and played for the jury, Dawson was finally arrested on the State's material witness warrant while the State was still presenting its case-in-chief. RP (4/18/11) 19. Dawson was held in custody until her testimony was completed. RP (4/18/11) 36-37.

Dawson testified that she did not remember the relevant events in question, and although she admitted she had called 911 and had given a recorded statement to the police, she claimed she did not remember why she had called 911 or what she had said in her statement. RP (4/19/11) 147, 151-52, 157-59. Dawson acknowledged that she told the police that everything she had said in her statement was true. RP (4/19/11) 157. Based on Dawson's

¹ Dawson's statements to treating physician Dr. Dana Pope were also admitted at trial under ER 803(a)(4). See RP (4/19/11) 61.

testimony, the State argued that Dawson's recorded statement to Officer Rankin was also admissible as a recorded recollection under ER 803(a)(5), and the trial court agreed. CP 274; RP (4/20/11) 171-72. Accordingly, the trial court agreed with defense counsel that the recording should not go into the jury room as an exhibit. RP (4/20/11) 173.

During deliberations, the jury asked the court to replay the recordings of Dawson's 911 calls, Thaves's calls to Dawson from the jail, and Dawson's statement to Officer Rankin. CP 119, 121. The trial court agreed to replay the 911 calls and the jail calls, but the court did not replay Dawson's recorded statement. CP 120, 122; RP (4/21/11) 241-52.

The jury found Thaves guilty of assault in the second degree, unlawful imprisonment, witness tampering, and two counts of misdemeanor violation of a court order as charged. The jury acquitted Thaves of assault in the first degree and felony harassment. CP 62-68.

Immediately after the jury returned its verdicts, the trial court held a bifurcated proceeding regarding the aggravating circumstance alleged for counts 2 and 3. RP (4/21/11, post-trial); RP (4/22/11). As proof of the aggravating factor, the State offered

certified copies of court documents from three prior cases in which Thaves was convicted of domestic violence crimes. These certified documents consisted of the following: 1) a district court docket establishing that in 1996, Thaves was convicted of one count of assault in the fourth degree - domestic violence (victim Michelle Coates);² 2) an information, two no-contact orders, and a judgment and sentence establishing that in 1998, Thaves was convicted of unlawful imprisonment and assault in the third degree - domestic violence (victim Lori Hemstreet);³ and 3) an information, two no-contact orders, and a judgment and sentence establishing that in 2003, Thaves was convicted of assault in the third degree - domestic violence (victim Holly Traub).⁴ Thaves's counsel objected to the admission of any certifications for determination of probable cause; however, when prosecutor agreed to remove the certifications for determination of probable cause from the superior court documents, Thaves's counsel conceded that the remaining certified documents were admissible. RP (4/21/11, post-trial)

² Post-Trial Ex. 1.

³ Post-Trial Ex. 3.

⁴ Post-Trial Ex. 2.

11-13. In addition, after some discussion, Thaves's counsel agreed to the trial court's proposed jury instructions for the bifurcated proceeding as well. RP (4/21/11, post-trial) 13-14.

At the conclusion of the bifurcated proceedings, the jury returned special verdicts finding beyond a reasonable doubt that Thaves's current convictions for second-degree assault and unlawful imprisonment were aggravated domestic violence crimes, meaning that they were part of an ongoing pattern of abuse of multiple victims as manifested by multiple incidents over a prolonged period of time. CP 69-71, 109-16.

The trial court imposed an exceptional sentence on counts 2 and 3 and standard-range sentences on the other counts. CP 276-86. Thaves now appeals. CP 275.

2. SUBSTANTIVE FACTS

Shortly after 9:00 a.m. on January 19, 2011, Erica Dawson called 911 to report that her boyfriend, Edward Thaves, was "gonna fucking kill [her]." Ex. 17; Ex. 18, p. 2. She told the operator that Thaves had been "choking [her] until [she] passed out" and that she had been unable to "move until this morning." Ex. 17; Ex. 18, p. 3. Dawson had to hang up the phone because she was afraid that

Thaves (who was in the bathroom) would kill her if he found out that she had called 911. Ex. 17; Ex. 18, p. 3.

A short time later, Dawson called back and pretended she was talking to a friend so that Thaves would not realize that she was speaking with a 911 operator. Ex. 17; Ex. 18, p. 4. When Dawson thought that Thaves was not listening, she whispered, "Hurry, hurry, hurry, hurry. Hurry." Ex. 17; Ex. 18, p. 4. Dawson pleaded with Thaves to let her leave the house, and told him, "Animal,⁵ I'm scared." Ex. 17; Ex. 18, p. 4. This call ended abruptly amid Dawson's screams and sounds of a struggle. Ex. 17.

