

NO. 35862-0-II
Cowlitz Co. Cause NO. 06-1-00768-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DONALD LESLIE HADLEY,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER ACTS COMMITTED BY THE DEFENDANT UPON THE VICTIM IN ORDER TO SHOW THE DEFENDANT'S MOTIVE IN ASSAULTING THE VICTIM AND TO UNDERSTAND AND EVALUATE THE VICTIM'S CREDIBILITY KNOWING THE HISTORY OF DOMESTIC VIOLENCE BETWEEN THE TWO.**
- 2. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE WHEN IT USED THE WORD "VICTIM" IN ITS INSTRUCTION, BECAUSE THE COURT FIRST INSTRUCTED THE JURY IT HAD TO FIND THE PRIOR ASSAULTS OCCURRED AND ONLY IF THEY OCCURRED THEY COULD CONSIDER THE PERSON A VICTIM OF THOSE ASSAULTS. SHOULD THE COURT FIND THE TRIAL COURT DID COMMENT ON THE EVIDENCE, THE COMMENT WAS HARMLESS.**
- 3. THE COURT PROPERLY ENTERED THE JUDGMENT OF CONVICTION, AS THERE WAS SUFFICIENT EVIDENCE OF ASSAULT IN THE FIRST DEGREE.**
- 4. THE DEFENDANT FAILED TO ESTABLISH DEFENSE COUNSEL WAS INEFFECTIVE, AS THE STATE DID NOT INTRODUCE IRRELEVANT OR UNFAIRLY PREJUDICIAL EVIDENCE, AND IF SUCH EVIDENCE WAS INTRODUCED, IT WAS LEGITIMATE TRIAL STRATEGY FOR DEFENSE COUNSEL NOT TO OBJECT.**
- 5. THE DEFENDANT FAILED TO ESTABLISH ANY ERRORS AND IF SUCH ERRORS WERE FOUND, THEY WERE NOT CUMULATIVE AS TO VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.**
- 6. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE WAS WARRANTED AS THE STATE IS NOT REQUIRED TO ALLEGE AGGRAVATING FACTORS IN THE INFORMATION, SO LONG AS THE**

**DEFENDANT IS PROVIDED NOTICE OF SUCH FACTORS
PRIOR TO TRIAL IN A SEPARATE DOCUMENT.**

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE
ASSIGNMENTS OF ERROR**

- 1. WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER ACTS COMMITTED BY THE DEFENDANT IN ORDER TO SHOW THE DEFENDANT'S MOTIVE IN ASSAULTING THE VICTIM AND TO JUDGE THE VICTIM'S CREDIBILITY IN LIGHT OF THE HISTORY OF DOMESTIC VIOLENCE. IF THE COURT DETERMINES THE ADMISSION WAS IMPROPER, WHETHER THE ERROR WAS HARMLESS, BECAUSE THE RESULT OF THE TRIAL WOULD NOT HAVE CHANGED WERE THE EVIDENCE EXCLUDED?**
- 2. WHETHER THE TRIAL COURT COMMENTED ON THE EVIDENCE WHEN IT INSTRUCTED THE JURY TO FIRST CONSIDER WHETHER PRIOR ASSAULTS OCCURRED BEFORE IT CONSIDERED BRENDA FRISK A VICTIM OF THOSE ASSAULTS?**
- 3. WHETHER THERE WAS SUBSTANTIAL EVIDENCE OF THE CHARGE OF ASSAULT IN THE FIRST DEGREE WHEN THE STATE PRESENTED EVIDENCE THE VICTIM AND THE DEFENDANT WERE TOGETHER JUST PRIOR TO THE ASSAULT, THEY WERE FIGHTING, THE DEFENDANT THREATENED THE VICTIM, AND AFTER ASSAULTING HER, PREVENTED HER FROM IMMEDIATELY OBTAINING MEDICAL TREATMENT FOR THE GREAT BODILY HARM HE INFLICTED?**
- 4. WHETHER THE STATE INTRODUCED IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE AND IF SO, WAS DEFENSE COUNSEL'S FAILURE TO OBJECT A LEGITIMATE TRIAL STRATEGY?**

5. **WHETHER THERE WERE ANY ERRORS AND IF SO, DID THEY AMOUNT TO CUMULATIVE ERRORS SUCH THAT THE JURY WOULD NOT HAVE FOUND THE DEFENDANT GUILTY WITHOUT THEM?**
6. **WHETHER THE STATE MUST ALLEGE AGGRAVATING FACTORS IN THE INFORMATION, OR WHETHER ALLEGING THEM IN A SEPARATE DOCUMENT IS SUFFICIENT TO PUT THE DEFENDANT ON NOTICE OF THE STATE'S INTENT?**

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In August 2005, Ms. Brenda Frisk and her long-term boyfriend, Donald Hadley lived in a small house at 321 24th Avenue, in Longview, Washington. RP 125-130. After living in an abusive relationship for five years, Ms. Frisk decided it was time to break it off and start her life over. RP 127-130, 193-194. Ms. Frisk described their relationship as fire and water and the break-up was inevitable. RP 193-194. Ms. Frisk informed Hadley in June of 2005 that she intended to move to Portland to be a caregiver and that he wasn't welcome. RP 129-130. The defendant didn't take the news well. RP 130-131. Frisk knew Hadley didn't want her move, but she made up her mind and even started to move her things to Portland. RP 129-130.

On the evening of August 20th, 2005, Ms. Frisk cashed her paycheck and she and the defendant decided to go to the Cross Keys bar to

have a few drinks and play pool. RP 139-140. Before leaving, Hadley put a small sawed-off bat in his coat sleeve. RP 140. When Frisk asked him why he was taking the bat, Hadley responded, "you never know, just because." RP 140. Ms. Frisk assumed he meant for protection. RP 140.

They arrived at the bar at approximately 5:00 pm. RP 141. Over the next three to four hours Ms. Frisk consumed about four or five rum and cokes and Mr. Hadley, four or five whiskey and cokes. RP 141-142. Ms. Frisk was playing pool and talking to some other patrons of the bar, when the defendant got jealous and angry at the interaction. RP 142-143. Ms. Frisk didn't like Hadley's behavior and decided that she didn't want to be there with him. RP 143. She told Hadley she wasn't going home with him, and was going to go to her ex-husband, Arthur Anderson's house, where she could be safe. RP 143, 195. They both left the bar at the same time in opposite directions. RP 194-195.

Ms. Frisk walked to Mr. Anderson's house, arriving between 11:00 pm and midnight. RP 143, 270. Mr. Anderson observed Frisk was intoxicated and distraught. RP 270-271. Anderson stated when Frisk arrived, she went to the wrong house and was confused. RP 271. Anderson noticed Frisk was staggering as she walked, but she did not have any trouble speaking, and didn't have any problem negotiating the dug-up front yard. RP 271-272. She came over to his house and used the

restroom. RP 271. Afterwards, Frisk told Anderson she had been in an argument with Hadley, and Anderson described Frisk as upset and scared. RP 270. Frisk then started to nag and argue with Anderson. RP 271. Anderson didn't want to argue with Frisk and asked her to leave. RP 271. However, Frisk refused to leave and Anderson had the Longview police department give her a ride home. RP 271-272. This was less than an hour after arriving at Anderson's home. RP 277. Ms. Frisk did not have any memory of arriving at Anderson's home or of the interaction of the two. RP 143.

The Longview police dropped Frisk at her home on 24th and Frisk remembered getting out of the car, and walking in her front door. RP 143-144. When she entered her house it was dark. RP 144. She heard the defendant's loud angry voice from behind her and was immediately scared. RP 144. Ms. Frisk did not have any recall of the events for the rest of the evening. RP 148.

According to Dana Ferguson, Ms. Frisk's next-door neighbor, she heard part of the assault that morning. Ms. Ferguson stated she came home about 1:30 or 2:00 in the morning, and heard Ms. Frisk and the defendant fighting. RP 323. Ferguson described Frisk's voice as monotone and Hadley's as a little escalated and eerie. RP 325, 334. Ferguson said she heard Frisk say, "I've had enough" and Hadley say, "I'll

tell you when you've had enough." RP 325. She then heard a thud as if something hit the wall of the house. RP 325. Ferguson heard Frisk moan, and the defendant say "I'll be the one to say whether you can take more or not." RP 325, 328. Ferguson then heard another noise like someone hitting the wall and Brenda moaned. RP 328-329. Ferguson then left her house without calling the police. RP 329, 332.

