

NO. 44892-1

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

STATE OF WASHINGTON, RESPONDENT

v.

AARON DUKES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 12-1-00172-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove his counsel was deficient for delaying opposition to admissible evidence that defendant set his girlfriend on fire as part of an ongoing pattern of abuse?
2. Is defendant incapable of establishing the trial court erred by accurately ruling defendant's prior act of domestic violence was admissible under ER 404(b)¹ and RCW 9.94A. 535(3)(h)(i)²?
3. Did the court properly exclude evidence of the victim's prior suicide attempt, which defendant impermissibly offered to argue she burned herself according to a propensity for self-harm?
4. Should defendant's claim of cumulative error fail when he has failed to establish the existence of any error?
5. Is remand for entry of a written order documenting the trial court's oral dismissal of defendant's misdemeanor marijuana charge unwarranted when a written order is not required by law?

¹ ER 404(b) "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

² Pursuant to RCW 9.94A.535(3)(h)(i) it is an aggravating circumstance that supports a sentence above the standard range in a case of domestic violence as defined in RCW 10.99.020 if 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.

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Aaron Dukes, was charged by amended information with assault in the first degree aggravated as a domestic violence offense (Count I); unlawful possession of a firearm in the first degree (Count II); unlawful possession of a controlled substance—forty grams or less of marijuana (Count III); and violation of a domestic violence court order (Count IV). CP 5-7. A persistent offender notice was filed on January 8, 2013. CP 9. Defendant's case was called for trial February 11, 2013. 1RP 2. The Honorable Linda CJ Lee presided. *Id.* Defendant pleaded guilty to Count II. 1RP 10, 46, 49, 55-56. CP 24-33.

The State moved for an advance ruling on the admissibility of defendant's 2007 assault on victim Wanda Wilson to prove the reasonable fear component of the charged assault as well as to explain Wilson's inconsistent statements about the 2012 incident. CP 17(State's motion in limine No. 2); 1RP 4. The 2007 assault was also offered to prove the charged domestic violence aggravator. 1RP 4. Defendant's prior protective order violations were predicate offenses for Count IV. CP 7.

Defense counsel initially conceded the 2007 assault was admissible as to the aggravator. 1RP 4. Counsel concluded a bifurcated trial was

unwarranted. 1RP 63.³ Counsel's trial objection to Wilson's description of the 2007 assault was overruled. 3RP 155-58. The same result followed his subsequent objection to police testimony and photographic evidence detailing that incident. 5RP 364-73.

The State preliminarily moved to exclude evidence of victim Wilson's character. CP 21-23 (State's motion in limine No.6); 1RP 6-7, 20-24, 40-41. During cross-examination defendant asked Wilson whether she was admitted to Western State Hospital in 2007 for a suicide attempt. 3RP 219. The court sustained the State's objection pursuant to ER 404(b) after defendant argued the testimony was admissible to prove Wilson burned herself in conformity with her propensity for self-harm. 3RP 220.

Defendant rested without calling witnesses. 7RP 506. The trial court orally granted defendant's motion to dismiss Count III (UPCS) due to the decriminalization of misdemeanor marijuana possession under I-502, which was enacted after defendant's offense but before his trial. 7RP 527-29; CP 339 (3/15/13, 2:02 PM). The jury convicted defendant as charged for Count I and IV. *See e.g.*, CP 54 (Instruction No. 9), 66 (Instruction No. 21); 73 (Instruction No. 25), 87, 89-91.

Defendant was sentenced to life without the possibility of parole as a persistent offender under RCW 9.94A.570 on April 19, 2013. CP 300.

³ Defendant does not assign error to that decision. App.Br. 1, 9-14.

His offender score 9+ as to Count I. The judgment accurately reflected the convictions obtained from defendant's guilty plea to Count II and trial on Counts I and IV. CP 296-98. The oral dismissal of Count III was not noted in the judgment; however, it was recorded in the Clerk's Minute Entry and is also available in writing through the verbatim report of proceedings. CP 298, 339 (3/15/13, 2:02 PM); 98 (§ 3.2); 7RP 527-29. Notice of appeal was timely filed on May 16, 2013. CP 310.

2. Facts

Wanda Wilson was a thirty six year old nursing technician in January, 2012. 3RP 122. She worked at an assisted living home for seniors. *Id.* Her mother helped her rent a garage apartment in Lakewood. 2RP 79-80; 3RP 123-24, 127-29; 169-172, 174-76; 4RP 268-69, 273-74. Defendant was Wilson's on again off again boyfriend of seven years who frequently visited her apartment in spite of the domestic violence protection order that prohibited that contact. 3RP 123-24. 2RP 79-80; 3RP 123-24, 127-29; 169-172, 174-76; 5RP 348, 380, 382; 6RP 416, 439-40, 466-67, 474; 7RP 495; CP 36 Ex. 22-25A.

Wilson spent most of January 9, 2012, cleaning her apartment. 3RP 130-31. Defendant arrived in the evening. 3RP 132. Wilson cooked a spaghetti and garlic bread meal for them to share. 3RP 134-35, 198.

Defendant went to a neighbor's house while Wilson cooked with the understanding he would return in about five minutes. 3RP 137. Wilson found him at the neighbor's house approximately four hours later. 3RP 135, 137, 199. She asked defendant if he intended to come home for dinner. 3RP 135, 200. Defendant was upset about being interrupted by "a woman ... telling him to come home" in the presence of "other men." 3RP 136. Wilson later described getting defendant for dinner as "the worst thing. Something [she] shouldn't have d[one]." 3RP 135.