Kent Police Officers Scott Rankin and Christopher Korus responded to Dawson's 911 calls. When the officers approached the front door of the house, they heard a woman screaming, a man yelling, sounds of a struggle, and something that sounded like a body hitting the floor. RP (4/14/11) 133, 165-66. Officer Korus pounded on the door and yelled "police," but there was no response. RP (4/14/11) 166. Officer Rankin kicked the door open. RP (4/14/11) 135.

⁵ "Animal" is Thaves's nickname. RP (4/19/11) 101.

As the officers entered the house, they saw Thaves in the living room and Dawson in the hallway behind him. RP (4/14/11) 167. They ordered Thaves to get down on the floor, and he eventually complied. Officer Rankin took Thaves into custody while Officer Korus and a backup officer performed a protective sweep of the house. RP (4/14/11) 136-37. Thaves was yelling "Erica" in a "hostile, aggressive" manner. RP (4/14/11) 137.

As the officers performed the protective sweep, Dawson followed them through the house and made several spontaneous remarks, including "thank god you're here," "he was going to kill me," "I couldn't run out the door 'cause he would catch me," and that Thaves "had kept her locked in the bedroom." RP (4/14/11) 171-73. Officer Korus described Dawson as "freaked out" and "petrified." RP (4/14/11) 171.

Thaves would not get up on his own and go to the patrol car, so Officer Korus and other officers had to carry him out of the house. RP (4/14/11) 173. When the officers put Thaves in the patrol car, he pretended to have a seizure until Officer Korus told him to "quit acting." RP (4/14/11) 174-75. At that point, Thaves sat up and "seemed to recover from his condition." Officer Korus then transported Thaves to jail. RP (4/14/11) 175.

Once Thaves had been removed from the scene, Officer Rankin spoke with Dawson and she agreed to give a recorded statement. RP (4/14/11) 150-51. Officer Rankin noted that Dawson had fresh injuries including marks on her neck consistent with strangulation, redness and swelling around her eyes and cheeks, and blood on the sides of her mouth. RP (4/14/11) 141, 147-48. During the recorded statement, Dawson explained that Thaves had punched her in the jaw and strangled her until she could not breathe and was losing consciousness. Dawson said that Thaves had threatened to kill her and would not let her leave the house. Ex. 9; CP 296-306. Officer Rankin noted that although Dawson was "matter of fact" initially when answering routine questions, she was very emotional and crying when describing what had occurred. RP (4/14/11) 141.

Dawson went to the emergency room at St. Francis Hospital in Federal Way. She told her treating physician, Dr. Dana Pope, that her boyfriend had beaten and strangled her. RP (4/19/11) 61. Dr. Pope ordered a CT scan of Dawson's neck, which revealed that her hyoid bone and cricoid cartilage were fractured. RP (4/19/11) 47-50, 62. These injuries are "highly consistent" with strangulation. RP (4/19/11) 120. Dr. Pope wanted to transfer Dawson to

Harborview for observation due to the nature of her injuries and concerns about the integrity of her airway, but Dawson left the hospital against medical advice. RP (4/19/11) 63-66.

Although a no-contact order was issued, Thaves persisted in calling Dawson from jail. Recordings of these calls were admitted at trial. RP (4/14/11) 185-93; RP (4/18/11) 11-13, 16-17, 21. During these calls, Thaves repeatedly urged Dawson not to come to court and to hide from the authorities. See CP 312, 318-20.

As noted above, Dawson was eventually arrested on a material witness warrant. RP (4/18/11) 19. Dawson testified that she could not remember what happened on January 19, 2011, that she did not know why she had called 911, and that she was not afraid of Thaves. RP (4/19/11) 147, 151, 153. Dawson also claimed that she did not remember whether Thaves had called her from the jail, and she denied that he had told her not to come to court. RP (4/19/11) 98-99, 148-49, 166. Dawson testified that she was a heavy drug user, and claimed that someone else had assaulted her. RP (4/19/11) 160-63. Nonetheless, Dawson acknowledged that she had given a statement to the police on January 19, 2011, and that she had told the police that the statement was true. RP (4/19/11) 157.

C. ARGUMENT

1. THE VICTIM'S RECORDED INTERVIEW WAS PROPERLY ADMITTED AS AN EXCITED UTTERANCE AND AS A RECORDED RECOLLECTION.

Thaves first claims that the trial court abused its discretion in admitting Erica Dawson's recorded statement to Officer Rankin. More specifically, Thaves argues that the statement was inadmissible under the hearsay rules as either an excited utterance or a recorded recollection. He further argues that the error was not harmless, and thus, that his convictions for assault in the second degree and unlawful imprisonment should be reversed.⁶ Brief of Appellant, at 8-16.