Brenda Frisk woke up in her bed the next afternoon around 1:00 pm. RP 148, 200. She felt very dizzy, and disoriented. RP 148-149. Her head hurt, she had no balance, and her hair was matted with dried blood. RP 148-150. She attempted three times to get out of bed, but fell onto the floor. RP 148-149. Several times, the defendant told her that she shouldn't get up, but should stay in bed. RP 148-151. One time when she fell, the defendant helped her back into the bed. RP 150. Another time, she told him that she needed to go to the bathroom, but he told her to lay down and stay in bed. RP 149. Rather than help her to the bathroom, he brought her a pan to pee in. RP 151. When Fritz asked what was wrong with her, the defendant only responded that she needed to lay there, but didn't say why. RP 151. Fritz recalled telling Hadley she needed to go to the hospital, but he told her she just needed to stay in bed and if she laid there for a while she might feel better. RP 153.

Fritz nodded off a couple of times that afternoon. PR 152. Her sense of time felt like everything was in slow motion. RP 159. A little before three in the afternoon, the defendant went to the bathroom and Fritz hurriedly got out of bed and using the walls for support crawled to the living room. RP 152. Fritz knew she had to get to a phone to call for help, because every time she asked the defendant for help, he would just make her stay in bed. RP 152-153. When she made it to the living room, she called her friend Marlene Hadley and left a message she needed help. RP 154. This message was introduced as evidence to the jury. RP 364. Marlene's boyfriend John Woodruff called Frisk back and Frisk asked him to take her to the hospital. RP 154, 202. Hadley came out of the bathroom and was upset Frisk was on the phone. RP 155. Angrily he asked who Frisk was talking with. RP 155-156. She told him she was talking with John and he was going to come take her to the hospital. RP 155. Hadley said she couldn't go to the hospital looking the way she did with her hair matted and frizzy. RP 155. Hadley helped Frisk to the kitchen and washed her hair in the kitchen sink. RP 156. Frisk remembered how much the cleaning hurt. RP 156. She said her head hurt in the back as well as her eye, knee, and elbow. RP 156. She remembered that after he washed her hair, he used a hairbrush to comb out the rats and tangles. RP 156-157. Some of her hair came out in the brushing and he

threw it into the garbage. RP 157. Frisk again asked Hadley what happened to her. RP 157. Hadley told her that she fell and hit her head on the refrigerator. RP 157. At that point John arrived and took them both to the hospital. RP 157.

At the hospital, Brenda Frisk told the emergency room doctor, Theodore Leslie, what Hadley said happened to her. RP 158, 204. According to Dr. Leslie, Ms. Frisk was slightly confused and related that she had a lot to drink the night before and thought she had fallen several times. RP 243, 247, 263,-264. At the time Ms. Frisk told Dr. Leslie that she'd fallen, she thought to herself the explanation of a fall didn't sound right. RP 204. Dr. Leslie testified it was clear to him Ms. Frisk wasn't sure what happened to her. RP 243.

Dr. Leslie examined Ms. Frisk in the St. John Medical emergency department. RP 243. She presented with multiple injuries mostly about the head and face, and some bruising on her hands and arms. RP 243, 246-247. Dr. Leslie noticed Ms. Frisk had a three and a half centimeter laceration to the back of her head. RP 248. Dr. Leslie performed some neurologic testing on Ms. Frisk and found her slightly off on her date and time, and as to balance. RP 244. He also immediately noticed her left eye was very swollen, ecchymotic (a purplish-red color), very bruised and had a lot of blood in the tissues around the left orbit. RP 245. Dr. Leslie

remembered her eye was swollen to the point where he had to pry the eyelid open to examine the eye. RP 255.

Given the neurologic findings and the obvious wound to her head, Dr. Leslie first ordered a CAT scan. RP 247. He was concerned if Frisk had internal bleeding in her head, she would need to be transferred elsewhere for treatment, due to the lack of a neurosurgeon at St. Johns. RP 247. Dr. Wright performed the CAT scan, and both Dr. Wright and Dr. Leslie reviewed the scan. RP 250, 280. Dr. Leslie diagnosed Ms. Frisk as having an acute right subdural hematoma (a blood clot) which extended along the tentorium (a sheath that separates the upper cerebral hemispheres and the cerebellum), a small left frontal subdural hematoma about five millimeters , and some extra-cranial soft tissue swelling around the laceration. RP 250-252, 265. Dr. Wright stated the right subdural hematoma was likely caused by the tearing of the bridging veins that go from the surface of the brain to the inner part of the skull. RP 282.

Dr. Leslie and Dr. Wright also found Frisk had a displaced left medial orbit fracture and Dr. Wright was also concerned there may be an orbital floor fracture. RP 252, 283. Lastly, Dr. Leslie determined Ms. Frisk suffered a concussion (an alteration in the level of consciousness), and cervical strain. RP 253-254. Based upon Ms. Frisk's visible injuries

and the CAT scan, both Dr. Leslie and Dr. Wright determined they occurred within the last day or two. RP 254, 282.

The brain injury concerned Dr. Leslie, because there was no way to predict if the bleeding would continue or the hematoma would increase in size. RP 251-252, 285. Dr. Leslie explained if a hematoma gets large enough, it could actually push the brain to the other side of the skull, cause severe neurologic symptoms, and can be life threatening. RP 251, 258, 285. Dr. Leslie stated that prolonged neurologic symptoms can be dizziness, headaches, and not feeling right. RP 264. He found Ms. Frisk's balance problems coincided with the bleeding site along the tentorium into the middle cranial fossa in her brain. RP 264. The area of the bleed was near the cerebellum, where a person's balance comes from. RP 264-265. Also Dr. Wright noticed that while the bleed had not caused any shift to the midline of the brain, there was some mild pressing on the surface of the brain. RP 282-283. In Dr. Leslie's opinion, any subdural hematoma has a significant morbidity, a higher chance of mortality, and worsening prognosis, and is therefore something a neurosurgeon and Level three trauma center should see. RP 265. Both he and Dr. Wright considered Ms. Frisk's injuries to be serious and potentially life threatening. RP 265, 286-287.

Immediately after receiving Ms. Frisk's CAT scan, Dr. Leslie called the Oregon Health Science University (OHSU), to see if they had a bed to accept Frisk as a trauma transfer. RP 256-257. OHSU did have a bed available and Dr. Leslie arranged the transportation of Ms. Frisk. RP 257. Before transport, Dr. Leslie placed seven staples in Ms. Frisk's scalp to bring the uneven wound edges together. RP 257.

When asked if Dr. Leslie could state the cause of Ms. Frisk's injuries, he replied he could not. RP 258. However, Dr. Leslie could state it was unlikely her injuries could have come from a simple fall because of the multiple injuries and the location of the eye fracture. RP 259. Dr. Leslie did say that these type of head wounds can bleed a lot, and when shown the pictures of Ms. Frisk's bedroom, thought the amount of blood was consistent with her injuries. RP 262, 266. However, Dr. Leslie did not see signs of great blood loss in Ms. Frisk and was more concerned with her obvious head injury. RP 267.

At OHSU Ms. Frisk was examined by Dr. William Wilson, a trauma and emergency general surgeon. RP 288. Upon first examination Dr. Wilson found the same injuries as had Drs. Leslie and Wright. RP 289. Dr. Wilson also remembered that Frisk's voice was slurred, but was otherwise neurologically intact. RP 289. A second CAT scan was taken, revealing a fair size subdural hematoma in the back and a small one up

front. RP 290-292. Dr. Wilson diagnosed Frisk with a traumatic brain injury, meaning it had to have happened with a fair amount of force. RP 292. Dr. Wilson explained the concern with a traumatic brain injury is whether the bleeding will continue. RP 292-293. Dr. Wilson elaborated that the tough tissue in the brain, called the dura, has large and well-protected veins inside. However, when these veins are torn, they carry a lot of blood, and the concern is whether they are continuing to bleed, or will re-bleed. RP 293. At the time Ms. Frisk came to OHSU she didn't know what happened to her. RP 293. Dr. Wilson expressed a concern that if the veins continued to bleed, the hematoma could drive the brain stem down through the foramen magnum, the area of the spinal cord. RP 293-294. Should that happen, the blood supply to that part of the brain and central area controlling the rest of the body would be cut off and a person will die. RP 294. Fortunately, Ms. Frisk's second brain scan showed the hematoma in her brain was not increasing and after a day or so under observation without any new symptoms Dr. Wilson's alarm went down considerably. RP 293-96, 304. Dr. Wilson did not think Ms. Frisk's condition was life-threatening, however, he couldn't definitively answer the question and didn't feel she was safe until after 12 to 24 hours had passed. RP 307, 311.