A violent argument ensued once they returned to Wilson's apartment. 3RP 136-37. Defendant "put [Wilson] on the floor ... and kicked [her] and kicked [her] and kicked [her]." 3RP 138. He walked into bathroom and returned with a bottle of rubbing alcohol as she made her way into the living room. 2RP 99; 3RP 138-39; 205; 6RP 425-26, 461-62. She mistakenly thought defendant retrieved the rubbing alcohol to treat the part of her leg he just kicked. 3RP 139. He poured it on her head instead. 3RP 139; 6RP 461-62. "And then he just grabbed a lighter and lit it like it was ... nothing. Like [she] was just nothing" 3RP 139, 195. She could not understand "why" "why" he would do that to her when she "did nothing but take care of [him] for seven years...." 3RP 139.

Wilson "caught on fire ... [she] was on fire everywhere." 3RP 140. Defendant watched her burn. 3RP 140. She managed to put most of the

fire out with her hand. 3RP 140-41. She felt as if her "whole face ... burned off." 3RP 140. Defendant eventually "tr[ie]d" to put out the fire on [her] leg" with his hand. 3RP 140-41.

Defendant wanted to take care of Wilson's injuries. 3RP 144-45, 173-74. Wilson pleaded she would "die if [she] didn't call 911." 3RP 145. Defendant left. 3RP 145. Wilson initially told the 911 operator masked intruders set her on fire. 2RP 78; 3RP 147, 200-01. Wilson later explained she was trying to "protect" defendant because she "was in love with him." 3RP 147, 201.

Wilson stood "naked in [her] doorway waiting for" help to arrive. 3RP 203. Police responded about five minutes later. 2RP 78-9, 81. Officer Olsen observed a figure silhouetted in smoke at the front door; steam or smoke was rising from the body. 2RP 81-2. The smell of "burnt hair and flesh" filled the air. 2RP 82; 3RP 203. Wilson stood still in "a daze" with her arms partially extended "repeating[:] I hurt, it hurts." 2RP 78-9, 81, 83. "All [Wilson] could say was it hurts." 2RP 84. "[S]kin [wa]s ... peel[ing] away" from the top of Wilson's arm, shoulder and ear. 2RP 98-99; CP 35, Ex. 1-8. Much of her hair had burned away; what remained was "kind of matted up on her head...." 2RP 98. "[H]er lips were cracked and bleeding." 2RP 98. Olsen knew nothing could be done for Wilson until medical aid arrived. 2RP 83-84.

A disposable lighter was found just outside Wilson's apartment; several others were located inside. 6RP 457-58. There was no sign of forced entry. 6RP 455. There was liquid "splatter" on the living room carpet next to "a clump of hair." 2RP 99; 6RP 460; CP 35 Ex. 11-12, 37-38, 40. A bottle of rubbing alcohol was on the bathroom counter. 2RP 100; 3RP 143; 6RP 462-63; CP 35, Ex. 13, 18, 52. A white threaded cap consistent with that bottle was in the living room. 6RP 461-62. A bedroom smoke detector was detached from its ceiling mount and placed on the bed as if to silence it or prevent it from sounding. 5RP 349, 379; 6RP 466-67; CP 35, Ex. 16, 50, 53. The uneaten spaghetti dinner was in the kitchen. 5RP 347; 7RP 494. There was no evidence of oven conditions to corroborate defendant's later claim Wilson burned herself with grease while cooking. 4RP 256; 5RP 350; 7RP 474-75, 494.⁴

Detectives contacted Wilson at Harborview Hospital. 4RP 288; 6RP 416. Intubation prevented her from speaking. 4RP 288-90; 6RP 417; CP 36, Ex. 26. She nodded in the affirmative when asked if defendant caused her injuries. 6RP 418. She again identified defendant as the person who burned her at a follow up police interview on February 17, 2012.

⁴ Wilson's mother (Puncha Wilson) contacted defendant by telephone the next morning to obtain his key to Wilson's apartment. 4RP 254-56, 61-62. Defendant told Puncha Wilson was burned by grease while cooking. 4RP 256, 258. There was no evidence of a grease mishap inside Wilson's apartment. 4RP 258-60.

6RP 424, 434-35. She gave the same account to her sister. 6RP 444. Police apprehended defendant. 4RP 281-82; 5RP 354. He had a small amount of marijuana in his pocket. 4RP 284-85; 5RP 325, 328-34. He also had a blister consistent with a burn injury on his left hand. 5RP 320, 355; 7RP 496-97.

Wilson was transferred to Harborview's burn center. 5RP 298, 301-02; 6RP 440-41. She suffered second degree burns over the 6% of her body that includes her face; third degree burns crossed another 6% of her body encompassing her neck, chest and left shoulder. 5RP 302-03, 308. Ocular burning caused corneal abrasion. 5RP 308. "[L]ow grade inhalation injury" resulted from her breathing the accelerant defendant used to ignite her, heat from that fire, or smoke from her burning clothes. 3RP 139, 195; 5RP 306-07. All of her wounds were debrided; tissue destroyed by the third degree burns was excised. 5RP 311. A "sheet graft" was created for her neck by employing a tool, which "looks like a fancy cheese slicer" to remove skin from her thigh. 3RP 148-49; 5RP 312. A similar process was used to "harvest" skin from other body parts to create "meshed grafts" for her chest and shoulder; those grafts caused mesh-pattern scarring that will never go away. 3RP 148-49; 5RP 312-14. Other scarring will also persist. 5RP 316. Wilson's pain was "[i]ndescribable." 3RP 149.

Wilson underwent several surgeries to treat the burns. 3RP 140, 148, 184. She was released from the hospital in February, 2012. 5RP 312. The fire reduced her to "a wreck" of her former self. 3RP 149. Wilson moved in with her mother, and depended on her mother for care. 4RP 242, 263. Some of Wilson's wounds became infected with MRSA,⁵ which Wilson perceives to be worse than the burns due to the isolating measures required to protect others from the infection. 3RP 150-53; 5RP 317-18. The loss of feeling resulting from her third degree burns will likely be permanent as the nerves were destroyed. 3RP 150; 5RP 318. Wilson received extensive psychiatric care for PTSD.⁶ 3RP 149. But that care and counseling cannot overcome the "daily" reminder that comes when Wilson has to look at herself to bathe. 3RP 149.

