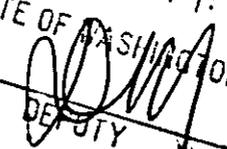


FILED
COURT OF APPEALS
DIVISION II
2014 OCT -7 PM 1:10
STATE OF WASHINGTON
BY 
DEPUTY

NO. 45962-1-II

**COURT OF APPEAL OF THE STATE OF
WASHINGTON
DIVISION II**

NICK IN YOUNG PARK,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S BRIEF

**Appeal from the Superior Court
Of Kitsap County, Washington
The Honorable Jennifer A. Forbes**

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Table of Contents

	<u>Page</u>
<u>A. Assignments of Error</u>	1
<u>B. Statement of the Case</u>	2
<u>C. Legal Argument</u>	6
I. MR. PARK'S CONSTITUTIONAL RIGHT TO REMAIN SILENT WAS VIOLATED WHEN HE WAS ALLOWED TO TESTIFY WITHOUT EVIDENCE OF A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER.	6
a. Lacking Evidence A Defendant's Choice To Testify Was Voluntary Is Analogous To Lack Of Such Evidence When Entering A Plea Of Guilty.	7
b. Lacking Evidence A Defendant's Choice to Testify Was Voluntary Is Analogous To Lacking Evidence Of Waiving The Right To Remain Silent During A Follow-Up Law Enforcement Interrogation.	8
c. Lacking Evidence A Defendant's Choice To Testify At Trial Was Voluntary Is Analogous To Lacking Similar Evidence At A CrR3.5 Suppression Hearing.	9
II. MR. PARK WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.	11
a. Trial Counsel Failed To Object To Inadmissible Other Bad Acts evidence Which The Jury Could Then Use to Inappropriately Determine Intent and Identity.	12
1. <u>Trial counsel's failure to object to irrelevant other bad act evidence was ineffective assistance.</u>	12

2. <u>Trial counsel's failure to object to other bad act evidence was prejudicial to Mr. Park</u>	15
b. Trail Counsel Failure To Move For Severance Of An Unrelated Charge Was Ineffective Assistance Which Allowed The Jury To Inappropriately Use Evidence Of That Count In Determining The Others.	16
1. <u>Trial counsel's failure to move for Severance of count nine from the remaining counts was ineffective assistance.</u>	16
2. <u>No severing count nine caused prejudice to Mr. Park.</u>	21
c. Trial Counsel Was Ineffective In Failing To Object To Entry Of Exhibit 33 On Redirect When Beyond The Scope Of Cross-Examination, And No Other Evidence Identified The Protected Part's Residence.	23
1. <u>It was ineffective assistance to fail to object to questions beyond the scope of cross-examination.</u>	23
2. <u>Failure to object prejudiced Mr. Park as no other evidence showed this to be Ms. McCormick's residence.</u>	24
d. Trial Counsel Was Ineffective At Sentencing.	25
1. <u>At sentencing, trial counsel failed to investigate, present mitigating evidence, or rebut the State's argument.</u>	25
2. <u>Trial counsel's deficient performance at sentencing was prejudicial.</u>	28
III. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO FIVE TIMES THE STANDARD RANGE BASED ON IMPROPER FACTORS.	30

<u>D. Conclusion</u>	32
----------------------	----

Table of Authorities

Washington Cases

<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980).	11
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978).	11, 14
<i>State v. Barragan</i> , 102 Wn. App. 754, P.3d 942 (2000).	14
<i>State v. Chervenell</i> , 99 Wn.2d 309, 662 P.2d 836, 838 (1983).	7
<i>State v. Conklin</i> , 37 Wash. 2d 389, 223 P.2d 1065 (1950).	24
<i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288, 1295-96 (2006).	28
<i>State v. Gatalski</i> , 40 Wn. App. 601, 699 P.2d 804, 809 (1985).	21
<i>State v. Goldberg</i> , 123 Wn. App. 848, 99 P.3d 924, 926 (2004).	25, 27
<i>State v. Hillman</i> , 66 Wn. App. 770, 832 P.2d 1369 (1992).	31
<i>State v. Jeffries</i> , 105 Wn.2d 398, 717 P.2d 722 (1986).	11
<i>State v. Lawley</i> , 32 Wn.App. 337, 647 P.2d 530 (1982).	8
<i>State v. Mak</i> , 105 Wn.2d 692, 711, 718 P.2d 07 (1986).	23
<i>State v. Mason</i> , 31 Wn. App. 1, 639 P.2d 800 (1982).	8
<i>State v. McDonald</i> , 143 Wn.2d 506, 22 P.3d 791 (2001).	11
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172, 183 (1992).	31
<i>State v. Prince</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).	14
<i>State v. Ritchie</i> , 126 Wn.2d 388, 894 P.2d 1308, 1312 (1995).	31
<i>State v. Robtoy</i> , 98 Wn.2d 30, 653 P.2d 284, 288 (1982).	6