Ms. Frisk was discharged from OHSU approximately three days after arriving with a prescription for pain medication and instructions she was not to drive or do any heavy lifting, and was best to be observed from time to time to ensure she was doing all right. RP 296, 298-299. When asked, Dr. Wilson said a brain injury involving a blood clot in the brain can and usually does give some short-term impairment and sometimes long-term impairment. RP 299. However, it was unlikely Frisk would have long-term sequelae or long-term neurologic damage from her injury. RP 299-300. Dr. Wilson explained generally people with this injury get better over time because the subdural blood will be reabsorbed. RP 300, 306. However, if a person continued to have equilibrium problems or headaches it could be associated with the brain injury. RP 300-302. If a person had continuing headaches, there wouldn't be anything the doctors could do to relieve the pain, without giving constant narcotics; something they would be loath to do. RP 306-307. Unfortunately, a person would just have to put up the pain. RP 307.

The State asked Dr. Wilson if he was able to tell if Frisk's injuries were caused by a fall. RP 300. Dr. Wilson said it was possible for a fall or multiple falls to cause the injuries, but it was unlikely based upon the location of both front and back head injuries and in his experience once a

person, has this magnitude of a fall, either drunk or sober, they don't usually get up to fall again. RP 300-302.

In addition to Dr. Wilson, Dr. Brett Ueech, a maxiofacial surgeon, attended to Ms. Frisk. RP 223, 225. Ms. Frisk presented with a sub-conjectival hemorrhage. RP 233. He ordered a computerized tomography (CT) scan of the facial bones to better assess Frisk's injuries. RP 226. Dr. Ueech noted Frisk had an injury to her medial orbit and her inferior orbit. RP 227. He also noted that Frisk's zygoma and maxilla bones making up the floor of the orbit were fractured. RP 228. These bones are exceedingly thin and easily fractured when orbital volume is acutely increased. RP 228. Dr. Ueech explained to break the bones of the internal orbit there is usually something that penetrates the protective border of the orbit and actually impacts upon the eyeball. RP 228. This impact forces the eyeball back into the eyesocket, and the bones blow out like shock absorbers. RP 228-229. These injuries are most often associated with personal violence or sporting injuries, like being hit in the eye with a ball. RP 229-230. Dr. Ueech also opined that this type of injury was unlikely to be caused by a ground-level fall or even tripping and hitting something pointed with the eye. RP 230. Dr. Ueech reasoned that if a person were to fall, he would also expect them to have associated injuries to their nose, forehead or chin, which Frisk did not have. RP 230.

Additionally, if someone hit a pointed object when they fell, they would probably rupture or severely damage the globe in the eye. RP 230-231, 234. Ms. Frisk did not have a ruptured globe, instead her injuries were most closely associated with injuries caused by a round object, something like the size of a tennis ball. RP 230-231. After reviewing the CT scan of Ms. Frisk, Dr. Ueech determined that surgery was unnecessary and they would take a conservative approach and wait to see if the injury healed on its own. RP 235.

While Frisk was in OHSU, her mother, Wilda Parkhurst, her brother and sister-in-law went to her house to pack her things for the move. RP 344-345. Ms. Parkhurst knew Frisk was in the hospital because the defendant called her and said Frisk was being rushed to Portland to see if she needed surgery. RP 343. Hadley told Parkhurst Frisk thought she'd fallen and hit her head, but Parkhurst had suspicions otherwise. RP 343, 358. Generally, Parkhurst and Frisk were fairly close, but Frisk hadn't spoken to Parkhurst much since she met Hadley. Parkhurst asked Frisk in the past if Hadley beat her up, but Frisk always denied any assaults. RP 358. Around two o'clock or three o'clock in the afternoon on August 21, 2006, Parkhurst called Frisk at home. RP 343. Hadley answered and told Parkhurst Frisk was sleeping and would call her later. RP 344. Hadley did not mention anything about Frisk hitting her head at this time. RP

343-344. Ms. Parkhurst did speak briefly to Frisk about what happened to her when Frisk was in the hospital. RP 357. Frisk said she thought she was in the front yard, fell and hit her head on the refrigerator. RP 357, 360.

When Parkhurst went to the home, the defendant wasn't there. RP 345. She looked at the refrigerator in the front yard and didn't see any blood on it or in the area. RP 360. As she entered, Parkhurst thought the living room was in fairly normal condition. RP 345. However, when she entered the kitchen, she saw blood on the floor and a bloody handprint on the refrigerator. RP 345-346. As Parkhurst made her way to the bedroom, she noticed blood off and on towards the room and there was blood everywhere in the bedroom, some of it still wet. RP 345, 347. Parkhurst immediately called the Longview Police Department. RP 346. She didn't disturb anything in the house before the police arrived and just took pictures. RP 350.

On August 23rd, 2005, Detective Reece went to the home of Brenda Frisk at the invitation of Ms. Parkhurst. RP 377-378. Detective Reece took pictures of the home and as he went through the house, noticed a lens from a pair of sunglasses lying in front of the couch. RP 380. He also noticed bloodstains in the carpet area in the kitchen, blood spatter on the stove, and a blood smear on the doorjamb of the bedroom door off the

kitchen. RP 380-381. As he entered the bedroom, Detective Reece noticed the bedding on the bed was covered in blood. RP 381-382. He collected this evidence and it was later presented to the jury. RP 382, 386-400. Detective Reece also located a bloody washcloth in the bathroom, and what appeared to be hair in the kitchen garbage can. RP 385-386.

In addition, Detective Reece located a back scratcher missing a middle wheel placed against a purple pillow in the bedroom. RP 383-384. The back scratcher appeared to have blood on it and was presented to the jury as evidence. RP 389-400. Ms. Frisk testified the back scratcher was not normally kept in the bedroom, had not been broken before that night, nor was there any blood on it. RP 179-180. Additionally, the blood in the house was not there prior to the night of the 21st, and she recalled wearing her sunglasses that night and they were not broken beforehand. RP 173-179, 183.

While Brenda Frisk was in the hospital, her friend Marlene Hadley visited. RP 367-368. Ms. Hadley spoke to Frisk about what happened. RP 368. Frisk appeared both nervous, scared, and confused when she spoke to Hadley. RP 367-368. The day after Frisk was hurt, Marlene spoke to the defendant. RP 369. The defendant told her that he found Frisk injured that morning and he didn't do it. RP 369-370. He said he'd gone around other places, in bars and places where she had been that night

and he had heard that someone had followed her from the bar because she'd upset someone in the tavern. RP 369. The Defendant thought this was how Frisk was hurt. RP 369.

Marlene Hadley also testified that she spent time with Brenda Frisk after her release from the hospital. RP 372. She noticed Frisk's injuries slowly started to improve. RP 372. Shortly after, Frisk was still confused and had a hard time concentrating. RP 372. Wilda Parkhurst also noticed Frisk was slow to recover. RP 351-355. Frisk had a hard time walking and talking even after returning from the hospital, and had memory problems. RP 352-355. Parkhurst took her to the women's support shelter from the hospital, because she thought it would be the safest place for her. RP 353. When Frisk was at the shelter, she received help from the women in attending to her injuries. RP 353-354. They helped her with the bathroom, getting around, and daily personal hygiene. RP 189, 353-354. Frisk testified that after her release from the hospital she continued to have pain from the injuries, her balance was still off, and she had stabbing headaches even up to the day of trial. RP 189-191. She also said that her feet were numb off and on and this affected her ability to walk. RP 190. Additionally, her vision was blurred and her eye twitched up to the day of trial. RP 190.

Detective Tim Deisher interviewed Ms. Frisk two times about what happened to her. RP 422-424. On August 24th, 2005, Ms. Frisk didn't recall how she received the injuries. RP 422. She said the defendant told her she fell outside, but she didn't know if that was true. RP 423. She also said she thought she left the bar with Hadley, but she didn't remember the walk home. RP 423. On August 30th, 2005, Frisk told Deisher she had come home and the defendant struck her with a souvenir bat in the front yard. RP 424.

B. PROCEDURAL HISTORY

The State charged defendant, Donald Hadley by information filed June 29, 2006, with one count of Assault in the first degree – domestic violence or in the alternative Assault in the second degree – domestic violence against Brenda Frisk. CP 1-2. On December 18, 2006, the State filed a separate notice of intent to seek exceptional sentence alleging deliberate cruelty and an on-going pattern of domestic violence. CP 11.