The 2012 attack was not the first time defendant assaulted Wilson in the course of their seven year relationship. 3RP 123-24, 154; 5RP 395-96. On August 25, 2007, defendant severely beat her, thr[ew] [her] in some bushes", and "left [her] for dead." 3RP 154-155.⁷ Wilson sustained lacerations to her face and head, she had dark bruising around an eye, and lost a considerable volume of blood. 3RP 159; 5RP 398-99; 5RP 399; CP

⁵ Staphylococcus aureus. 5RP 313.

⁶ Post traumatic stress disorder.

⁷ Although Wilson initially testified defendant was the person who assaulted her in 2007, she quickly equivocated, claiming her level of intoxication at the time resulted in confusion about her attacker's identity. *See e.g.*, 159.

39, Ex. 62-63. The lacerations were sealed by fourteen stitches to her cheek and seven stitches to her nose. 3RP 159; 5RP 398-99, 401; CP 39, Ex. 58-59. Like the 2012 incident, Wilson initially told police defendant was not responsible for the attack because "[she] love[d] him and ... d[idn]'t want to get him in trouble." 3RP 167. Defendant was apprehended by a K-9 unit after being tracked from the scene for approximately fifteen minutes. 5RP 396-98. He had blood on his clothing. 5RP 398.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE HIS COUNSEL WAS DEFICIENT FOR DELAYING OPPOSITION TO ADMISSIBLE EVIDENCE THAT DEFENDANT SET HIS GIRLFRIEND ON FIRE AS PART OF AN ONGOING PATTERN OF ABUSE.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The State proceeded to trial with the charge of first degree assault. CP 5; 58 (Instruction No. 9); RCW 9A.36.011(1)(a), (c). Defendant had the jury consider the lesser charge of second degree assault. CP 45; CP 67

(Instruction No. 17). Both offenses require proof of "assault" as defined by WPIC 35.50, which provides in part:

"[A]n assault is ... an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury."

CP 59 (Instruction No. 10); *State v. Magers*, 164 Wn.2d 174, 182-86, 189 P.3d 126 (2008). The domestic violence aggravator further required the offense be:

"[p]art of an ongoing pattern of psychological, physical, or sexual abuse of [the] victim ... manifested by multiple incidents over a prolonged period of time."

RCW 9.94A.535(h)(3)(i); CP 76 (Instruction No. 30).

The State proffered evidence of defendant's 2007 domestic violence assault on Wilson as proof of the charged assault's reasonable apprehension component, Wilson's credibility, and the domestic violence aggravator. 1RP 4; CP 17. Defense counsel initially conceded admissibility as to the aggravator. 1RP 4. Wilson reluctantly testified defendant assaulted her in 2007. 3RP 154. She then immediately equivocated about defendant's identity as the assailant, but explained her attacker "beat [her] up" "really bad," "thr[ew] [her] in some bushes and left [her] for dead." 3RP 155. Defendant objected when the prosecutor asked Wilson to describe her resulting injuries. 1RP 154. The State cited

*Magers*⁸ as support for the proposition that the jury needed to know enough about the 2007 incident to evaluate Wilson's credibility in light of the domestic violence background that influenced her inconsistent identification of defendant as the person who burned her. 1RP 156-57.

The trial court overruled the objection, stating:

"I believe the issue in [*Magers*] is the credibility of the witness and ... given what the Court has heard about this case and what the Court has heard in opening statements and questioning on voir dire, the credibility of this witness, Wanda Wilson, is at issue in this case and is what is being attacked by the defense in this case. And whether it is because she's recanting or because she is changing her story and giving different versions, it is still at the heart of the matter[:] the credibility of the witness. I'm going to be allowing the question."

3RP 158.

Counsel later argued against admitting police testimony and photographs documenting the injuries Wilson sustained in the 2007 assault. 5RP 364-69. He maintained the sentencing aggravator making them relevant was moot given the life sentence that would follow a conviction for the strike offense; alternatively, he claimed the 2007 incident was too remote in time to support the aggravator. 5RP 364-65.

The court ruled:

"I've now had a chance to review not only ... [*Magers*] relied on by both sides, but also ... the Court's notes with

⁸ 164 Wn.2d 181-86.

regard to Wanda Wilson's testimony, and the arguments raised by counsel. And I believe ... the incident in 2007 is ... admissible as this Court has previously ruled. The evidence goes to the aggravator that is being alleged by the State in Count I, and the evidence is relevant to not only Count I's aggravator, but to the domestic violence no contact violation charged alleged in Count IV. The Court finds that the probative value is not outweighed by any ... unfair prejudice to the defendant ... The defense argues that an incident five years ago is too remote in time to show prolonged period. That is an argument that can be made to the jury. However, evidence of the 2007 incident ... is necessary for the State to prove the aggravator in Count I and Count IV itself. Therefore, ... the Court is finding that its probative value is not substantially outweighed by any unfair prejudice caused by the passing of five years."

SRP 370-71. The court allowed the police testimony and photographs, but excluded several hearsay statements attributed to Wilson. SRP 371-73.

- a. Defendant failed to prove his counsel was deficient for delaying opposition to admissible evidence.

Counsel is deficient when representation falls below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995). "*Strickland* begins with a strong presumption ... counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing *State v. Richenbach*, 153 Wn.2d

126, 130, 101 P.3d 80 (2004); *see also State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

Exceptional deference must be given to counsel's tactical and strategic decisions. *In re Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007) (*citing Strickland*, 466 U.S. at 689); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). "A fair assessment of attorney performance requires ... every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 690. The defendant bears the burden of establishing the absence of any "conceivable" legitimate strategy or tactic explaining counsel's performance to rebut the strong presumption that counsel's performance was effective. *Grier*, 171 Wn.2d at 42.