<i>State v. Silva</i> , 119 Wn. App. 422, 81 P.3d 889, 893 (2003).	6
<i>State v. Thomas</i> , 109 Wn.2d 222, 229, 743 P.2d 816 (1987).	11, 14
<i>State v. Warren</i> , 55 Wn. App. 645, 779 P.2d 1159, 1164-65 (1989).	16, 19
<i>State v. York</i> , 50 Wn App. 446, 749 P.2d 683, 686 (1987).	17, 22

Other Cases

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). 15

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003). 25, 26.

Constitutional Provisions

Const. art. I, § 9. U.S. Const. amend. V.	6
U.S. Const. amend. VI.	11

Statutes

RCW 9.94A.585(4)(b).	30
----------------------	----

Rules

CrR 3.5(b)	9-10
ER 404(b)	12-13
ER 611	23
RAP 2.5(a)(3)	6

Other Authorities

12 Wash. Prac., Criminal Practice & Procedure § 3321 (3d ed.).	6
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Appendix

Washington State Constitution

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Constitution of The United States of America

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RCW 9.94A.585

Which sentences appealable — Procedure — Grounds for reversal —
Written opinions.

(1) A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(6) The court of appeals shall issue a written opinion in support of its decision whenever the judgment of the sentencing court is reversed and may issue written opinions in any other case where the court believes that a written opinion would provide guidance to sentencing courts and others in implementing this chapter and in developing a common law of sentencing within the state.

(7) The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

CrR 3.5

CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the

defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

ER 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. 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 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.

(b) Other Crimes, Wrongs, or Acts. 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.

ER 611

MODE AND ORDER OF INTERROGATION
AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross Examination. Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

RAP 2.5

CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

A. Assignments of Error

1. The trial court erred in not advising Mr. Park of his right to remain silent at trial and in allowing Mr. Park to testify with no evidence that he had been advised of that right and was waiving it knowingly, voluntarily, and intelligently.
2. The trial court erred in entering convictions when the defendant did not received effective assistance of counsel.
3. The trial court erred in sentencing Mr. Park to five times the standard sentence without sufficient justification.

Issues Pertaining to Assignments of Error

1. Whether a trial court is required to assure a criminal defendant is making a knowing, voluntary, and intelligent waiver of his right to remain silent at trial when the defense calls the defendant as a witness.
2. Whether trial counsel's performance was ineffective considering the entire record.
 - a. Whether defense counsel is ineffective when she fails to object to irrelevant prior bad act evidence.
 - b. Whether defense counsel is ineffective when she fails to move to sever unrelated charges

- c. Whether defense counsel is ineffective when she fails to object to entry of evidence during redirect which is beyond the scope of cross-examination and the only evidence of one element of a charged crime.
 - d. Whether defense counsel is ineffective when she fails to present mitigating circumstances or otherwise rebut the State's argument at sentencing.
3. Whether a trial court has abused its discretion when it sentences a defendant to five times the standard sentence based primarily on free crimes and future dangerousness.

B. Statement of the Case

Mr. Park was charged in Kitsap County Superior Court on May 31, 2013, with felony violation of a court order.¹ On the assigned trial date, the State filed an amended information alleging ten counts.² Those counts and the general facts alleged are as follows:

- Count 1. Violation of a Court Order—Mr. Park was alleged to have driven past the home of Narree McCormick on March 10, 2013 at a

¹ CP 1-16.

² CP 23-33.

time when a domestic violence no contact order prohibited him from coming within 500 feet of her residence.³

- Count 2 Violation of a Court Order—Mr. Park was alleged to have contacted Narree McCormick on March 3, 2013 through a facebook account in the name of Daniel Kim at a time when a domestic violence no contact order prohibited him from electronic communication with Ms. McCormick.⁴
- Count 3 Cyberstalking—Mr. Park was alleged to have suggested the commission of lewd acts to Nicole Torricellas on February 10, 2013 using a facebook account in the name of Daniel Kim.⁵ (Ms. Torricellas was also a witness to the incident alleged in count one).
- Count 4 Cyberstalking—Mr. Park was alleged to have suggested the commission of lewd acts to Nicole Wurscher between November 2, 2012 and February 5, 2013 using a facebook account in the name of Zach Baughman and anonymous communication through the website AVVO.com.⁶

³ CP 23-24. RP page 422 line 24 .