Prior to trial, the court held a hearing to determine the admissibility of the defendant's prior convictions and prior bad acts of domestic violence against Brenda Frisk. RP 1-103. The State called Brenda Frisk, Marlene Hadley, Arthur Anderson and Dana Ferguson to testify to those prior acts and provided the court and defense counsel with a lengthy list of potential evidence. RP 1-103, Supplemental Clerk's Papers 22-23. The

Court ruled that some of these instances were admissible to show motive or lack of accident, but not for common scheme or plan. RP 30-31. Additionally, the Court admitted them as to Brenda Frisk's state of mind and her credibility at the time of testifying. RP 30. The court found the acts of misconduct were proven by a preponderance of the evidence, determined they were relevant to prove an element of the crime, and lastly found the probative value outweighed any prejudicial effect. RP 29-32, 104-108.

Given the court's ruling, the parties drafted an instruction to the jury. RP 121-122. Neither party objected to the instruction. RP 120-122. Before the State called its first witness, the court gave the jury the following instruction:

If you determine, based on the evidence, that prior assaults occurred, that evidence of prior assaults by the Defendant on the victim may only be considered by you to understand the victim's state of mind at the time of any statements she made before testifying or while testifying and during the assault, if you determine an assault occurred. It might also be considered as proof of motive by the Defendant. The evidence of prior assaults by Ms. Brenda Frisk on the Defendant may only be considered by you as to bias on behalf of Ms. Frisk against the Defendant.

RP 124-125. The State then called Brenda Frisk to testify. RP 125. Ms. Frisk testified to the facts already mentioned in the

factual history above, as well as to the following instances of abuse

by the Defendant:

(1) In 2002, the defendant kicked in the bathroom door, breaking the door frame, entered the room and punched Frisk in the face a couple of times. RP 131. This assault caused bruising and swelling to Frisk. RP 132. The Police were called and the defendant was convicted of the assault. RP 132.

(2) In September 2003, Frisk and Hadley were fighting, and Hadley shoved Frisk down the stairs where she fell and cut her arm on a plate. RP 132. The police were called and the defendant was convicted of the assault. RP 132.

(3) Another time in 2003, the defendant kicked and stomped Frisk with his cowboy boots, breaking her denture plate in half. RP 132-133. This caused at least 68 visible bruises over Frisk's body and she couldn't get out of bed for five days. RP 133. Marleen Hadley witnessed these bruises. RP 133, 373. Frisk did not tell anyone the defendant caused her injuries. RP 134.

(4) In 2004, the defendant punched Frisk in her mouth until her denture plate again broke. RP 134-135. She jumped out her bedroom window to escape. RP 134. She did not report the incident because he begged and pleaded with her and she hoped he would get help for his problem. RP 134. Arthur Anderson also testified Frisk showed up at his house barefoot that night. RP 274.

(5) Another time in 2004, the defendant hit her in the head with a full beer can. RP 135. The can "split" Frisk's forehead open, and left a small scar. RP 135-136. She did not go to the hospital because the defendant didn't want anyone to know what happened. RP 135-136. She was left to attend the injury the best she could with butterfly bandages. RP 136.

(6) Ms. Frisk would sometimes carry weapons or put weapons around the house to protect herself. RP 136-137. She would sometimes put knives in the bedroom doorjam to prevent the defendant from getting inside. RP 137.

(7) The defendant would make various threats to kill Ms. Frisk over the last few years in the relationship. RP 137.

Additionally, the State introduced three citations and judgment and sentences showing the defendant was convicted of assaulting Brenda Frisk on 9/13/03 and assault and malicious mischief on 7/15/02. See Exhibits 1, 2, 4, 6-8. The defense was also allowed by the court to solicit evidence that Frisk hit the defendant with her car while she was intoxicated. RP 111, 211-212.

At the end of case, the Court instructed the jury as to the charges, but not as to the aggravating factors. RP 442-458. As part of the concluding instructions, the court again re-read the above instruction, this time substituting the name of Ms. Frisk for the word victim. RP 448. The jury returned a verdict of “guilty” as to Assault in the first degree and found per a special verdict that Frisk and Hadley were family or household members. RP 497-498, CP 68-69. The Court then instructed the jury as to the aggravating factors, counsel presented closing arguments as to the factors, and the jury returned special verdicts finding the State proved each aggravating factor beyond a reasonable doubt. RP 507-525, CP 70. The Court sentenced the defendant to 192 months based upon the finding of aggravating factors. RP 543, CP 86-89.

IV. ARGUMENT

1. **THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER ACTS COMMITTED BY THE DEFENDANT UPON THE VICTIM IN ORDER TO SHOW THE DEFENDANT'S MOTIVE IN ASSAULTING THE VICTIM AND TO UNDERSTAND AND EVALUATE THE VICTIM'S CREDIBILITY KNOWING THE HISTORY OF DOMESTIC VIOLENCE BETWEEN THE TWO.**

The defendant argues the trial court erred in admitting other acts committed by the defendant, under Washington Rule of Evidence (ER) 403 because they were unfairly prejudicial. Evidence Rule 403 states that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403 (2007).

Rule 403 requires a balancing process. “Nearly all evidence will have some probative value, and nearly all evidence will possess some of the undesirable characteristics mentioned in the rule.” 5 Karl B. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence*, at 212 (2007-08 ed. 2007). As such, the burden is on the party seeking to exclude the evidence to show the probative value is substantially outweighed by the danger of unfair prejudice. *See Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 6110 (1994).

A trial court is vested with broad discretion in administering Rule 403, and its judgment in the balancing process should be overturned only for manifest abuse of discretion. *See State v. Kendrick*, 47 Wa.App. 620,

628, 736 P.2d 1079 (Div 1, 1987). An abuse of discretion exists when the discretion is manifestly unreasonable or based upon untenable grounds or reasons. *See State v. Price*, 126 Wa.App. 617, 635, 109 P.3d 27 (Div 2, 2005).

Under Rule 403 the court need not conduct the balancing process on the record. *See State v. Baldwin*, 109 Wa.App. 516, 528, 37 P.3d 1220 (Div 3, 2001). Additionally, there is no set formula for what the trial court must consider in the balancing process. *See Kendrick*, 47 Wa.App. at 628. Division One has suggested a court consider the importance of the evidence in light of the case, the strength and length of the inferences needed to make the fact relevant, the availability of other means of proof for the fact, whether the fact is disputed, and any potential effectiveness of a limiting instruction (if needed). *See id.*

In the present case, the trial court admitted evidence of prior convictions of acts of domestic violence and prior unreported acts of domestic violence by the defendant upon the victim under Rule 404(b). RP 29-32. In general, evidence of prior convictions and bad acts is inadmissible to show action in conformity therewith. *See ER 404(b)* (2007). However, such evidence may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See ER 404(b).*

In order to admit evidence of other wrongs, the trial court must engage in the following four steps:

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

State v. Thach, 126 Wash.App. 297, 310, 106 P.3d 782, 789 (2005), quoting *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002). In considering the fourth step, a court must not admit the evidence if its relevance is outweighed by the prejudice to the defendant. See *State v. Terry*, 10 Wa.App. 874, 520 P.2d 1297 (Div 1, 1974) *overruled on other grounds* *State v. Young*, 160 Wa.2d 799, 161 P.3d 967 (2007). This amounts to a Rule 403 balancing test. See *State v. Womac*, 130 Wa.App. 450, 123 P.3d 528 (Div 2, 2005) *overruled on other grounds* *State v. Womac*, 157 WA.2d 1021, 142 P.3d 171 (2006).

Courts routinely hold evidence of prior acts of misconduct are admissible in spousal murder trials to show motive for the murder, lack of accident, or intent. See *State v. Stenson*, 132 Wa.2d 668, 701-750, 940 P.2d 1239 (1997), *State v. Powell*, 126 Wa.2d 244, 258-265, 893 P.2d 615 (1995), *State v. Price*, 126 Wa.App. 617 634-639, 109 P.3d 27 (Div 2, 2005), *State v. Terry*, 10 Wa.App. 874, 881-884.

In *State v. Powell*, the victim's body was found in the Puget Sound. *See State v. Powell*, 126 Wa.2d 244, 247. An autopsy revealed her death was caused by manual strangulation and she died fairly soon after her last meal. *See id.* The police soon focused on her husband as a suspect based upon information provided by the victim's friends and relatives. *See id.* at 247-48. When the police served a search warrant upon the shared home, they discovered very little out of place. *See id.* The only evidence was some of the victim's clothing and jewelry were out of place, the victim's dog was missing, and the defendant was wearing a ring the victim customarily wore. *See id.*

At trial, the court admitted evidence the defendant assaulted the victim four times in the year prior to the victim's death, the night before the murder they verbally fought and the victim left the residence, and shortly before the murder the defendant was observed angry when he discovered money was withdrawn from their joint bank account. *See id.* at 249-54. The Supreme Court found the admission of the prior assaults and fights was appropriate to show the defendant's motive. *See id.* at 260. The court considered motive particularly important because there was only circumstantial proof of guilt. *See id.* The Court specifically stated the testimony established the hostile relationship between the victim and defendant as a strong motive for murder. *See id.* Additionally, the court

found the evidence of quarrels preceding a crime and evidence of threats by the defendant as probative upon the question of the defendant's intent as well as the res gestae of the crime. *See id.* at 261-265..