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances will the failure to object

constitute ineffective representation. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763). Ineffective assistance claims based on counsel's failure to object require defendant's to prove: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would have been different if the objection was successful. *See generally State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

i. It is legitimate trial strategy to refrain from making dubious objections to admissible evidence.

"A lawyer shall not ... assert or controvert an issue ... unless there is a basis in law and fact for doing so that is not frivolous...." RPC 3.1. Motions to exclude evidence must be warranted by existing law or a good faith argument for modification of existing law and must not be interposed for any improper purpose. CR 11.

In a domestic-violence assault case evidence of the defendant's prior acts of domestic violence against the same victim is admissible to prove the victim's fear is objectively reasonable. *See State v. Magers*, 164

Wn.2d 174, 181-83, 189 P.3d 126 (2008).⁹ It is likewise admissible under ER 404(b) to assist the jury in evaluating a victim's credibility where he or she has provided conflicting versions of events, recanted, or attempted to minimize the defendant's responsibility for the charged offense. *Id.* at 185-87. The latter basis for admissibility serves the jury's right to assess the victim's credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim. *Id.* at 186 (quoting *State v. Grant*, 83 Wn. App. 98, 106, 920 P.2d 609 (1996)).¹⁰ Evidence of prior domestic violence is also admissible under RCW 9.94A.535(3)(h)(i) to prove a crime on trial is part of an ongoing pattern of abuse. *See e.g., State v. Bell*, 116 Wn. App. 678, 683, 67 P.3d 527 (2003); *State v. Atkinson*, 113 Wn. App. 661, 670-71, 54 P.3d 702 (2002).

⁹ *Magers* was a plurality decision; however, a six justice majority agreed a defendant's prior acts of domestic violence are admissible under ER 404(b) as evidence on the issue of the victim's credibility in a trial for a subsequent domestic violence offense against that victim. *See* 164 Wn.2d at 186, 194.

¹⁰ To reasonably admit prior acts evidence for a non-propensity based theory there must be some similarity among the acts themselves. Wigmore calls this the "abnormal factor" that ties them together. *See State v. Wade*, 98 Wn. App. 328, 335, 989 P.2d 576 (1999) (citing John H. Wigmore on Evidence § 302). Once this connection is established other reasonable inferences such as intent can logically flow from the prior acts. *Id.*; *see also State v. Holmes*, 43 Wn. App. 397, 400-401, 717 P.2d 766 (1986). Prior acts evidence may often be the only method of proving intent in specific intent crimes. *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994) (citing *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975)).

Counsel appropriately refrained from challenging the admissibility of the 2007 assault at the outset of trial. Count I required the State to prove defendant assaulted Wilson, which put the reasonableness of the fear she experienced during the 2012 assault directly at issue. The fact defendant violently beat Wilson and left her for dead just five years before he set her on fire gave Wilson good reason to believe defendant was deadly earnest in his desire to hurt her. *See State v. Johnson*, 172 Wn. App. 112, 124, 297 P.3d 710 ("Controlling or domineering behavior, whether considered alone or in the context of a history of physical abuse, may ...tend to prove a victim's reasonable fear of an abuser. This is particularly true in the context of domestic violence."), *review granted*, 178 Wn.2d 1001, 308 P.3d 642 (2013).

The 2007 assault enabled the jury to assess whether Wilson's initial attempt to conceal defendant's identity as the person who burned her in 2012 was a lamentable by-product of fear and misguided loyalty cultivated through a domestic violence relationship that span seven years. It explained why, after all the pain Wilson endured from the fire, she actually blames herself for the attack, attributing it to her decision to get defendant for dinner while he was in the company of "other men." *See* 3RP 135. It provided invaluable insight into why she had such difficulty

looking at defendant in court. 3RP 123. It also put her otherwise inexplicable initial inability to testify against defendant in context:

[Prosecutor] "Okay ... Ms. Wilson, who burned you?"
[Wilson] "Oh, god."
[Prosecutor] "I didn't hear you."
[Wilson] "I - - I can't - - I'm having a panic attack. You'll have to wait for that question."
[Prosecutor] "Okay. We'll talk about something else then. Okay[?]"
[Wilson] "Okay."

3RP 123, 130.

Her near physiological resistance to identifying defendant as her attacker resumed when the prosecutor returned to the subject:

[Prosecutor] "What happened after he left the kitchen?"
[Wilson] "I can't do this right now. That part right there, I can't do this right now. I have to - - - I have to wait a second. I'm going to have a panic attack and I don't want it - - - to have it."
[Wilson] "I want to get it over with. I want to leave."
...
[Prosecutor] "What happened after Mr. Dukes left the kitchen?"
[Wilson] "Oh, my gosh. Must have went in the bathroom and got alcohol." ...
[Prosecutor] "[T]hen what happened?"
[Wilson] "Poured it on my head, on my hair...."
[Prosecutor] "So, he poured it over your hair?"
[Wilson] "I can't do this. I can't do this right now. Can I leave the room for a second? No, I don't even want to leave the room. I have to come back."
[Prosecutor] "Let's just push on through, okay? So he poured it over your head and then what happened?"
[Wilson] "And then he just grabbed a lighter and lit it like it was fucking nothing. Like I was just nothing. That's what pisses me off. I'm so pissed off because I don't know

why. Why? Why? I did nothing but take care of your ass for seven years, mother fucker you. That's all I did. That's all I did. (Witness crying.)"

3RP 138-39.

At the conclusion of the evidence the jury was properly instructed:

"You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things ... the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witnesses statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony."

CP 50 (Instruction No. 1) (emphasis added).