⁴ CP 24.25 RP page 444 line 15.

⁵ CP 25- 26. RP page 445 line 10.

⁶ CP 26. RP page 447 line 7.

- Count 5 Cyberstalking—Mr. Park was alleged to have suggested the commission of lewd acts to Amy Ingoli between February 1, 2013 and March 6, 2013 using a facebook account in the name of Daneil Kim.⁷
- Count 6 Cyberstalking—Mr. park was alleged to have suggested the commission of lewd acts to Janice Melendres between December 1, 2012 and April 28, 2013 through text messages.⁸
- Count 7 Cyberstalking—Mr. Park was alleged to have suggested the commission of lewd acts to Monica Burgess on February 6, 2013 using a facebook account in the name of Daniel Kim.⁹
- Count 8 Harassment—Mr. Park was alleged to have sent text messages to a Lance Provost on March 10, 2013 wherein he was alleged to have threatened to kill Nicole Torricellas.¹⁰
- Count 9 Telephone Harassment—Mr. Park was alleged to have harassed Kristina Felt while on phone calls placed from the Kitsap County Jail between May 13, 2013 and July 8, 2013.¹¹
- Count 10 Cyberstalking—Mr. Park was alleged to have sent repeated anonymous text messages to Ashley Rinehart intending to harass her

⁷ CP 26-27. RP page 448 line 14.

⁸ CP 27-28. RP page 450 line 9.

⁹ CP 28-29. RP 451 line 2.

¹⁰ CP 29. RP page 451 line 19.

¹¹ CP 29-30. RP page 452 line 19.

between October 1, 2012 and May 9, 2013.¹² Mr. Park was acquitted on this count.¹³

The defense called Mr. Park to testify in his own defense.¹⁴ There was no colloquy regarding Mr. Park's right to remain silent. There was no representation by defense counsel that there was a knowing, voluntary, and intelligent waiver of that right. There was no finding by the trial court of a knowing, voluntary, and intelligent waiver.

On January 22, 2014, Mr. Park was convicted after jury trial on counts one through nine and found not guilty on count ten.¹⁵ On February 28, 2014, Mr. Park was sentenced to three hundred months in custody.¹⁶ The standard sentencing range was calculated at 60 months.¹⁷ Mr. Park filed timely notice of appeal.

¹² CP 30-31. RP page 453 line 21.

¹³ RP page 479 line 17-19.

¹⁴ RP page 345 line 5.

¹⁵ RP page 478 line 13-page 479 line 19.

¹⁶ RP 523.15-18, CP 294.

¹⁷ CP 290.

C. Legal Argument

I. MR. PARK'S CONSTITUTIONAL RIGHT TO REMAIN SILENT WAS VIOLATED WHEN HE WAS ALLOWED TO TESTIFY WITHOUT EVIDENCE OF A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER.

Criminal defendants have a right to remain silent before and during trial.¹⁸ Washington Courts have held that the burden is on the State to prove by a preponderance of the evidence that a waiver of this constitutional right was knowing, voluntary, and intelligent.¹⁹ This burden requires the State show affirmative conduct; failure to assert the right to remain silent followed by incriminating statements is insufficient.²⁰

A manifest error affecting a constitutional right may be raised for the first time on appeal.²¹ Violation of a criminal defendant's right to remain silent requires reversal of the convictions.²²

¹⁸ Const. art. I, § 9. U.S. Const. amend. V.

¹⁹ *State v. Robtoy*, 98 Wn.2d 30, 35, 653 P.2d 284, 288 (1982), abrogated on other grounds, recognized by *State v. Radcliffe*, 164 Wash.2d 900, 194 P.3d 250 (2008); *State v. Pierce*, 94 Wash.2d 345, 618 P.2d 62 (1980), overruled by *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982); *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973). *Lego v. Twomey*, 404 U.S. 477, 486-87, 92 S.Ct. 619, 30 L.Ed.2d 619 (1972).

²⁰ 12 Wash. Prac., Criminal Practice & Procedure § 3321 (3d ed.), citing, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *United States v. Womack*, 542 F.2d 1047 (9th Cir. 1976)

²¹ RAP 2.5(a)(3)

²² *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889, 893 (2003), citing, *State v. Nelson*, 72 Wash.2d 269, 285, 432 P.2d 857 (1967).

Here, there is no evidence in the record to support the defendant's choice to testify was made knowingly, intelligently, and voluntarily, so the State is not able to bear that burden.

While there is no specific proof of voluntary waiver, such as a trial court colloquy and valid response, is required, rules in analogous situations are illustrative of the type and level of evidence required.