These arguments should be rejected. First, the record shows that Dawson gave the statement while she was still under the stress of the traumatic assault Thaves had committed upon her, and thus, it was properly admitted as an excited utterance. Second, the fact that the recorded statement was played for the jury rather than read into the record is a procedural matter that does not affect its admissibility as a recorded recollection, and in

⁶ Thaves does not challenge his convictions for witness tampering and two counts of misdemeanor violation of a court order on appeal.

any event, does not constitute an abuse of discretion under the procedural circumstances present in this case. Lastly, other evidence that is not challenged on appeal amply supports the jury's verdicts; accordingly, Thaves cannot show a reasonable probability that the verdicts would have been different if the statement had not been admitted, and thus, any error is harmless. This Court should affirm.

As a preliminary matter, it is important to note that because Erica Dawson testified at trial, the confrontation clauses of the federal and state constitutions are not at issue. See State v. Price, 158 Wn.2d 630, 643-50, 146 P.3d 1183 (2006) (holding that a witness testifies and is available for confrontation even if the witness claims to have no memory of relevant events). Rather, the only issue presented is whether the trial court manifestly abused its discretion in admitting Dawson's statement to Officer Rankin under the rules of evidence.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State

v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will not disturb a trial court's evidentiary ruling unless "no reasonable judge would have made the same ruling." State v. Woods, 143 Wn.2d 561, 595-96, 23 P.3d 1046 (2001).

a. The Statement Was Admissible As An Excited Utterance.

Under ER 803(a)(2), an out-of-court statement is admissible as an excited utterance if the statement relates to a startling event or condition, and the statement was made "while the declarant was under the stress of excitement caused by the event or condition." A statement is admissible as an excited utterance if three requirements have been met: 1) a startling event occurred; 2) the declarant made the statement while under the stress of the startling event; and 3) the statement relates to the startling event. State v. Ohlson, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

The passage of time between the startling event and the statement, although certainly a factor to be considered, is not dispositive as to whether the statement qualifies as an excited utterance. State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992); State v. Flett, 40 Wn. App. 277, 287, 699 P.2d 774 (1985).

In addition, statements made in response to questioning may still be sufficiently spontaneous to be admissible as excited utterances. State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). Ultimately, the key to admissibility under ER 803(a)(2) is whether the trial court reasonably concludes that the statement was made while the declarant was still under the stress of a startling event such that the declarant did not have an opportunity "to reflect on the event and fabricate a story." Williamson, 100 Wn. App. at 258.

In Williamson, the defendant kidnapped the victim and held her hostage overnight. The next morning, she convinced the defendant to let her go to work. Instead, the victim drove to her sister's house, told her sister and brother-in-law what had happened, and then went to the police station to report the kidnapping. All of the victim's statements, including those made to the police at the station, were admitted as excited utterances. Williamson, 100 Wn. App. at 251-52.

On appeal, the defendant argued that the victim's statements were inadmissible because they were made "in response to specific questions by or under family or police direction." Id. at 255. The court rejected the defendant's claim, and specifically observed that the victim "appeared to have been crying, and was very fearful,

emotional, nervous, and excited" when she gave the statement to the police, even though an hour or more had passed between her arrival at her sister's house and her arrival at the police station. Id. at 258-59. A similar case presents itself here.

In this case, Thaves was still physically assaulting Erica Dawson when Officer Rankin and Officer Korus arrived at their house in response to Dawson's 911 calls. RP (4/14/11) 132-33, 165-66. Officer Rankin kicked the door open and took Thaves into custody. RP (4/14/11) 135-37. While Officer Korus was performing a protective sweep of the house, Dawson followed him through the house making spontaneous statements, including "thank god you're here" and "he was going to kill me." RP (4/14/11) 171-73. Not long after Thaves had been removed from the scene, Officer Rankin took a recorded statement from Dawson. RP (4/14/11) 140-41. Rankin noted that Dawson had fresh injuries, including marks on her neck consistent with strangulation and blood on the sides of her mouth. RP (4/14/11) 147-48.

On the recording itself, although Dawson initially sounds fairly calm when answering routine questions (such as giving her full name and date of birth), she is very emotional, upset, and crying when describing what Thaves had done to her. Ex. 9.

Although Dawson answered Rankin's questions, most of her statements consist of narrative, spontaneous descriptions of what occurred. Ex. 9; CP 296-306. Dawson's statement is interrupted more than once by her sobbing. Ex. 9. Dawson also expressed her fear of Thaves in no uncertain terms. Ex. 9; CP 299, 305.