It would be antithetical to the truth finding function of a trial to expose jurors to the kind of raw emotionally charged and obviously conflicted testimony they experienced from Wilson, instruct them to deduce Wilson's credibility from her demeanor while testifying, deprive them a linchpin piece of information—like the 2007 attack—necessary to make sense of her behavior, and then expect a verdict that represents the truth about an incident of profound importance to the community and defendant alike. See *Johnson*, 172 Wn. App. 125 (citing *State v. Baker*, 162 Wn. App. 468, 474-75, 259 P.3d 270, review denied, 173 Wn.2d 1004, 268 P.3d 942 (2011)). The jury was entitled to evaluate Wilson's

credibility knowing the dynamics of her relationship with defendant, so it could draw reasonable inferences about the affect of that relationship on her testimony. *See Magers*, 164 Wn.2d 181-83; *Baker*, 162 Wn. App. 475; *Grant*, 83 Wn. App. at 107-08). The existence of legitimate reasons for counsel to delay the objection defendant identifies on appeal defeats his claim of deficient performance.

ii. An objection to the admissible evidence defendant challenges could not have been reasonably sustained.

Defense counsel has no duty to pursue strategies that reasonably appear unlikely to succeed. *State v. Brown*, 159 Wn. App. 366, 371-72, 245 P.3d 776 (2011) (citing *In re Personal Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004); *McFarland*, 127 Wn.2d at 334 n.2.); e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) (counsel's failure to argue novel theories of law is incapable of supporting an ineffective assistance claim), *cert. denied*, 546 U.S. 882 (2005)).

Counsel made the objections and argued the legal theories defendant maintains would have won exclusion of the challenged evidence. 3RP 157-58; 5RP 364-69. The trial court properly overruled counsel's objections, rejecting those theories, and permitted the State to prove its case with the admissible evidence. 3RP 158; 5RP 370-73.

Defendant's claim the objections he renews on appeal would have been sustained if made below cannot be reconciled with the record.

Absent those objections, and counsel still could not be rationally faulted for failing to pursue defendant's untenable interpretation of RCW 9.94A.535(h)(3)(i). "There is no basis...to find ineffective assistance for defense counsel's failure to move to suppress evidence in anticipation of a change in the law." *State v. Pearsall*, 156 Wn. App. 357, 362, 231 P.3d 849 (2010), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1113 (2011) (*citing State v. Millan*, 151 Wn. App. 492, 502-03, 212 P.3d 603 (2009), *review granted, reversed on other grounds, State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011)). At the time of defendant's trial no court had adopted his novel interpretation of RCW 9.94A.535(h)(3)(i); the success of his argument therefore turned on the court finding a new limitation in the statute. Reasonable trial strategies need not adjust to advance claims that may become meritorious as the law evolves. *See State v. Slighte*, 157 Wn. App. 618, 624, 238 P.3d 83, *review granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991).

iii. Exclusion of the prior domestic violence offense would not have affected the outcome of defendant's trial.

To prove prejudice under *Strickland's* second prong, defendant must establish there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011(2001) (*citing Strickland*, 446 U.S. at 687).

Defendant appropriately, albeit indirectly, acknowledges proof of defendant's guilt as to Count I was so overwhelming that exclusion of the challenged evidence would not have likely altered the jury's general verdict. App.Br. 4-5, 12; *see also* 2RP 79-80, 99-100; 3RP 123-24, 127-29, 138-43, 147, 169-172, 174-76, 195, 201, 205; 4RP 256-60; 5RP 302-03, 308, 320, 348-49, 355, 379-80, 382; 6RP 416, 418, 424-26, 434-35, 439-40, 444, 460-63, 466-67, 474; 7RP 495-97; CP 34-36, Ex. 1-8, 11-13, 16, 18, 22-25A, 37-38, 40, 50-53. The special verdict would have been similarly unaffected as the jury may very well have unanimously found the aggravator based on the "manifestation of deliberate cruelty" pursuant to RCW 9.94A.535(h)(iii) in defendant's act of setting Wilson on fire,

instead of interpreting it as part of an ongoing pattern of abuse, despite the ample proof for each basis. *See* CP 76 (Instruction No. 30);¹¹ CP 90-91.

b. Defendant failed to prove counsel's overall performance was ineffective.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 89 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted the testing envisioned by the Sixth Amendment has occurred, even if defense counsel made demonstrable errors in judgment or tactics. *Id.* This is because “[t]he essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict

¹¹ Instruction No. 26 "To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt: (1) That the victim and the defendant were family or household members; and (2) That: (a) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks; or (b) the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim. If you find from the evidence that element (1), and any of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. To return a verdict of "yes," the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" on the special verdict form."

rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

Defendant misapplies *Strickland* to the extent he suggests ineffective assistance can be proved by establishing counsel missed a helpful objection. Reviewing courts assess counsel's overall performance. Defendant's counsel filed a trial brief and argued motions in limine. 1RP 36-60; 2RP 63-75; CP 10-15. The record indicates he questioned potential jurors, gave an opening statement and presented a closing argument on defendant's behalf. *See e.g.*, 2RP 74-45; 3RP 158; 8RP 569. Counsel cross-examined critical witnesses. 2RP 105, 111; 3RP 194; 4RP 264, 291; 5RP 321, 334, 386; 6RP 425, 447, 488, 500. He actively interposed objections. *See e.g.*, 2RP 86, 3RP 159, 160-61, 165, 168, 170, 171, 174-75, 177, 181, 190-91; 4RP 248, 249-50, 259, 263; 5RP 392, 398; 6RP 417, 443, 446; 7RP 498, 517, 519. And he proposed instructions. CP 43-46. Defendant rightly does not claim these fundamental activities were deficiently executed. His ineffective assistance claim should fail.

2. THE TRIAL COURT ACCURATELY RULED
DEFENDANT'S PRIOR ACT OF DOMESTIC
VIOLENCE ADMISSIBLE UNDER ER 404(b)
AND RCW 9.94A.535(3)(h)(iii).