A. Lacking Evidence A Defendant's Choice To Testify Was Voluntary Is Analogous To Lack Of Such Evidence When Entering A Plea Of Guilty.

A plea of guilty is not valid unless there is evidence that the defendant knew of his right to not testify at trial.²³ While it is the best practice to obtain this evidence by express advisement, other extrinsic evidence, like evidence of advisement by counsel prior to the hearing, may be used for this purpose.²⁴

A criminal defendant who chooses to testify at trial has given up the same right to remain silent at trial as a defendant who is making a statement in support of a plea of guilty. Hence, the same rule should apply.

²³ *State v. Chervenell*, 99 Wn.2d 309, 312, 662 P.2d 836, 838 (1983).

²⁴ *Id.* at 312-13, citing *United States v. Webb*, 433 F.2d 400, 403 (1st Cir.1970). *cert. denied*, 401 U.S. 958, 91 S.Ct. 986, 28 L.Ed.2d 242 (1971).

B. Lacking Evidence A Defendant's Choice To Testify Was Voluntary Is Analogous To Lacking Evidence Of Waiving The Right To Remain Silent During A Follow-Up Law Enforcement Interrogation.

A criminal suspect who has once waived his right to remain silent must be re-advised of this right during a subsequent interrogation if a significant period of time has passed since the initial warning.²⁵ The validity of a renewed interrogation after assertion of the right to remain silent is, judged by whether the totality of the circumstances shows the defendant voluntarily waived his rights at this subsequent interrogation.²⁶

While this principle refers specifically to investigative interrogation, it would seem an odd caveat to say that in this circumstance a suspect must be re-warned before being re-interrogated *unless he is on the stand in the criminal trial*—the very time at which the right has its benefit. Such a suggested caveat would be all the more odd considering that unlike during interrogation, at trial the defendant having waived his right may not longer re-assert it if he no longer wishes to answer questions.

Here, Mr. Park had waived his right to remain silent during at least part of the investigation, but a significant period of time had passed between that interrogation and Mr. Park's choice to testify. Were he asked on the

²⁵ See, *State v. Lawley*, 32 Wn.App. 337, 344, 647 P.2d 530 (1982).

²⁶ *State v. Mason*, 31 Wn. App. 1, 639 P.2d 800 (1982).

day of trial to answer more questions from law enforcement, he would need to have been advised again of his right to remain silent. Hence, he should have been so advised before testifying. Furthermore, while it would seem obvious that a person has the same rights at a second police interrogation that he had at the first, it is not quite so obvious that the right is the same in the completely different courtroom setting. Hence, the re-advicing rule would be even more imperative before trial testimony.

The State may argue that Mr. Park must have known that he had a choice to not testify at trial as trial counsel would surely have discussed that right with him or it would have been otherwise obvious in the context of a trial. However, there is no evidence of this on the record, and it is the State's burden to bear. Moreover, this evidence must support actual knowing, voluntary, intelligent waiver of the right, not simply awareness of it.

C. Lacking Evidence A Defendant's Choice To Testify At Trial Was Voluntary Is Analogous To Lacking Similar Evidence At A CrR 3.5 Suppression Hearing

CrR 3.5 states the required procedure for admission of a criminal defendant's confession at trial. CrR 3.5(b) requires the trial court judge:

[I]nform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does

testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

Requirements (3) and (4) are specific to this type of preliminary hearings and relate to admissibility of statements under ER 104(d).

However, the constitutional principles on which requirements (1) and (2) are based apply equally to testimony at trial. Hence, while not specifically required by rule, constitutional principles require trial courts to provide the information in CrR 3.5(b)(1) and (2) to any criminal defendant testifying at any point in prosecution so as to determine whether a knowing, voluntary, and intelligent waiver has been given.

Even if the Court declines to extend the requirement of an express warning to criminal defendants at trial, the constitution requires some evidence that the defendant was aware of the information contained in CrR 3.5(b)(1) and (2). In the present case, no such information was provided by the trial court to Mr. Park, there is no other evidence that Mr. Park knew that information, and the trial court made no finding that he had made a knowing, voluntary, and intelligent waiver of his right to remain silent.

II. MR. PARK WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Criminal defendants have a right to “effective” assistance by a lawyer who represents him.²⁷ The standard for determining whether a criminal defendant has been denied the effective assistance of counsel is whether “after considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?”²⁸ Therefore, in order to establish a denial of effective assistance of counsel, a defendant has the burden of proving (1) that he or she was denied effective representation, and (2) that he or she was prejudiced thereby.²⁹

A criminal defendant is denied effective assistance of counsel where the attorney commits omissions which no reasonably competent counsel would have committed.³⁰ The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with new counsel.³¹

²⁷ U.S. Const. amend. VI. *Cuyler v. Sullivan*, 446 U.S. 335, 351, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980).