As was the case in Williamson, the trial court in this case exercised its discretion reasonably in admitting Dawson's statement as an excited utterance. In fact, this case is arguably more compelling than Williamson because a shorter period of time had elapsed between the startling event and the statement in this case, and because Dawson's highly emotional state is evident from the recording. The trial court's ruling should be affirmed, as Thaves has not shown an abuse of discretion.

Nonetheless, Thaves argues that the statement was not an excited utterance, citing State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). However, Pugh does not address the admissibility of excited utterances under the rules of evidence. Rather, Pugh analyzes the admissibility of "res gestae" statements in the absence of the declarant under the federal and state confrontation clauses, which is a very different issue. Pugh, 167 Wn.2d at 831-45. This Court should reject Thaves's claim, and affirm.

b. The Statement Was Admissible As A Recorded
Recollection.

Under ER 803(a)(5), an out-of-court statement is admissible as a recorded recollection if the declarant once had knowledge but has an insufficient recollection at the time of trial to testify fully and accurately. Admitting a statement under this rule is proper when the following factors are met: 1) the record pertains to a matter about which the witness once had knowledge; 2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; 3) the record was made or adopted by the witness when the matter was fresh in the witness's memory; and 4) the record reflects the witness's prior knowledge accurately. State v. Mathes, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987).

This Court has held that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial. State v. Alvarado, 89 Wn. App. 543, 551, 949 P.2d 831 (1998). Therefore, "[t]he court must examine the totality of the circumstances, including 1) whether the witness disavows accuracy; 2) whether the witness averred accuracy at the time of making the statement; 3) whether the recording process is reliable;

and 4) whether other indicia of reliability establish the trustworthiness of the statement." Id. at 551-52. Moreover, the rule does not preclude the admission of an audio recording instead of written materials:

Although the rule is traditionally thought of as applicable to written memoranda, nothing in the rule limits its application to writings. The rule refers very broadly to a "memorandum or record" and has been held applicable, for example, to a witness's out-of-court oral statement recorded on a tape recorder.

5C K. Tegland, Wash. Prac., Evidence § 803.26 (5th ed. 2007) (footnote omitted).⁷

In this case, Dawson testified that she did not remember what happened on January 19, 2011. RP (4/19/11) 147. She admitted that she "must have" called 911 that day, but claimed that she could not remember why. RP (4/19/11) 151. Dawson said she could remember giving a recorded statement to the police and affirming that everything she said in that statement was true. RP (4/19/11) 157. Dawson claimed not to remember anything else she said in the statement. RP (4/19/11) 158.

⁷ The omitted footnote cites this Court's decision in Alvarado, which involved a tape-recorded statement.

Dawson's testimony and the recorded statement itself provided sufficient foundation for the admission of the statement as a recorded recollection. Dawson claimed to have no memory of the relevant events, but she acknowledged that she had given a statement and that she had averred accuracy at the time it was made. The recording method was obviously reliable, and there were other indicia of reliability, including Dawson's 911 calls, her spontaneous remarks to Officer Korus, fresh visible injuries that were consistent with her report of being punched and strangled, and medical evidence. In sum, ER 803(a)(5) applies here, and Thaves's argument to the contrary is without merit.

Nonetheless, Thaves argues that ER 803(a)(5) requires that a recorded recollection be read into the record and not admitted as an exhibit, and thus, he contends that the audio recording was inadmissible. Brief of Appellant, at 14-15. This argument is contrary to this Court's decision in Alvarado, in which the victim's recorded statement was played for the jury, both during trial and during deliberations. Alvarado, 89 Wn. App. at 547. Moreover, this portion of ER 803(a)(5) does not address the *admissibility* of the contents of a statement; rather, it addresses the *procedure* whereby the statement is published to the jury. As such, since

Thaves did not object on these grounds at trial, any claim regarding this procedure has been waived. See State v. Guloy, 104 Wn.2d 412, 421-22, 705 P.2d 1182 (1995) (the failure to raise a timely, specific evidentiary objection at trial constitutes a waiver of any claim of error on appeal).

Lastly, it is important to note that Dawson's recorded statement was originally admitted under the doctrine of forfeiture by wrongdoing when there was no expectation that Dawson would appear at trial to testify. RP (4/13/11) 109-18; CP 269-74. Accordingly, the recording was admitted and played for the jury *before* Dawson was arrested as a material witness. RP (4/14/11) 152-53; RP (4/18/11) 19-20. Under these circumstances, the trial court did not abuse its discretion because it was not possible to "un-play" the recording. Moreover, the recording was played only once; it was not replayed during deliberations, despite the jury's request to hear it again. RP (4/21/11) 247-50; CP 119-20. Therefore, the trial court complied with the rule's direction that a recorded recollection not be admitted as an exhibit.