The trial court only abuses its discretion when its decision to admit evidence is manifestly unreasonable or rests on untenable grounds or

reasons. *State v. Johnson*, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013) (citing *Magers*, 164 Wn.2d 174), review granted, 178 Wn.2d 1001, 308 P.3d 642 (2013); *State v. Johnson*, 159 Wn. App. 766, 773, 247 P. 3d 11 (2011) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

For the reasons detailed above the trial court appropriately allowed the challenged evidence as proof of Wilson's reasonable fear and credibility as well as proof of the domestic violence aggravator. *Supra* (§1). It then instructed the jury on how to properly curtail its evaluation of that evidence:

"Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's prior assault against Wanda Wilson and may be considered by you only for the purpose of assessing the victim's state of mind, her credibility, and for answering the question on special verdict form 2. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

CP 69 (Instruction No. 19), *see also* CP 47-68, 70-78. The jury is presumed to have followed that instruction. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

It would have been error for the trial court to exclude the challenged evidence based on defendant's unsound interpretation of RCW 9.94A.535(3)(h)(i). The primary objective when interpreting any statute is

to ascertain and give effect to the Legislature's intent. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). A court's analysis of a statute "begin[s] with an examination of the statute's plain language, according to its ordinary meaning." *Id.* The plain meaning of nontechnical statutory terms may be discerned from their dictionary definitions. *Id.* (citing *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006)). Reliance on a thesaurus is also appropriate when necessary. *Id.* "If language in a statute is subject to only one interpretation, then inquiry is at an end." *Id.*

RCW 9.94A.535(3)(h)(i) applies to domestic violence offenses when:

"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." (Emphasis added).

"Multiple" means "consisting of, including, or involving more than one... several...[o]ccurring more than once...." Webster's Third New International Dictionary, 1485 (2002). "[P]rolonged" does not have a precise definition; however, it has been interpreted by Washington's courts to mean something more than a few weeks and has been found in cases where the abuse was perpetrated over a period of years. *Bell*, 116 Wn. App. at 684; *Atkinson*, 113 Wn. App. at 671-72; *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). It's plain meaning

unambiguously denotes a protracted interval of time. *See* Webster's Third New International Dictionary, 1815 (2002); *Epefanio*, 156 Wn. App. at 392.

Two domestic violence assaults inflicted on two separate occasions, five years apart, unequivocally satisfy the plain meaning of "multiple incidents over a prolonged period of time." *See* RCW 9.94A.535(3)(h)(i) (emphasis added); *Bell*, 116 Wn. App. at 684; *Atkinson*, 113 Wn. App. at 671-72; *Epefanio*, 156 Wn. App. at 392; Webster's Third New International Dictionary, 1485, 1815 (2002). Defendant urges this court to discordantly read "multiple" to require three or more incidents of domestic violence to occur within some unidentified period of time less than the five years at issue in his case. App.Br. 10-11. That interpretation necessitates a dramatic departure from the plain meaning of the nontechnical words our Legislature employed in a self-defining¹² statute, which in turn requires an unjustified derogation of the interpretive rule restraining courts from adding words or clauses to an unambiguous statute when the Legislature has chosen not to include them. *See Kintz*, 169 Wn.2d at 549-50 (citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

¹² Defendant erroneously applies a dictionary definition to "ongoing" "pattern" when RCW 9.94A.535(3)(h)(i) provides "ongoing pattern" in the context of the statute means "multiple incidents over a prolonged period of time."

The Legislature could have, *but did not* define "multiple" in a way that deviates from its usual meaning; as it could have, *but did not* circumscribe the time period within which the incidents of abuse must occur. *See Kintz*, 169 Wn.2d at 550; *see also e.g.*, RCW 9.94A.030(36)(a) ("Pattern... means ... two or more of the following ... gang-related offenses....") (emphasis added); *Kintz*, 169 Wn.2d at 552 ("repeatedly" is defined as "on two or more separate occasions ... Thus, a stalking conviction [under RCW 9A.46.110(1)(a)] requires evidence of two or more distinct ... occurrences of following or harassment....") (emphasis added); *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 446 (1983) (a "pattern" of racketeering activity defined as "two or more of several defined crimes....") (emphasis added); *compare with* RCW 46.61.502(6)(b) (driving under the influence (DUI) is a felony when the defendant has four or more prior offenses within ten years).

Defendant's reading of RCW 9.94A.535(3)(h)(i) is also at odds with Legislator's demonstrated intent to broaden—not limit—its application to address recidivist domestic violence offenders like defendant. *See State v. Sweet*, 174 Wn. App. 126, 131, 297 P.3d 73, *review granted*, 177 Wn.2d 1023, 309 P.3d 504 (2013); *see also Kintz*, 169 Wn.2d 549). Based on defendant's escalating pattern of violence against Wilson it is highly unlikely she would have survived the third attack defendant asks this

Court to require as a matter of law. *See e.g.*, 2RP 98; 3RP 139, 154-155, 159, 195; 5RP 398-99; CP 35, Ex. 1-8, CP 39, Ex. 62-63. It was ultimately for the jury to decide whether the domestic violence aggravating factor was proved. *See Epefanio*, 156 Wn. App. at 392. The time interval between a prior bad act and present offense goes to weight not admissibility. *State v. Evans*, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986) (time lapse of nine years between prior bad act and charged offense) (*citing State v. Bouchard*, 31 Wn. App. 381, 386, 639 P.2d 761, *review denied*, 97 Wn.2d 1021 (1982)). Defendant was free to argue the evidence of multiple incidents was deficient as to kind, number, or duration.

Defendant alternatively argues the 2007 offense was inadmissible because it was not "necessary" to prove the charged assault. App.Br.12. That position cannot be reconciled with "the State[']s] right to present ... evidence to amply prove every element of the crime charged, and to rebut all defenses, even if the effect was substantial duplication...." *State v. Daniels*, 56 Wn. App. 646, 650, 784 P.2d 579 (1990) (*citing State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983); *State v. Castellanos*, 132 Wn.2d 94, 98-102, 935 P.2d 1353 (1997)). One can never predict with certainty which fact or facts will prove helpful, or decisive, to

a particular jury's decision. The objection defendant claims was ineffectively delayed could not have been reasonably sustained.¹³

3. THE COURT PROPERLY EXCLUDED EVIDENCE OF THE VICTIM'S PRIOR SUICIDE ATTEMPT BECAUSE DEFENDANT OFFERED IT TO PROVE CONDUCT IN CONFORMITY WITH A PROPENSITY FOR SELF HARM IN VIOLATION OF ER 404 and ER 405.