²⁸ *State v. Adams*, 91 Wn.2d 86, 89, 586 P.2d 1168 (1978), citing *State v. Myers* 86 Wn.2d 419, 424, 545 P.2d 538 (1976).

²⁹ *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722 (1986), cert. denied 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986).

³⁰ *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

³¹ *State v. McDonald*, 143 Wn.2d 506, 514, 22 P.3d 791 (2001).

While ineffective assistance is determined based on the entire record, in the present case several errors by trial counsel in and of themselves constitute ineffective assistance sufficient to require remand.

A. Trial Counsel Failed To Object To Inadmissible Other Bad Acts Evidence Which The Jury Could Then Use To Inappropriately Determine Intent and Identity.

1. Trial counsel's failure to object to irrelevant other bad act evidence was ineffective assistance.

“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.”³² In Counts one and two, Mr. Park was accused of violating a no contact order protecting Naree McCormick.³³ Ms. McCormick was the State’s first witness at trial.³⁴ During her testimony Ms. McCormick testified about the circumstances which originally lead to the no contact order including Mr. Park allegedly pushing, slapping, threatening, and stalking her.³⁵ She also testified about the facts of several previous

³² ER 404(b)

³³ CP page 1-3.

³⁴ RP page 76 line 7.

³⁵ RP page 81 line 18--Pushing, slapping, and threatening. RP page 82 line 6—stalking.

convictions to which Mr. Park had previously stipulated.³⁶ and the facts of several other incidents constituting criminal conduct both charged and uncharged.³⁷ Defense counsel failed to object to any of this.

The State may argue that such testimony was necessary to prove prior convictions necessary to the crimes charged. However, all necessary convictions were stipulated to prior to trial.³⁸ Furthermore, that previously stipulation shows that allowing the State to present facts of prior bad acts was not a defense strategy but was simply a grave error.

If objected to, the Court would have excluded this evidence. Other bad acts are admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”³⁹ None of the prior bad acts evidence is relevant to any of these purposes. Moreover, even if the evidence were admissible it would be ineffective assistance to not request a limiting instruction which would limit the evidence’s use to one of the approved purposes.

³⁶ RP page 85 line 10 Ms. McCormick describes the facts of Stalking and Protection Order Violation convictions under cause number 09-1-00077-6 to which the defendant had already stipulated.

³⁷ RP page 82 line 17 describes the facts of an identity theft charge and the financial and emotional effects it had on her life: RP page 84 line 13 and page 86 line 8 allege multiple uncharged Protection Order Violations with factual details and effects such as fear and having to move residences.

³⁸ RP page 17 line 13. CP of stipulation form as above.

³⁹ ER404(b)

Furthermore, allowing the details of the required prior convictions would not be the strategy of any competent lawyer. In *Prince* and *Barragan* the Court of Appeals found failure to request a limiting instruction not ineffective because it was a legitimate trial strategy to not emphasize prior convictions.⁴⁰ Here, trial counsel both stipulated to and allowed the state to present detailed evidence of the requisite prior convictions, giving those prior convictions much greater emphasis than necessary.

Failing to object to evidence of inadmissible prior bad acts, especially where as here many of those acts are similar to those charged, is an omission which no reasonably competent counsel would have made.⁴¹ Admission of such evidence prevented a fair and impartial trial.⁴² Hence, Mr. Park's convictions must be reversed and the case remanded for a new trial.

⁴⁰ *State v. Prince*, 126 Wn. App. 617, 109 P.3d 27, review denied 155 Wn.2d 1018, 124 P.3d 659 (2005). *State v. Barragan*, 102 Wn. App. 754, P.3d 942 (2000).

⁴¹ *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

⁴² *State v. Adams*, 91 Wn.2d 86, 89, 586 P.2d 1168 (1978), citing *State v. Myers* 86 Wn.2d 419, 424, 545 P.2d 538 (1976).

2. Trial counsel's failure to object to other bad act evidence was prejudicial to Mr. Park.

To show prejudice, “the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”⁴³ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁴⁴

Here, the first substantive evidence the jury was presented with was inundated with this inadmissible other bad act evidence.⁴⁵ The State then relied on this evidence to allege a pattern of behavior as evidence Daniel Kim was in fact Mr. Park and that Mr. Park had intent to harass the various women.⁴⁶

The jury very likely used this prior evidence to enter convictions for counts where proof of intent or identity was weak. For example, the jury convicted Mr. Park of count six (cyberstalking Janice Melendres) despite Ms. Melendres' testimony that she continued her relationship with Mr. Park after the alleged threats because “I thought it was just—he was just joking.”⁴⁷

⁴³ *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

⁴⁴ *Id.*

⁴⁵ RP page 81 line 13-page 86 line 3.