In sum, Thaves has not shown that the trial court abused its discretion, and thus, this Court should affirm.

c. Any Possible Error Is Harmless.

A nonconstitutional error will be deemed harmless unless the defendant demonstrates a reasonable probability that the error affected the outcome of the trial. State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Even if this Court were to find that the trial court abused its discretion in admitting Dawson's statement to Officer Rankin, Thaves's convictions should not be reversed because any possible error is harmless.

In this case, ample evidence other than Dawson's recorded statement proved Thaves's guilt for second-degree assault and unlawful imprisonment. During the first 911 call that was played for the jury, Dawson told the operator that Thaves had been "choking [her] until [she] passed out" and that she had not been able to "move until this morning." Ex. 17; Ex. 18, p. 3. During the second 911 call that was admitted, Dawson pleaded with Thaves to allow her to leave, and he responded by attacking her, as evidenced by her screams. Ex. 17; Ex. 18, p. 4-5. After the police broke the door open, Dawson told Officer Korus that Thaves was going to kill her, that she "couldn't run out the door 'cause he would catch [her]," and that he "had kept her locked in the bedroom." RP (4/14/11) 173. When Dawson went to the hospital, she told Dr. Dana Pope that

she had been strangled and beaten by her boyfriend. RP (4/19/11) 61. The CT scan of Dawson's neck revealed that her hyoid bone and cricoid cartilage were fractured; these injuries are highly indicative of strangulation. RP (4/19/11) 50; RP (4/19/11) 120. Thaves's calls to Dawson from the jail were highly inculpatory as well. See CP 318-19.

In sum, substantial and compelling evidence other than Dawson's statement to Officer Rankin proved that Thaves was guilty of assault in the second degree by strangulation and unlawful imprisonment. Accordingly, Thaves cannot show a reasonable probability that the outcome of the trial would have been different if the recorded statement had not been admitted. Any possible error is harmless, and this Court should affirm.

2. THE JURY PROPERLY FOUND AN AGGRAVATING CIRCUMSTANCE BECAUSE THAVES HAD ABUSED FOUR DIFFERENT WOMEN OVER A PROLONGED PERIOD OF TIME.

Thaves next claims that the State presented insufficient evidence to support the jury's finding of an aggravating circumstance that Thaves's convictions for second-degree assault and unlawful imprisonment were aggravated domestic violence

offenses that were part of an ongoing pattern of abuse of multiple victims over a prolonged period of time. More specifically, Thaves contends that the State did not prove that the other women were "victims" as the term "victim" is defined in another provision of the Sentencing Reform Act (SRA), because that definition of "victim" is limited to the person harmed by the charged offense. Thus, Thaves contends that his exceptional sentence must be reversed and that he must be resentenced within the standard range. Brief of Appellant, at 17-21. This claim should be rejected, because Thaves's proposed interpretation of the relevant statute is absurd and contrary to legislative intent.

As a preliminary matter, although Thaves's claim is framed as a challenge to the sufficiency of the evidence, Thaves's claim is more appropriately analyzed as an issue of statutory interpretation because the claim is based entirely on the statutory definition of the word "victim" as contained in RCW 9.94A.030(53).

Statutory interpretation is a question of law, which courts review *de novo*. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The reviewing court's primary duty in interpreting a statute is to "discern and implement the intent of the legislature." Id.

A reviewing court derives the meaning of a statute from the words of the statute itself. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). All statutory language must be given effect, with no part of the statute rendered meaningless or superfluous. Id. at 699; State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Courts will not ascribe to the legislature a vain act. Kasper v. Edmonds, 69 Wn.2d 799, 804, 420 P.2d 346 (1966). The meaning of a particular word in a statute is not gleaned from that word alone; the purpose is to ascertain the legislative intent of the statute as a whole. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999).

There is one rule of statutory construction that "trumps every other rule": the reviewing court must not construe the statutory language in a way that results in absurd or strained consequences. Davis, 137 Wn.2d at 971; *see also* State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (holding that "[s]tatutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided").

A trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons to do so. RCW

9.94A.535. The legislature has created a list of aggravating circumstances that may justify an exceptional sentence above the standard range, including the aggravating circumstance applicable in this case:

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The 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.

RCW 9.94A.535(3)(h)(i).