After upholding the purpose for admitting the misconduct evidence, the court next reviewed the danger of unfair prejudice. *See id.* at 264. In looking at the record as a whole, the Supreme Court determined the trial court did not abuse its discretion and the prior misconduct evidence was not outweighed by prejudice. *See id.* In its reasoning, the court looked to see whether the evidence was likely to stimulate an emotional response rather than a rational decision, and said in doubtful cases, the scale should be tipped in favor of the defendant. *See id.* However the court made sure to point out, "proper evidence will not be excluded because it may also tend to show that the defendant committed another crime unrelated to the one charged." *Id.* In *Powell*, the Supreme Court found the trial court carefully sorted through the proposed testimony and excluded a substantial amount of evidence in an effort to balance out the overall prejudicial effect. *See id.* at 265. It found the trial court actually excluded evidence that may have been admissible in an effort to be fair, and the evidence it did admit was less inflammatory than others proposed. *See id.* Because of these reasons, admission was proper and there was no abuse of discretion. *See id.*

In *State v. Stenson*, the defendant was convicted of first-degree premeditated murder of his wife. In March of 1993, the defendant called 911 to report that his friend and business partner, Frank, had shot the defendant's wife and then himself. *See State v. Stenson*, 132 Wa.2d 668, 677, 940 P.2d 1239 (1997). When the police arrived, the defendant had an elaborate story of how the killing occurred. *See id.* at 677-78. However, when the police continued to investigate, the physical evidence pointed to the defendant having beat Frank and then killed him when he was incapacitated. *See id.* at 677-80. Additionally, the evidence showed the defendant was in financial straits and had purchased a large life insurance policy on his wife. *See id.* at 680-81. During the trial, the State sought to introduce a conversation between the defendant and his wife, where he told his wife that she would be in a lot of trouble if anything happened to his truck when she drove it to town. *See id.* at 700. Because of this, his wife did not drive to town. *See id.* The State sought this evidence to show the relationship between husband and wife. *See id.* The trial court admitted it and the Supreme Court upheld the admission on the ground it was relevant as to motive. *See id.* at 701-703. The Supreme Court again upheld the reasoning in *State v. Powell* and found that in comparison, the evidence in *Stenson* was not nearly as prejudicial as that in *Powell*. *See id.* at 702-03.

The Courts of Appeal have also added their perspective to the issue of prejudice in 404(b) evidence. In *State v. Price*, the trial court admitted evidence the defendant quarreled with the victim in the period of time leading up to the murder. *See State v. Price*, 126 Wa.App. 617, 638-39, 109 P.3d 27 (Div 2, 2005). The reviewing court upheld the admission of evidence, agreeing with the trial court, “that evidence of previous hostility between the defendant and the victim was relevant to motive for assault or murder.” *Id.* at 639. While the Court of Appeals didn’t mention the balance of prejudice, it did cite to the limiting instruction the court gave to the jury that they were only to consider the testimony as to motive. *See id.* Given the presence of the limiting instruction, the court found the admission of the evidence was not an abuse of discretion. *See id.*

In *State v. Terry*, a jury convicted the defendant of Murder in the second degree involving the death of a three-year-old child. The evidence in the case showed the defendant had buried the body of the child in his back yard. *See State v. Terry*, 10 Wa.App. 874, 875, 520 P.2d 1297 (Div 1, 1974). According to the defendant, he was exasperated with the child for repeatedly wetting his pants and then denying doing so. *See id.* On the day in question, the child wet his pants and the defendant was taking him upstairs to see his mother. *See id.* at 875-76. He set the child down and according to the defendant the child fell down the stairs and died. *See*

id. At trial, the court allowed testimony that the defendant in the three to four weeks prior to the child's death, put a knife to the throat of another child and said he would cut her up, he beat a different child, and spanked both the victim and his brother leaving bruises. *See id.* at 876-77. The Court also admitted testimony from a witness that he heard the mother of the victim sometime after the victim's death yelling at the defendant to stop choking the baby. *See id.*

The Court of Appeals held the testimony was admissible under Rule 404(b) for the absence of accident or mistake since the defendant claimed the child fell down the stairs and testified he only occasionally spanked children. *See id.* at 882-883. The Appellate Court stated that under such conditions, the relevance of the testimony outweighed any possible prejudice to the defendant and the trial court did not abuse its discretion. *See id.* at 883. Also that while they themselves may not have made the same decision, it was a close call and they would not second-guess the trial court. *See id.* at 884.

In the present case, the victim testified she had no memory of the assault. RP 148. This left the State with a completely circumstantial case, similar to the State in the murder cases mentioned above. Like the trial court in *State v. Powell*, 126 Wa.2d 244, 258-265, 893 P.2d 615 (1995), the trial court here was careful what it admitted of prior bad acts and

balanced those acts on the record. The State proposed eighteen separate instances of prior misconduct. ^{SUPP CP} Clerk's Minutes at 22-23. Of those the Court only allowed ten. RP 29-30. The Court did not admit the remaining eight instances, finding they did not go directly to a history of domestic violence between the parties and were not probative. RP 32. In addition to carefully sorting through the State's proposed instances, the trial court considered whether the jury would rely upon the prior acts to conclude the defendant must have committed the alleged crime. RP 31. The court stated the tendency could be avoided by the appropriate instruction. RP 31. Additionally, the court balanced the probative value of the number of alleged prior bad acts with their prejudicial effect. The court determined that if the jury believed the defendant committed the prior bad acts, it was not unfairly prejudicial to consider them as to his motive and to use them to weigh the victim's state of mind and credibility while testifying. RP 31. The trial court specifically considered *State v. Powell*, 126 Wa.2d 244, 258-265, 893 P.2d 615 (1995), in its decision and found it wasn't limited to just homicide cases and the prior acts would be relevant to explain the relationship of the parties. RP 31. ~~This does not amount to discretion that is manifestly unreasonable or based upon untenable grounds or reasons.~~ ^{Given the court's thoughtful consideration & in light of Powell, and Terry, Price's Stausen,} See *State v. Price*, 126 Wa.App. 617, 635, 109 P.3d 27 (Div 2, 2005).

the trial ct. did not abuse its discretion

This case is also like *State v. Terry*, 10 Wa.App. 874, 883, 520 P.2d 1297 (Div 1, 1974), in the defendant's claim Ms. Frisk's injuries were the cause of an accidental fall. The record is replete with instances where the defendant told either Ms. Frisk or Ms. Hadley that Ms. Frisk fell. RP 157, 158, 204, 357, 360, 369-370, 423. Additionally, defense counsel cross-examined all the doctors whether the injuries could have been the result of a fall. RP 229-230, 258-266, 301-302. Given the nature of the defense, the relevance of the prior act testimony outweighed any possible prejudice to the defendant and the trial court did not abuse its discretion. *See State v. Terry*, 10 Wa.App. 874, 883, 520 P.2d 1297 (Div 1, 1974).

Lastly, the court gave a limiting instruction like that in *State v. Price*, 126 Wa.App. 617, 638-39, 109 P.3d 27 (Div 2, 2005). This instruction told the jury they could only use the prior act information to understand Frisk's state of mind at the time of her statements or as proof of motive. RP 124-125. This instruction comports with the general concerns considered in *State v. Kendrick*, 47 Wa.App. 620, 628, 736 P.2d 1079 (Div 1, 1987), and the court balanced the instruction, the evidence presented, and the alternative means of proof through the testimony presented to the court in the pre-trial hearing. RP 2-108, *See State v. Kendrick*, 47 Wa.App. 620, 628, 736 P.2d 1079 (Div 1, 1987).

The defendant argues the evidence is unfairly prejudicial because it involves similar acts to the alleged crime. Appellant's Br. at 22. An example given by Hadley is the admission of evidence of a defendant's prior possession of cocaine, when the defendant denied knowing the drugs were in the car and alleged the police planted the drugs. *See State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001). The Appellate Court in *Pogue* found error in the trial court decision because the defendant's knowledge of what cocaine looked like was not in issue. *See id.* at 986-87. The court only reversed the case, because it determined 404(b) evidence was erroneously admitted, and that it was a reasonable probability the jury may have acquitted. *See id.* at 988. A reasonable probability of acquittal is not same as the balancing test of whether the danger of unfair prejudice substantially outweighs probative value under Rule 403.