⁴⁶ RP page 439 line 17.

⁴⁷ RP page 152 line 9.

Hence, without the inadmissible prior bad acts evidence the jury would likely have found differently on identity and intent elements, especially in the cyberstalking charges.

B. Trial Counsel Failure To Move For Severance Of An Unrelated Charge Was Ineffective Assistance Which Allowed The Jury To Inappropriately Use Evidence Of That Count In Determining The Others.

A case may be remanded for ineffective assistance based on trial counsel's failure to seek severance when the defendant demonstrates that 1) a severance motion should have been granted and 2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.⁴⁸

1. Trial counsel's failure to move for severance of count nine from the remaining counts was ineffective assistance.

While joinder is generally preferred in the name of efficiency, joinder is inherently prejudicial and severance is required when (a) the defendant may become embarrassed or confounded in presenting separate defenses; (b) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his

⁴⁸ *State v. Warren*, 55 Wn. App. 645, 653-54, 779 P.2d 1159, 1164-65 (1989).

guilt of the other crime or crimes charged; (c) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; or (d) when a latent feeling of hostility may be engendered by the charging of several crimes.⁴⁹

In the present case, each of the four grounds for granting a separate trial was present.

a. Mr. Park's defense in the cyberstalking counts was that he did not make those electronic communications—specifically the communications made from internet accounts owned by Daniel Kim and others. His defense in the telephone harassment charge was that the communications were not harassment. Because Mr. Park was made to defend all charges at once, he was left seeming to choose whatever defense was most factually available for each count rather than taking a factually accurate positions. In this way his defense was confounded.

b. In several of the other charges, communications were made from facebook accounts alleged to belong to Mr. Park though not in his name. In those counts, the jury was allowed to infer Mr. Park's identity as the perpetrator by a pattern of similar behaviors. In essence, the jury was

⁴⁹ *State v. York*, 50 Wn App. 446, 450, 749 P.2d 683, 686 (1987).

asked to use evidence from the Telephone Harassment count where identity was not at issue to find that Mr. Park regularly engages in harassing communications and behavior and so was the likely sender of those communications. Therefore, the jury not only could but was asked to use the evidence from the Telephone Harassment charge to determine guilt in the others and vice versa.

c. Similarly, because the jury was asked to find identity or intent on various charges based on a pattern of behavior presented in other charges, it is likely that the jury convicted Mr. Park on at least some charges based on the sheer volume of allegedly harassing communications they were presented with rather than based solely on the evidence presented to support individual counts. The State may argue that this must not have been true as Mr. Park was acquitted on count 10. This same concern is discussed in section B-2 below.

d. A latent hostility was encouraged in the jury by trying all counts together as the State painted Mr. Park as a “terrorist,” as the trial judge put it, who habitually preys on young women and must be stopped rather than

focusing on the individual facts of each count.⁵⁰ This is best demonstrated by the State's presentation of evidence on the count I Violation of a Court Order charge where much detail was given regarding Mr. Parks relationship with both the alleged victim and his uncharged accomplice but relatively little time was spent on relevant details like how close to the house Mr. Park had come.⁵¹

Once prejudice has been established, severance of charges must be granted unless the prejudice is offset. This is decided by considering four additional factors: (e) the strength of the state's evidence on each count, (f) the clarity of defenses to each count, (g) whether the court properly instructed the jury to consider the evidence of each crime, and (h) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged.⁵²

e. The strength of the State's case varied widely between the telephone harassment and the other counts as counts two through eight required broad assumptions to be made based on circumstantial evidence before one could conclude that Mr. Park was at all involved. The

⁵⁰ RP page 522 line 20.

⁵¹ RP page 77 line 13-page 86 line 3 (testimony of alleged victim regarding her past relationship with Mr. Park. RP page 133 line 12-page 137 line 15 (testimony of Janice Melendres regarding her previous relationship with Mr. Park). RP page 139 line 9 through page 142 line 6 (testimony of Janice Malendres regarding the facts of count I).

⁵² *Warren*, 55 Wn. App. at 654-55.