The plain language of this statute establishes that the pattern of abuse can involve the same victim or multiple victims, and that the pattern of abuse must be established by "multiple incidents over a prolonged period of time." In accordance with statutory construction principles, the statute must be interpreted so that each word is accorded meaning, and no portion of the statute is rendered meaningless or superfluous. Beaver, 148 Wn.2d at 343; Roggenkamp, 153 Wn.2d at 624. Thus, this statute plainly provides that in sentencing an offender, the trial court may consider a jury's finding of a pattern of abuse based on prior incidents involving other victims. Limiting this aggravating circumstance to a

single incident and a single victim would render the words "multiple victims" and "multiple incidents over a prolonged period of time" utterly meaningless.

Thaves's claim hinges on the term "victim" as defined elsewhere in the SRA:

(53) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

RCW 9.94A.030(53). Thaves contends that this definition of "victim" limits the application of the aggravating circumstance to only the victim of the charged offense. Thaves's argument fails for two reasons. First, the legislature did not limit the "pattern of abuse" aggravating circumstance to a single victim and a single offense, but expressly included "multiple victims" and "multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(h)(i). Thus, Thaves's argument is contrary to the plain language of the statute defining the aggravating circumstance, and hence, contrary to legislative intent. Second, the legislature expressly provided that the definitions set forth in RCW 9.94A.030 apply "[u]nless the context clearly requires otherwise." RCW 9.04A.030. The "pattern of abuse" aggravating circumstance is

clearly a context where the statutory definition of "victim" does not apply, as it would render the aggravating circumstance meaningless -- an absurd result that the legislature obviously did not intend.

Most of the aggravating factors in the SRA refer to the "current offense" or "the offense" to indicate that the aggravator focuses on the current offense rather than some other offense or incident. See RCW 9.94A.535(a) - (aa). Although the aggravator at issue in this case requires that "the current offense involves domestic violence," it then requires a finding that that current offense is "part of an ongoing pattern" of abuse involving "a victim or multiple victims manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535(h)(i). Thus, it would be nonsensical to conclude that the definition of "victim" set forth in RCW 9.94A.030(53) applies here, because it would limit the aggravator to a single victim and a single offense in direct contravention of the statutory language. In other words, Thaves's interpretation of the statute would defeat its manifest purpose, *i.e.*, to allow for harsher punishment for chronic domestic violence offenders.

Notably, this Court very recently held that the statutory definition of "victim" did not apply in another context that would lead to absurd results contravening legislative intent. See State v. Landseidel, 165 Wn. App. 886, 269 P.3d 347 (2012) (holding that the defendant's wife was not a "victim" for purposes of determining whether the defendant was eligible for a SSOSA). This Court should reach the same conclusion in this case, as the interpretation of the statute that Thaves proposes would render it functionally meaningless.

The plain language of RCW 9.94A.535(3)(h)(i) authorizes a trial court to impose an exceptional sentence when the jury finds a pattern of domestic violence involving multiple victims over a prolonged period of time. Thaves's arguments to the contrary should be rejected. Moreover, the evidence of the aggravating circumstance is clearly sufficient under the plain language of the statute.

The standard of review for determining whether the evidence was sufficient to support a conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221,

616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 316-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970)). A defendant raising a claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The same standard applies to a challenge to the sufficiency of the evidence to support an exceptional sentence. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009).

In this case, the State proved that Thaves's convictions for second-degree assault and unlawful imprisonment against Erica Dawson involved domestic violence, and the State offered certified documents establishing that Thaves was convicted of other domestic violence crimes against other victims in 1996, 1998, and 2003. Post-Trial Exs. 1, 2, 3. This evidence proved that Thaves had a criminal history consisting of a pattern of domestic violence against multiple victims spanning more than a decade. Viewing this evidence in the light most favorable to the State, this evidence was more than sufficient to establish that Thaves's current convictions for second-degree assault and unlawful imprisonment were domestic violence offenses that were part of an ongoing pattern of abuse of multiple victims over a prolonged period of time as the

statute requires. Thaves's argument to the contrary should be rejected.

3. THE "PATTERN OF ABUSE" AGGRAVATING CIRCUMSTANCE IS NOT SUSCEPTIBLE TO A VAGUENESS CHALLENGE, AND IN ANY EVENT, IT IS NOT UNCONSTITUTIONALLY VAGUE.

Thaves next claims that both the statute and the jury instructions permitting a jury to find an aggravating circumstance for an ongoing pattern of abuse are unconstitutionally vague. Brief of Appellant, at 21-31. However, the Washington Supreme Court has held that aggravating circumstances are not subject to vagueness challenges because they do not define conduct or allow for arbitrary arrest and prosecution by the State. See State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). This Court is bound by that decision.