The defendant also uses the example of *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), to support his claim. Appellant's Br. at 18. In *Acosta*, the defendant put forward a claim of diminished capacity to the charges of robbery in the first degree, theft in the second degree, taking a motor vehicle without permission, and possession of methamphetamine. *See id.* *Acosta* called an expert witness to support his claim and the State presented their own counter expert. *See id.* During

direct examination of the State's expert, the expert recited the laundry list of the defendant's convictions. *See id.* The Appellate Court found this list was inadmissible under 404(b) and really just went to the defendant's bad character and conformity to commit the charged offenses. *See id.* at 435. The Court also found the State's expert unreasonably relied upon the defendant's criminal history to determine capacity. *See id.* at 435-36. While the court did say the potential unfair prejudice far outweighed the probative value, it put the criminal history in a vacuum. *See id.* at 437. The court already dismissed the expert's opinion as faulty because it said the expert used the criminal history to show the defendant's bad character. *See id.* The court felt the expert used improper evidence to come to the conclusion the defendant had an antisocial personality and it stated that when used solely to establish a basis for the expert's opinion, the criminal history was an unfair balance. *See id.* In essence only after the court eliminated every relevant reason to admit the criminal history, did it then do a balance under Rule 403, finding the use was prejudicial.

The defendant also cites to *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), to illustrate how prior criminal history can be damaging in a case. Appellant's Br. at 19-20. In *Escalona*, the State presented confusing and inconsistent testimony from the victim that the defendant stabbed the victim with a knife after the victim asked the

defendant to leave his house. *See State v. Escalona*, 49 Wn.App. at 252. The only other corroboration was the testimony from the victim's girlfriend, which was unfortunately also inconsistent. *See id.* at 252-53. The defendant testified and denied the stabbing, even giving the police permission to seize the knife he allegedly used. *See id.* at 253-54. The police testimony corroborated much of the defendant's testimony. *See id.* at 254.

During cross-examination of the victim, the victim mentioned the defendant had a record and had stabbed someone previously. *See id.* at 253. Defense counsel immediately moved to strike and asked for a mistrial. *See id.* The Court struck the testimony and gave the jury an instruction to disregard, but did not grant the mistrial. *See id.* The Court of Appeals found the evidence was inherently prejudicial and even though jurors are deemed to follow instructions, it was unlikely the jurors would have ignored this evidence. *See id.* at 256. The court concluded that an instruction was insufficient to cure the prejudicial effect, given the testimony, combined with the weakness of the State's case and the logical relevance the criminal history would have in relation to the charge. *See id.* at 255-56.

Escalona is distinguishable from the present case in a number of ways. First, the admission of 404(b) evidence was not an irregularity.

The trial court went through a lengthy process to determine the relevance of the criminal history and prior acts to the elements of the charge and to the witness testimony. RP 29-32. This evidence is admissible under the number of cases presented above. See discussion *supra* pp. 20-26. Secondly, the court's instruction to the jury was specific as to what they could consider the evidence for and the defense presented counter evidence of prior bad acts of Frisk against Hadley. RP 124-125, 212-213. In *State v. Powell*, *State v. Price*, *State v. Stenson*, and *State v. Terry*, evidence of prior bad acts and in some instances convictions were used and neither the Washington Supreme Court nor the Courts of Appeal stated a jury could not follow the instructions of the court. See *State v. Stenson*, 132 Wa.2d 668, 940 P.2d 1239 (1997), *State v. Powell*, 126 Wa.2d 244, 893 P.2d 615 (1995), *State v. Price*, 126 Wa.App. 617, 109 P.3d 27 (Div 2, 2005), *Sate v. Terry*, 10 Wa.App. 87420 P.2d 1297 (Div 1, 1974) *overruled on other grounds State v. Young*, 160 Wa.2d 799, 161 P.3d 967 (2007).

Third, the State's case was stronger than the case presented in *Escalona* and did not merely rest on inconsistent statements by the victim and another witness. The State presented evidence Brenda Frisk intended to end her and Hadley's relationship very soon. RP 127-130, 193-194. And even though Frisk could not remember the actual assault, she testified

concerning their argument at the bar before she left and the defendant's jealous behavior at the bar. RP 142-143, 148. Additionally, the State presented testimony of Dana Ferguson that Frisk and Hadley fought at home around 1:30 to 2:00 am. RP 323. Ferguson testified she heard Fisk tell Hadley she'd had enough and Hadley said, "I'll tell you when you've had enough." RP 325. She then heard Frisk moan, the defendant say "I'll be the one to say whether you can take more or not," then a loud thump, like someone hitting a wall, and Fisk moan again. RP 325, 328-329. The State also presented physical evidence and pictures from the home of the blood, hair, broken sunglasses and broken bloody back scratcher. RP 382-400. Moreover, Frisk testified she tried to get help from the defendant for her injuries and the defendant denied her medical help, telling her to stay in bed. RP 148-153. When Frisk managed to call for help, the defendant was angry with her for calling. RP 155. Only when the Defendant learned help was coming did he tried to clean up Frisk, arguably to make her injuries seem less serious, her more presentable, and his explanation of her fall more reasonable. RP 155-157.

Given the admissibility of the prior act evidence for motive, lack of accident, and state of mind of the victim while testifying, the court's instruction to the jury, and the defendant's admission of prior act evidence

of Frisk, the defendant failed to prove the probative value of the evidence was substantially outweighed by the danger unfair prejudice.

2. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE WHEN IT USED THE WORD “VICTIM” IN ITS INSTRUCTION, BECAUSE THE COURT FIRST INSTRUCTED THE JURY IT HAD TO FIND THE PRIOR ASSAULTS OCCURRED AND ONLY IF THEY OCCURRED THEY COULD CONSIDER THE PERSON A VICTIM OF THOSE ASSAULTS. SHOULD THE COURT FIND THE TRIAL COURT DID COMMENT ON THE EVIDENCE, THE COMMENT WAS HARMLESS.

“Article IV, section 16 of the Washington State Constitution prohibits a judge from conveying to the jury [their] personal opinion about the evidence in a case or instructing a jury that matters of fact have been established as a matter of law.” *State v. Sivins*, 138 Wa.App. 52, 58, 155 P.3d 982 (Div 3, 2007) *citing State v. Jackman*, 156 Wa.2d 736, 743-44, 132 P.3d 136 (2006). It is not necessary a judge expressly convey their personal feelings on an element of the offense, as an implied feeling is sufficient. *See State v. Jackman*, 156 Wa.2d 736, 743-44, 132 P.3d 136 (2006). If a trial judge’s comments or instructions “constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial.” *State v. Lane*, 125 Wa.2d 825, 838, 889 P.2d 929 (1995). It is then the State’s burden to “show that no prejudice resulted to the defendant, unless it affirmatively appears from the record that no prejudice could have resulted.” *Id.* at 838-39.

In determining whether a trial judge commented on the evidence, a reviewing court must evaluate the facts and circumstances of the case. *See State v. Sivins*, 138 Wa.App. at 59. A court should look to see if the trial court's comment was isolated or cumulative. *See id.* Additionally, a court should determine if the instruction at issue resolves a disputed fact or bears on the credibility of a witness. *See State v. Lane*, 125 Wa.2d at 61. If an instruction correctly states the law and allows each party to argue its case, a trial court is afforded considerable discretion in selecting their wording. *See State v. Brown*, 132 Wa.2d 529, 618, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007, 118 S.Ct. 1192 (1998).

In the present case, the trial court instructed the jury as follows:

If you determine, based on the evidence, that prior assaults occurred, that evidence of prior assaults by the Defendant on the victim may only be considered by you to understand the victim's state of mind at the time of any statements she made before testifying or while testifying and during the assault, if you determine an assault occurred. It might also be considered as proof of motive by the Defendant. The evidence of prior assaults by Ms. Brenda Frisk on the Defendant may only be considered by you as to bias on behalf of Ms. Frisk against the Defendant.

RP 124-125. This instruction does not resolve a disputed fact or comment on Ms. Frisk's credibility. The term "victim" is defined as "the person who is the object of a crime." BLACK'S LAW DICTIONARY 1567 (6th ed. 1990). The trial court clearly instructs the jury they must first find that the

prior assaults occurred, as well as the current alleged assault before they consider what impact the prior assaults had upon the “victim.” RP 124-125. As such, the court only instructs a logical conclusion. If the jury finds there was a crime, then the person who is the object of the crime is a victim. “As long as jury instructions correctly state the law and allow each party to argue its case,” the instruction does not comment on the evidence. *See State v. Brown*, 132 Wa.2d at 618.