Telephone Harassment charge had direct, documented, recorded communications established by multiple first hand witnesses from which the jury could make its factual determinations.

f. As discussed above, the defense on the telephone harassment charge was no intent to harass while the defense on the cyberstalking charges and count two Protection Order Violation was identity. These defenses are clear taken separately but cause confusion when presented together as they leave the defendant seeming to cling to whatever defense is factually available rather than present a true story of the events.

g. The approved instruction was given on this point.⁵³

h. Evidence from counts two through seven where the defendant was alleged to have used the Facebook aliases and make similar statements may have been admissible were those counts separated from each other as evidence of a common scheme or plan. However, neither those aliases nor those alleged pseudonyms were involved in the telephone harassment count. Hence, this factor weighs in favor of severing the Telephone Harassment count from the others.

⁵³ CP page 139 (Instruction 5).

One final factor a court may consider in whether charges should have been severed is the efficiency of trying counts together.⁵⁴ Clearly it was efficient to present evidence that Mr. Park uses Facebook aliases like Daniel Kim only once.⁵⁵ However, as pointed out above, this evidence was not relevant to the Telephone Harassment charge. Virtually no piece of evidence would have to be presented twice if the Telephone Harassment charge had been severed. Hence, one primary purpose of liberal joinder, efficiency, was not served by trying Count IX with the remaining counts. The prejudice to Mr. Park, then, stands unjustified.

2. Not severing count nine caused prejudice to Mr. Park.⁵⁶

It is likely that the jury would have decided differently if the charges were severed. As argued above, the jury likely found on the identity and intent elements in several counts based on pattern of behavior evidence

⁵⁴ *State v. Gataliski*, 40 Wn. App. 601, 610, 699 P.2d 804, 809 (1985), as modified on reconsideration (July 26, 1985).

⁵⁵ Similarly, it was likely more efficient to have Ms. McCormick only testify once rather than sever the two Protection Order Violation Charges despite only one allegedly using the facebook pseudonyms. It was also similarly efficient to have Ms. Torricellas testify as to counts three and eight in one trial though only three uses facebook pseudonyms. No such efficiency is served by not severing the Telephone Harassment count.

⁵⁶ Similar arguments to those in the above section would show ineffective assistance for not moving to sever count ten, Cyberstalking, but as the jury acquitted Mr. Park on that charge there is no prejudice.

rather than evidence specific to that count.⁵⁷ Without this evidence, the jury may have decided differently on those identity and intent elements, especially in the cyberstalking counts.

In *York*, the Court found lack of prejudice in part because the jury only found the defendant guilty on one count, guilty of a lesser included offense on a second, and not guilty on a third, showing that the jury had considered each of the counts separately.⁵⁸

Here, unlike *York*, acquittal on count ten was likely based on insufficiency of the accusation, not disbelief of the accusation or credibility judgments. While we can only speculate on the jury's reasoning, the evidence regarding county ten was essentially that Mr. Park sent a woman flowers and asked if she would like to go on a date with some persistence. The victim testified she was in fear, but fear under these circumstances is not a reasonable response. The State's attorney admits during closing "I can't sit here and say that this crime against Ashley Rinehart is particularly egregious or particularly bad."⁵⁹ The trial judge agreed at sentencing that the evidence presented did not support that

⁵⁷ See for example, RP page 439 line 17 (identity elements) and RP page 152 line 9 (intent elements).

⁵⁸ 50 Wn. App. at 452.

⁵⁹ RP page 453 line 21.

charge.⁶⁰ Hence, it is likely that the jury believed that accusations but simply, and correctly, decided it was insufficient for a charge of cyberstalking.⁶¹

This is further evidenced by the conviction on Count 6 despite the alleged victim's testimony referenced above that she did not take the threats seriously.⁶²

C. Trial Counsel Was Ineffective In Failing To Object To Entry Of Exhibit 33 On Redirect When Beyond The Scope Of Cross-Examination, And No Other Evidence Identified The Protected Party's Residence.

Redirect examination is ordinarily permitted to further discuss testimony within the scope of cross-examination.⁶³

1. It was ineffective assistance to fail to object to questions beyond the scope of cross-examination.

In the present case, the entire cross-examination of Narree McCormick was regarding the facts alleged in count two.⁶⁴ During

⁶⁰ RP page 522 line 25-page 523 line 4.

⁶¹ It was ineffective assistance of counsel to not move for dismissal of this charge after the State's case in chief; however, this oversight was not prejudicial as the defendant was ultimately acquitted.

⁶² RP page 152 line 9

⁶³ ER 611. *State v. Mak*, 105 Wn.2d 692, 711, 718 P.2d 07 (1986) (rejected on other grounds by, *State v. Hill*, 123 Wn.2d 61, 870 P.2d 313 (1994), citing *State v. Gefeller*, 76 Wn.2d 449, 451, 458 P.2d 17, 18 (1969).