But even if a vagueness challenge could be brought, Thaves cannot meet his burden of showing unconstitutionality beyond a reasonable doubt. Because Thaves's challenge does not implicate the First Amendment, he must show that the aggravating circumstance is unconstitutionally vague as applied to him. Given Thaves's long history of abusive conduct against multiple victims,

Thaves was on notice that the "pattern of abuse" aggravating circumstance could apply to him if he continued to assault and abuse his intimate partners.

As a preliminary matter, Thaves did not object to the jury instructions regarding the aggravating circumstance at trial. RP (4/21/11, post-trial) 13. Therefore, Thaves is barred from raising a vagueness challenge to the jury instructions because "unobjected-to jury instructions are not subject to constitutional vagueness challenges on appeal." State v. Releford, 148 Wn. App. 478, 793, 200 P.3d 279, rev. denied, 166 Wn.2d 1028 (2009). Accordingly, only Thaves's challenge to the statute will be addressed further.

a. The Aggravating Circumstance Is Not Subject To A Due Process Vagueness Challenge.

Under the Due Process Clause, a statute is void for vagueness if: 1) it fails to define the offense with sufficient precision such that a person of ordinary intelligence can understand it; or 2) it does not provide sufficiently specific standards 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 statutes that either prohibit conduct or require conduct. Baldwin, 150 Wn.2d at 458.

The Washington Supreme Court has held that aggravating circumstances 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. As the court observed, "[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. at 459. 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 461.⁸

⁸ The Washington Supreme Court also recently declined to reconsider the issue of whether a different statutory aggravating factor (RCW 9.94A.535(3)(y)) is subject to challenge on vagueness grounds, holding instead that this aggravator is categorically inapplicable to the crime of assault in the first degree. State v. Stubbs, 170 Wn.2d 117, 131, 240 P.3d 143 (2010).

A decision by the Washington Supreme Court is binding on this Court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009), rev. denied, 169 Wn.2d 1007 (2010). Accordingly, this Court is bound by Baldwin.

Nonetheless, Thaves argues that Baldwin is no longer good law in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This argument should be rejected because the analysis in Baldwin remains valid even though a jury, rather than a judge, now makes the finding of whether an aggravating circumstance accompanied the commission of the crime in most cases.

The aggravating circumstances listed in RCW 9.94A.535 (some of which are still found by the trial court rather than the jury) do not purport to define criminal conduct or to specify what sentence must be imposed. Instead, they comprise a list of accompanying circumstances that may justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating circumstance does not mandate an exceptional sentence, nor does it control the length of the sentence to be imposed.

In other words, even when a jury finds an aggravating circumstance, the trial court still retains its discretion to decide

whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence, and, if so, how long that sentence should be. RCW 9.94A.535. Put another way, "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed." Baldwin, 150 Wn.2d at 461. This principle remains true regardless of whether the aggravating circumstance is found by the jury or by the judge. In sum, the analysis in Baldwin remains valid, and thus, Thaves's claim fails.

But even if Thaves could challenge the aggravating circumstance on vagueness grounds, his challenge would also fail on the merits.

b. The Aggravating Circumstance Is Not Unconstitutionally Vague.

The party challenging a statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality; "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990). A statute is unconstitutionally vague only if it

fails to define the offense with sufficient precision such that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement. Eckblad, 152 Wn.2d at 518. A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). As the Washington Supreme Court has recognized, some measure of vagueness is inherent in the use of language. Id.

Moreover, Thaves must specifically demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him because his vagueness challenge does not implicate the First Amendment. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). When an "as applied" vagueness claim is raised, as in this case, the challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the [statute] and not by examining hypothetical situations at the periphery of the [statute's] scope." Douglass, 115 Wn.2d at 182-83.

The statute at issue here provides that the aggravating circumstance exists if "[t]he current offense involved domestic violence" and "[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." RCW 9.94A.535(3)(h)(i). Thaves claims that the phrase "ongoing pattern of abuse" is unconstitutionally vague. However, it is readily apparent that the aggravating circumstance is not unconstitutionally vague when considered in the context of Thaves's conduct.

In this case, Thaves was convicted of second-degree assault by strangulation and unlawful imprisonment against Erica Dawson. These crimes were undisputedly crimes of domestic violence, as there was no question that Thaves and Dawson were in a dating relationship when these offenses were committed. In addition, the post-trial exhibits established that Thaves had been convicted of assaulting Michelle Coates in 1996, of assaulting and unlawfully imprisoning Lori Hemstreet in 1998, and of assaulting Holly Traub in 2003. Post-Trial Exs. 1, 2, 3. A person of ordinary intelligence would certainly understand that six convictions for crimes of domestic violence for abusing four different women over a period of

approximately 15 years⁹ would subject an offender to the "pattern of abuse" aggravating factor. In addition, there is clearly no evidence of arbitrary enforcement in these circumstances. Accordingly, Thaves's vagueness challenge is without merit, as he cannot show beyond a reasonable doubt that the statute is vague as applied in this case.