An appellate court is to review the entire facts and circumstances of the case before them. In the present case, the trial court also instructed the jury that they were the sole judge’s of credibility and the court would not comment on the evidence. RP 115, 445, 447-448. Additionally, at the end of the case, the judge read the same instruction and used Ms. Frisk’s name in place of victim – making the use of the word victim an isolated incident. Jurors are presumed to follow the court’s instructions. *See State v. Sivins*, 138 Wa.App. at 61. Taken into consideration with the entire jury instructions, the trial court’s use of the term “victim” is not a comment on the evidence or the credibility of any witness.

Should the court find the trial court’s use of the term victim is a comment on the evidence, there was no prejudice to the defendant and it affirmatively appears from the record that no prejudice could have resulted.

of the crime beyond a reasonable doubt.” *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880, 882 (1991). In such review, “circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability. *Id.* Lastly, the reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wa.App. 193, 202, 110 P.3d 1171, 1175 (Div. II 2005), *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533, review denied, 119 Wn.2d 1011 (1992), *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d850 (1990) (appellate court will not review credibility determinations).

To prove Assault in the First Degree in the present case the State had to prove the Defendant intentionally assaulted Brenda Frisk by a means likely to produce great bodily harm to her or death to her. CP 1, RCW 9a.36.011(1)(d) (2007). The State also specifically alleged the defendant either hit Ms. Frisk in the head or face with either a baseball bat and/or back scratcher. CP 1.

The State presented evidence Brenda Frisk intended to end her and Hadley’s relationship very soon. RP 127-130, 193-194. Frisk testified she was moving to Portland for a job, the Defendant wasn’t welcome, and the relationship was over. RP 129-130. The Defendant didn’t take this

news well and he didn't want Frisk to move. RP 130-131. While Frisk and Defendant were drinking at the bar the night of the assault, the Defendant became jealous and angry at her interaction with other bar patrons. RP 142-143. Frisk got fed up with Hadley's behavior, told him she wasn't going home with him, and they left in different directions. RP 143, 194-195.

Frisk then went to the home of her ex-husband, Arthur Anderson. RP 143, 270. Frisk told Anderson that she had been in an argument with Hadley, and Anderson testified Frisk was upset and scared. RP 270-271. Additionally, although Anderson described Frisk as intoxicated, he said she was able to walk, speak, and negotiate the torn-up front yard without incident. RP 271.

The State presented testimony of Dana Ferguson that Frisk and Hadley fought at home around 1:30 to 2:00 am. RP 323. Ferguson testified she heard Frisk tell Hadley she'd had enough and Hadley said, "I'll tell you when you've had enough." RP 325. She then heard Frisk moan, the defendant say "I'll be the one to say whether you can take more or not," then a loud thump, like someone hitting a wall, and Frisk moan again. RP 325, 328-329.

Frisk woke the next day dizzy and disoriented. RP 148-149. She testified she tried to get help from the Defendant for her injuries and the

Defendant denied her medical help, telling her to stay in bed and she might feel better. RP 148-153. Hadley also told Frisk that she'd fallen and hit her head on the refrigerator. RP 157. Additionally, when Frisk managed to call for help, the Defendant was angry with her for calling. RP 155. Only when the Hadley learned help was coming did he tried to clean up Frisk, arguably to make her injuries seem less serious, her more presentable, and his explanation of her fall more reasonable. RP 155-157.

The State also presented physical evidence and pictures from the home of the blood, hair, broken sunglasses and broken bloody back scratcher. RP 382-400. Wilda Parkhurst testified was there was blood in the kitchen, in the hallway and everywhere in the bedroom. RP 345-347. Additionally, Parkhurst said that when she called the home the afternoon of the 21st, Hadley never mentioned to her Brenda was injured or had hit her head. RP 343-344. Moreover, Frisk testified that neither her sunglasses nor the back scratcher were broken prior to that evening. RP 173-180.

The State also presented evidence of the prior assaultive history between Hadley and Frisk. Over the past four years before the assault, Ms. Frisk put up with Mr. Hadley beating her. She didn't always report the crimes, wouldn't tell her friends how she got her injuries, and would even forgo going to the hospital to get medical treatment. RP 131-137.

This was pertinent to explain their relationship and understand Hadley's motive in assaulting Frisk.

Determinations of credibility are the province of the jury and will not be disturbed on appeal. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850, 855 (1990) citing *State v. Casbeer*, 48 Wa.App. 539, 542, 740 P.2d 335 (1987). In the instant case, there is sufficient evidence for the jury to believe the State's witnesses.

The evidence shows Hadley was angry and upset and jealous. He was also aware of the immediacy of the break-up given Frisk's refusal to return. Additionally, there was evidence Hadley and Frisk were fighting that night, and the noises Ferguson heard could have been the assault and Frisk hitting the wall. Lastly, it is extremely suspicious that Hadley didn't tell Frisk's mother about the injury, kept Frisk in bed and refused to get her medical treatment. From the sounds of Frisk and Hadley's conversation and the state of the bedroom, it could hardly have escaped his notice that she was bleeding profusely, could hardly stand, and needed medical attention. Lastly, Frisk never saw Hadley after he was at the hospital with her. All this testimony leads to the conclusion that Hadley assaulted Frisk.

The Defendant cites to *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), for the proposition Frisk's injuries were consistent with a

reasonable inference of innocence. See App. Br. 28-30. *Aten* centered around a corpus delicti issue in the death of a four-month old child. See *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). The State presented evidence from a pathologist that the infant died from Sudden Infant Death Syndrome (SIDS) or acute respiratory failure. See *id.* at 643. The pathologist explained he could not conclude a logical and reasonable inference the child died from any human action. See *id.* at 647. Because of the inability to determine the cause of death was anything other than accidental, the court found there was insufficient information to show corpus delicti and thus, the defendant's statements were inadmissible and there was insufficient evidence to convict. See *id.* at 658-663.

The present case is distinguishable from *Aten*. In the present case there is evidence of a stressor to the Defendant in the end of the relationship. There are also the sounds the neighbor heard, and the Defendant's suspicious behavior afterwards. Lastly, three doctors testified it would be unlikely for Frisk to have obtained the injuries from a fall, due to the nature of the injuries and their location. RP 229-234, 259, 300-302.

4. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO FACTUAL EVIDENCE THAT MS. FRISK WAS TAKEN TO THE WOMEN'S SHELTER BECAUSE IT WAS THE SAFEST PLACE.

The defendant argues that his trial counsel's failure to object to irrelevant and prejudicial evidence denied him the right to effective assistance of counsel. The alleged prejudicial evidence is that Brenda Frisk moved into and spent four months at the local women's shelter because that was the safest place for her. RP 353.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wa.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. "[T]he substance of this guarantee is that courts must make 'effective' appointments of counsel." *Jury*, 19 Wa.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise

under similar circumstances.” *State v. Visitacion*, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986).

The defendant failed to establish ineffective assistance of counsel with respect to his trial counsel’s failure to object to factual evidence for three reasons: first, the evidence that Frisk moved into the women’s shelter because it was the safest place for her was not irrelevant and prejudicial; second, should the Court find this evidence was irrelevant and prejudicial, the defendant was not denied effective representation by his trial counsel’s failure to object to such evidence; and third, should the Court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by his trial counsel’s failure to object.

It is true that evidence must be relevant to be admissible under Evidence Rule 401. The Defendant argues the statement, “Frisk would be safest in the women’s shelter” expresses the opinion Frisk was a victim of the defendant’s assaults and in need of protection. The Defendant jumps to conclusions with this assumption.

The Defendant cites to Frisk's testimony that she never returned to the residence. (RP 168). This testimony was elicited in regards to whether she had ever seen the home after she was admitted into the hospital. RP 168. The State asked Ms. Frisk if she had a full recollection of what she told Detective Deisher. RP 168. When she answered in the negative, the State asked if she was ever back at the home. RP 168. Frisk again answered no, and said that her family packed up her belongings. RP 168. The State then asked her to identify the photographs taken by Detective Reece of her home. RP 168. This colloquy is indicative of her memory concerning her statements to Deisher about the facts of the night and that she had never been to the house to change any evidence or refresh her memory with the physical evidence.

The Defendant also cites to the record where Frisk testified she lived in the shelter for four months after the assault and then moved out on her own. RP 192. Nothing in the record states why Frisk lived at the shelter at this point. However, just before Frisk said she lived at the shelter, Frisk described the nature of her injuries. RP 189. She stated her injuries were so bad that the women at the shelter had to push her around in a chair because she couldn't walk properly. RP 189. The statement of living at the shelter goes directly to the explanation of her injuries, not to a need for protection.