"State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *State v. Donald*, ___ Wn. App. ___, ___ P.3d ___ (WL 6410340, 6)(2013) (citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 413 (1998)). "[A] criminal defendant's constitutional right to a meaningful opportunity to present a complete defense limits this latitude." *Id.* (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). "But the defendant's right to present a defense also has limits. [It] is subject to reasonable restrictions and must yield to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*

¹³ Defendant appropriately refrains from challenging the sufficiency of the evidence supporting the aggravator. A properly instructed jury found the aggravator beyond a reasonable doubt, and that decision is entitled to great deference. *See Epefunio*, 156 Wn. App. at 392. App.Br. 1-3.

(citing *Scheffer*, 523 U.S. at 308; *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Acosta*, 123 Wn. App. 424, 441, 98 P.3d 503 (2004)). A defendant must therefore limit his or her defense to the presentation of admissible evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993)).

The exclusion of evidence largely lies within the sound discretion of the trial court. *Rehak*, 67 Wn. App. at 162; *State v. Kilgore*, 107 Wn. App. 160, 185, 26, P.3d 308 (2001) (citing *State v. Mak*, 105 Wn.2d 692, 710, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 404 (2000)). A court does not abuse its discretion unless the exclusion is "manifestly unreasonable or based upon untellable grounds or reasons." *Magers*, 164 Wn.2d at 181. The unreasonableness of a trial court's decision is manifest when it is "obvious, directly observable, overt or not obscure..." See *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

State's motion in limine No. 6 moved to exclude evidence of victim-Wilson's character. CP 21-23; 1RP 6-7, 20-24. During subsequent cross-examination defendant posed the following question to Wilson:

[counsel] "In 2007 were you admitted to Western State Hospital due to a suicide attempt?"

3RP 219. The State objected. 3RP 219. The court engaged defense counsel in the following colloquy:

[court] "Mr. Whitehead?"

[counsel] "Whether this - - whether Wanda Wilson attempted to harm herself in the past is relevant to who did - - poured the alcohol on her and who lit it on fire."

[court] "So you're arguing propensity, which is exactly what 404(b) excludes."

[counsel] "Well, the - - one of the elements here is who lit - - who poured the alcohol and lit the fire."

3RP 220. The court sustained the objection and instructed the jury to disregard counsel's question. *Id.*

- a. The propensity evidence was properly excluded pursuant to ER 404.

ER 404's ban on propensity evidence does not impermissibly impair a defendant's Sixth Amendment right to present a defense. *Donald, supra* at 2. "As a general rule, character evidence is not admissible to prove ... a person acted in conformity with a character trait on a particular

occasion." *State v. Bell*, 60 Wn. App. 561, 564, 805 P.2d 815 (1991) (citing ER 404(a)).¹⁴ And evidence of specific acts of conduct is generally inadmissible to prove character in the rare instances in which it is admissible. *Id.* (citing ER 404(b); ER 405(a)).

Evidence of a victim's character is typically inadmissible unless offered to prove self defense or suicide. *State v. Martin*, 169 Wn. App. 620, 628, 281 P.3d 315 (2012); *State v. Safford*, 24 Wn. App. 783, 604 P.2d 980 (1979); *State v. Brooks*, 16 Wn. App. 535, 540, 557 P.2d 362 (1977); *State v. Jones*, 19 Wn. App. 850, 854, 578 P.2d 71 (1978). ER 404 does not unduly restrict a defendant's right to present a defense as it only prevents the defendant "from presenting propensity evidence the common law generally excludes because it is distracting, time-consuming, and likely to influence a fact finder far beyond its legitimate probative value." See *Donald*, *supra* at 8 (citing 3 Clifford Fishman, *Jones on Evid.: Civil and Criminal* § 14.1).

¹⁴ ER 404(a) "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; (2) Character of the Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

"Exclusion of propensity evidence furthers two goals ... *Scheffer* recognized as reasonable. It ensures the reliability of evidence introduced at trial and avoids litigation collateral to the primary purpose of trial ... [thus] the per se exclusion of propensity evidence to prove how a person acted on a particular occasion is not disproportionate to the ends it is designed to serve." *Id.* (citing *Scheffer*, 523 U.S. at 308-09); see also *State v. Hudlow*, 99 Wn.2d 1, 19, 659 P.2d 514 (1983).

The trial court properly excluded reference to Wilson's alleged suicide attempt pursuant to ER 404.¹⁵ Defendant unmistakably purposed that evidence to advance the impermissible inference Wilson set herself on fire in conformity with her propensity to harm herself. Exclusion of that evidence did not prevent defendant from subjecting Wilson's testimony to adversarial testing. He cross-examined her about the alcohol she consumed the night of the incident as well as the inconsistencies in statements she made while trying to protect him from arrest. See e.g., 3RP 200, 216. Exclusion was also consistent with the court's obligation to

¹⁵ Defendant's attempt to blame Wilson for the fire was also an improper attempt to argue other suspect evidence without satisfying the foundational requirement for its admissibility. See *State v. Rafay*, 168 Wn. App. 734, 799-800, 285 P.3d 83 (2012). Washington has long followed the rule that before a defendant may present evidence suggesting another person committed the charged offense, the defendant must first establish a sufficient foundation, including a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party. The requisite foundation requires a clear nexus between the other person and the crime. The proposed testimony must show a step taken by the third party that indicates an intention to act on the motive or opportunity. *Id.*

exercise reasonable control over witness interrogation to make it effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from undue embarrassment. *See* ER 611.