Nonetheless, Thaves cites death penalty decisions of the United States Supreme Court in support of his argument that the "pattern of abuse" aggravating circumstance is vague. Brief of Appellant at 26-28. However, Thaves fails to cite any authority holding that a vagueness challenge under the Eighth Amendment applies outside the death penalty context. Several courts, including this Court, have held that it does not. See State v. E.A.J., 116 Wn. App. 777, 792, 67 P.3d 518 (2003) (rejecting Eighth Amendment vagueness challenge to juvenile manifest injustice); Holman v. Page, 95 F.3d 481, 487 (7th Cir. 1996) (holding that Eighth Amendment vagueness inquiry does not apply to non-capital

⁹ Five or six weeks has been held to be sufficient for a "prolonged period of time." State v. Epefano, 156 Wn. App. 378, 392, 234 P.3d 253, rev. denied, 170 Wn.2d 1011 (2010).

cases), *overruled on other grounds*, Owens v. United States, 387 F.3d 607 (7th Cir. 2004).

The theoretical underpinnings of a vagueness challenge under the Eighth Amendment do not support its application beyond capital cases. It originates in the notion that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Lewis v. Jeffers, 497 U.S. 764, 774, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (quoting Gregg v. Georgia, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Claims of vagueness directed at aggravating circumstances in death penalty cases are made under the Eighth Amendment on the basis that unfettered discretion to impose the death penalty is constitutionally invalid. Maynard v. Cartwright, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). This body of law has not been applied outside the death penalty context.

But even if Thaves could assert an Eighth Amendment vagueness claim, the court's review is "quite deferential." Jones v. United States, 527 U.S. 373, 400, 119 S. Ct. 2090, 144 L. Ed. 2d

370 (1999). "As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." *Id.* The aggravating circumstance in this case certainly has a "core meaning" that a jury could understand, *i.e.*, that Thaves had abused multiple victims in multiple incidents of domestic violence over a prolonged period of time. Accordingly, Thaves's claim would be without merit even if the United States Supreme Court's Eighth Amendment jurisprudence were applicable.

In sum, Thaves has failed to meet his burden of showing beyond a reasonable doubt that the "pattern of abuse" aggravating factor is unconstitutionally vague as applied. This Court should affirm.

4. THE EVIDENCE PRODUCED TO SUPPORT THE AGGRAVATING FACTOR WAS ADMISSIBLE UNDER THE RULES OF EVIDENCE.

Lastly, Thaves claims that the bifurcated portion of the trial devoted to proving the aggravating circumstance did not comply with the rules of evidence. Brief of Appellant, at 32-34. This claim is without merit because certified court records are admissible

under the rules of evidence. Also, this claim is waived because Thaves agreed that the documents were admissible.

Under RCW 5.44.040, certified copies of public records are both self-authenticating and admissible. A certified court document, such as a judgment and sentence, is admissible under this statutory hearsay exception. State v. Benefiel, 131 Wn. App. 651, 128 P.3d 1251, rev. denied, 158 Wn.2d 1009 (2006).

In this case, the State introduced certified copies of court documents that established Thaves's prior convictions for four domestic violence offenses against three different women. Post-Trial Exs. 1, 2, 3. The admission of these certified records was proper in accordance with RCW 5.44.040.

In addition, once the prosecutor agreed to remove the certifications for determination of probable cause from the two exhibits containing documents from superior court, Thaves agreed that the certified documents were admissible and did not object to their admission during the bifurcated proceedings.¹⁰ RP (4/21/11,

¹⁰ Thaves argues that the jury was asked to consider the aggravating circumstance based on certifications for determination of probable cause. Brief of Appellant, at 33. This argument is contrary to the record. Also, although the trial prosecutor erroneously stated that the rules of evidence "are relaxed" in sentencing proceedings (see RP (4/21/11, post-trial) 12), this remark is of no moment because the documents in question were admissible in any event and because Thaves agreed to their admission.

post-trial) 11-13, 18. The failure to raise a timely, specific objection to the admission of evidence at trial constitutes a waiver of any claim of error on appeal. Guloy, 104 Wn.2d at 421-22. Thaves's claim should be rejected for this reason as well.

D. CONCLUSION

For all of the reasons set forth above, Thaves's convictions and sentence should be affirmed.

DATED this 2nd day of April, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, 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. EDWARD THAVES, Cause No. 67238-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

4/2/12
Date