Lastly, Wilda Parkhurst, Frisk's mother testified the shelter was the safest place for Frisk in the context of Frisk's injuries. Directly after Parkhurst's statement about safety, she says Frisk was still showing signs of confusion, trouble walking and talking. RP 353-354. She explains Frisk needed help to walk, comb her hair or do just about anything. RP 353-354. Parkhurst didn't know how long Frisk needed the help because the women at the shelter were taking care of Frisk. RP 354. This statement was also given in relation to Frisk's injuries. There was never any statement that Frisk stayed at the shelter because she was concerned the Defendant would return or would hurt her. The Defendant has taken snippets of the transcript and drawn a conclusion not supported by the context of the testimony.

Additionally, each reference to the shelter is relevant to the State's case to explain the extent of Frisk's injuries. The Defendant pled not guilty to the crime of Assault in the first degree or in the alternative of Assault in the second degree, meaning the State had to prove every element of the crime, including the danger of great bodily harm under assault in the first degree or substantial bodily harm under second degree assault. RCW 9A.36.011, RCW 9A.36.021(1)(a) (2007). Frisk's need for care and supervision after release from the hospital is important to show the lasting damage of the injuries. That the women at the shelter needed

to help with basic toilette and walking is relevant testimony. Moreover, given the level of care needed, it is certainly explainable that the safest place for Frisk was where someone could give her that care. The reference to safety certainly doesn't imply prejudice given the context of the testimony. Therefore the testimony was both relevant and not prejudicial, and it was not error for defense counsel not to object.

Should the Court find the evidence Frisk stayed at the women's shelter was irrelevant and prejudicial, the defendant failed to establish ineffective assistance of counsel, because he was not denied effective representation. The defendant argues that no tactical reason existed for counsel's failure to object to testimony concerning the women's shelter being the safest place. Accordingly, the defendant argues this failure to object satisfies the first prong of the test for ineffective assistance of counsel, the denial of effective representation.

"In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121, 126 (1980). Despite the defendant's argument, a tactical reason for not objecting to testimony about the shelter existed. The Defendant's theory of the case was Frisk fell and caused her injuries. The testimony concerning the shelter went to

the level of her injuries and could also intimate any bias on behalf of Frisk and Parkhurst against the defendant. For example, the defense argued Frisk and Parkhurst were out to get the Defendant because they assumed she needed protection, when there wasn't any physical evidence to show the Defendant assaulted Frisk. RP 474. Defense counsel argued Parkhurst instantly assumed Frisk was assaulted by Hadley when she heard Frisk was in the hospital. RP 474, 483-484. Not to object to her statement about the shelter was a legitimate trial tactic to talk about her bias.

Because the failure to object to testimony could have been a trial tactic, the defendant's trial counsel functioned as a reasonably competent attorney would under the circumstances and the defendant was not denied effective representation by his trial counsel.

Even if the Court finds the defendant was denied effective representation with respect to his trial counsel's failure to object, the defendant must establish he was prejudiced by such failure. In order to do so, the defendant must prove "that there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *State v. Visitacion*, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). Specifically, the defendant must prove that if his trial counsel had objected to the testimony, he would not have been convicted.

Absent evidence Frisk went to the women's shelter, there was sufficient evidence for the jury to find the defendant guilty of the charge. *See* discussion *supra* pp. 34-37. Therefore, should the Court find the defendant was denied effective representation, the State requests the Court find the defendant was not prejudiced as a result.

5. THE DEFENDANT FAILED TO ESTABLISH ANY ERRORS AND IF SUCH ERRORS WERE FOUND, THEY WERE NOT CUMULATIVE AS TO VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

The cumulative error doctrine is "Limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn App. 147, 154, 822 P.2d 1250 (1992).

Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985),

cert. denied, 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy*, at 425. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981), *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *U. S. cert. den.* 115 S.Ct. 2004, 131 L. Ed. 2d 1005.

The State has identified no error, harmless or prejudicial, resulting from the trial court's rulings regarding any of the foregoing issues. Given the scope of this trial, and the over-whelming evidence of guilty, the State asserts that no error, had a material effect on its outcome. Nor does the State believe that a different result would have been reached in their absence.

6. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE WAS WARRANTED AS THE STATE IS NOT REQUIRED TO ALLEGE AGGRAVATING FACTORS IN THE INFORMATION, SO LONG AS THE DEFENDANT IS PROVIDED NOTICE OF SUCH FACTORS PRIOR TO TRIAL IN A SEPARATE DOCUMENT.

The defense argues that under *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980), and the State and Federal constitutions, notice of intent

to seek an exceptional sentence must be alleged in the information. However, the defense misconstrues the relevant case law, and the applicable statute does not require the notice be alleged in the information. Given this, the defense's claim must fail.

The State agrees with the defense that various mandatory sentence enhancements such as those for firearms, deadly weapons, and protected zones must be alleged in the information. *See Theroff*, 95 Wn.2d 385. However, this rule does not require that notice of an exceptional sentence be included in the information. The reason is clear, the enhancements discussed in *Theroff* and the other cases cited by the defense are *mandatory* while the decision to impose an exceptional sentence is entrusted to the sole discretion of the trial court. The relevant portions of RCW 9.94A.533 state “the following additional time *shall* be added.” (Emphasis added.) In contrast, the exceptional sentence statute, RCW 9.94A.537, states that if the jury finds that aggravating factors were present, the court “*may* sentence the offender” to a term not to exceed the statutory maximum. (Emphasis added.) This distinction is key, as very different consequences flow from a jury's finding of an enhancement when compared to a finding of an aggravating factor.

The defense's argument becomes particularly tenuous when the relevant case law regarding notice of the death penalty is considered. In

State v. Clark, 129 Wn.2d 805, 920 P.2d 187 (1996), the court rejected the argument that notice of intent to seek the death penalty should be included in the information. The Washington Supreme Court held that:

Clark argues this right includes the right to notice of the prosecutor's intent to seek the death penalty. Indeed, Clark argues the death penalty notice adds an additional element to the underlying crime of aggravated murder, citing *State v. Campbell*, 103 Wash.2d 1, 25, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). Clark misreads *Campbell*. The statutory death notice here is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime. While we require formal notice to the accused by information of the criminal charges to satisfy the Sixth Amendment and art. I, § 22, *State v. Vangerpen*, 125 Wash.2d 782, 787, 888 P.2d 1177 (1995), we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime. *State v. Lei*, 59 Wash.2d 1, 3, 365 P.2d 609 (1961) (no constitutional requirement of notice regarding habitual criminal offender penalties). Due process in sentencing requires only adequate notice of the possibility of the death penalty. *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991).

Clark, 129 Wn.2d at 811. When viewed in the context of the death penalty case law, it becomes clear that the aggravating factors for an exceptional sentence are not elements of the crime charged and need not be included in the information. Instead, the factors may be alleged separately, as was done in the case at hand.

Furthermore, prior to the enactment of RCW 9.94A.537, Washington courts' had ruled that a defendant had *no* right to notice of an

exceptional sentence. In *State v. Moro*, 117 Wn.App. 913, 920, 73 P.3d 1029 (2003), the court noted that “due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a possibility in all sentencings.” *See also State v. Falling*, 50 Wn.App. 47, 49-50, 747 P.2d 1119 (1987); *State v. Wood*, 57 Wn.App. 792, 798, 790 P.2d 220 (1990); *State v. Holyoak*, 49 Wn.App. 691, 697, 745 P.2d 515 (1987); *State v. Dennis*, 45 Wn.App. 893, 898, 728 P.2d 1075 (1986). Considering this, RCW 9.94A.537 should not be construed as requiring the aggravating factors to be alleged in the information, especially given the notable absence of any such language from the text of the statute.

Finally, the State would note that the aggravating factors to support an exceptional sentence are not essential elements of the crime charged in any case. Thus, under CrR 2.1(b) these factors could be stricken as surplusage if alleged in the information. The defense’s suggestion that these factors could be alleged in the information is illusory. Instead, the factors are properly alleged in a separate notice.

Based on the preceding argument, the States asks this Court to hold that the aggravating factors to support an exceptional sentence need not be

alleged in the information and uphold the Defendant's exceptional sentence.

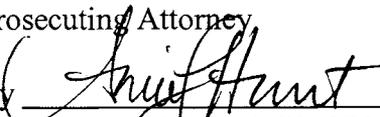
V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 25th day of January, 2008

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By


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