- b. The excluded testimony also violated ER 405.

ER 405 provides the following methods of proving character:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."

Character is rarely an essential element of the charge, claim, or defense in a criminal case. To be an essential element character must itself determine the rights and liabilities of the parties. *State v. Mercer-Drummer*, 128 Wn. App. 625, 632, 116 P.3d 454 (2005) (*citing State v. Kelly*, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984)).

Propensity for self-harm is not an "essential element" of defendant's charges or defense. CP 5-7; 8RP 569; *see also Mercer-Drummer*, 128 Wn. App at 631-32. Evidence of a specific instance of prior self-harm to prove conduct in conformity with that propensity during the charged assault would have been properly excluded under ER 405(b)

even if it was an admissible pertinent trait. *Mercer-Drummer*, 128 Wn. App. at 630, 632. Defendant's proof would have been limited to Wilson's reputation for that trait in a relevant community. *Id.* (citing ER 405(a));¹⁶ see also *State v. Cervantes*, 169 Wn. App. 428, 433, 282 P.3d 98 (2012) (A trial court's decision may be affirmed on any basis)) (citing RAP 2.5(a)).

c. Any probative value in the challenged evidence was substantially more prejudicial than probative.

Evidence that has some probative value on a fact of consequence may be properly excluded when its value is substantially outweighed by its prejudicial effect. *Bell*, 60 Wn. App. at 565 (citing ER 403). The suicide attempt was not established as relevant to defendant's case. See ER 401.¹⁷ The record is silent as to why Wilson found life so unbearable in

¹⁶ If a defendant claims self-defense, prior misconduct by the victim may be admissible to show that the defendant had a reasonable apprehension of danger. In this situation, admissibility is not governed by ER 404 or ER 405 because the evidence is not offered to show that the victim acted in conformity with the prior misconduct. The evidence is simply circumstantial evidence of the defendant's state of mind. See *State v. Walker*, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975)). Whereas character evidence a victim committed suicide in a defense to a charge of murder is only to be proved by reputation regarding the victim's personality traits and emotional or mental state to the extent it tends to prove he or she was manifesting depression consistent with suicide. See ER 404; ER 405(a); *Martin*, 169 Wn. App. at 629; *Brooks*, 16 Wn. App. at 540; *Bell*, 60 Wn. App. at 564.

¹⁷ ER 401 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence."

2007 that death seemed preferable to what she was enduring.¹⁸ One would have to speculate to tie the 2007 suicide attempt to the 2012 assault, or to determine whether the incident marked a credible attempt on her life or a call for help. The evidence could have been excluded as unduly prejudicial under ER 403¹⁹ by the same reasoning due to its tendency to be misunderstood by jurors unfamiliar with the meaning of suicidal behavior within the context of protracted domestic violence. See *Cervantes*, 169 Wn. App. at 433 (A trial court's decision may be affirmed on any basis) (*citing* RAP 2.5(a)).

4. THIS COURT SHOULD REJECT DEFENDANT'S CLAIM OF CUMULATIVE ERROR SINCE NO ERROR WAS PROVED.

"[T]he cumulative error doctrine requires reversal when the combined effect of ... errors denie[s] the defendant a fair trial."

State v. Garcia, ___ Wn. App. ___, 313 P.3d 422 (2013). That doctrine is inapplicable to defendant's case as he failed to prove isolated error much less a prejudicial aggregate.

¹⁸ See ER 103(a) (Error may not be predicated on a ruling which excludes evidence unless a substantial right of the party is affected, and in the case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked).

¹⁹ ER 403 "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

5. REMAND FOR ENTRY OF A WRITTEN ORDER DOCUMENTING THE DISMISSAL OF DEFENDANT'S MARIJUANA CHARGE IS UNWARRANTED BECAUSE A WRITTEN ORDER IS NOT REQUIRED.

A trial court is not obliged to issue a written order when it orally dismisses one count in a multi-count information that results in conviction. *See State v. Davis*, 176 Wn. App. 849, 18-19, ___ P.3d ___ (2013).

Defendant's judgment accurately reflected the combined outcome of his guilty plea and trial by imposing sentence on Counts I, II, and IV. CP 5-7, 24-33, 54 (Instruction No. 9), 66 (Instruction No. 21); 73 (Instruction No. 25), 87, 89-91, 96-7, 339 (3/15/13, 2:02 PM); 1RP 10, 49, 55-56; 7RP 527-29; *See Davis*, 176 Wn. App. at 18-19. Remand for the requested entry of a written notation in the judgment to document the oral dismissal of Count III is unwarranted. Although not required by law, a written record of Count III's dismissal appears in the Clerk's Minute Entry. CP 339 (3/15/13, 2:02 PM: "[T]he court dismisses the count regarding unlawful possession of marijuana...."). A written record of that judicial act may now also be found in the verbatim report of proceedings. *See* 7RP 527-29.

Defendant's reliance on *Moten* to support his request for remand is misplaced as that case addressed a scrivener's error not present in

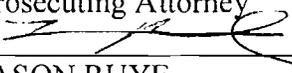
defendant's judgment. See *State v. Moten*, 95 Wn. App. 927, 976 P.2d 1286 (1999); see also *Davis*, 176 Wn. App. at 18-19 (Appellate courts ordinarily do not address assertions unsupported by authority) (citing *State v. Young*, 90 Wn.2d 613, 625, 574 P.2d 1171 (1978); *State v. Selander*, 65 Wn. App. 134, 136, 827 P.2d 1090 (1992); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); RAP 10.3(a)(6)).

D. CONCLUSION.

Defendant failed to prove ineffective assistance of counsel, judicial error, or an aspect of his judgment in need of correction. His convictions and sentence should be affirmed without remand.

DATED: FEBRUARY 7, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/7/14
Date Signature

PIERCE COUNTY PROSECUTOR

February 07, 2014 - 3:28 PM

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