⁶⁴ RP page 99 line 16-page 10 line 20.

redirect all but one question on redirect was aimed at identifying Ms. McCormick's house in Exhibit 33—an identification which was only relevant to count one.⁶⁵ The two counts relate to very different incidents on separate days. While a trial court has discretion to allow testimony on redirect which was omitted by oversight, the Court never affirmatively made this decision.⁶⁶ No competent lawyer would fail to object to questions so far beyond the scope of cross-examination. And, there is no possible defense strategy which could be served by failing to object.

2. Failure to object prejudiced Mr. Park as no other evidence showed this to be Ms. McCormick's residence.

But for trial counsel's failure on this point, the State would not have produced sufficient evidence that the home was Ms. McCormick's residence. While Janice Melendres testified that Mr. Park told her it was his ex-girlfriend's residence, she does not identify that ex-girlfriend as Ms. McCormick.⁶⁷ Hence, without the testimony on redirect Mr. Park could not have been convicted on count one.

⁶⁵ RP page 105 line 3-page 106 line 10.

⁶⁶ *State v. Conklin*, 37 Wash. 2d 389, 223 P.2d 1065 (1950).

⁶⁷ RP page 140 line 9.

D. Trial Counsel Was Ineffective At Sentencing..

Effective representation at sentencing is decided using the same standards as effective representation at trial.⁶⁸

1. At sentencing, trial counsel failed to investigate, present mitigating evidence, or rebut the State's arguments.

The State submitted a 5 page Memorandum of Authorities Re: Sentencing in which it argued for a top of the range sentence on all counts with four of the counts to be run consecutive to the others and to each other.⁶⁹ Defense counsel submitted no reply brief, and, at sentencing conceded that counts should be run consecutive.⁷⁰ No pre-sentencing report or treatment evaluation of any kind was submitted.

In *Wiggins v. Smith* the U.S. Supreme Court found trial counsel's performance at sentencing in a capital punishment case deficient where counsel failed to perform an investigation into mitigating factors which met professional norms in the relevant jurisdiction.⁷¹ In that case, trial counsel limited his investigation to a pre-sentencing investigation report despite availability of funding for a forensic social worker to perform a

⁶⁸ *State v. Goldberg*, 123 Wn. App. 848, 851, 99 P.3d 924, 926 (2004).

⁶⁹ CP page 287-292.

⁷⁰ RP page 511 line 17.

⁷¹ *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003).

more thorough investigation.⁷² The Court found that a decision to not argue mitigating information could not have been an informed tactical decision where counsel failed to do an adequate investigation on which to base such a decision.⁷³

Similarly here, trial counsel failed to investigate and present mitigating information at sentencing which was up to professional norms. While this was not a capital case, trial counsel here failed to investigate even to the point that the *Wiggins* court found inadequate. Trial counsel did argue for a shorter sentence on available counts to allow jurisdiction for community custody so as to force the defendant to undergo treatment which may aid him in his maintaining law abiding behavior. However, trial counsel failed to request a pre-sentencing investigation or psychological evaluation which would have supported her claim that Mr. Park was amendable to such treatment. While pre-sentencing investigations or relevant evaluations are not performed in every felony sentencing, it is standard professional practice to request such evaluations when a defendant is facing a lengthy sentence or when a counsel intends to argue amenability to treatment as a mitigating factor.

⁷² *Id.*

⁷³ *Id. at 528.*

In *Goldberg*, Division 3 of the Court of Appeals declined to find ineffective assistance at sentencing because trial counsel attempted to rebut all of the State's aggravating arguments, made a plea for mercy based on the defendant's age and circumstances, and argued for a sentence at the low end of the standard range.⁷⁴

Here, trial counsel either conceded or made no effort to rebut any point made by the state, including the State's clearly unconstitutional argument that Mr. Park's failure to "accept responsibility" and accept the State's plea offer should result in greater punishment.⁷⁵ Furthermore, while trial counsel made some request for sentences at the low range, she simply conceded the State's request several counts must be run consecutive in an exception to standard sentencing.⁷⁶ Such a sentence was not inevitable as trial counsel stated.⁷⁷

There was no possible strategic advantage to arguing only for reduction on certain counts to require treatment but not provide the court with any evaluation or report regarding the defendant's need for or amenability to treatment. It seems clear from the record that rather than

⁷⁴ *Goldberg*, 123 Wn. App. at 852-53.

⁷⁵ RP page 511 line 16. CP 290 lines 16-19.

⁷⁶ RP page 511 line 17.

⁷⁷ *Id.*

use some strategy to secure a lesser sentence, trial counsel simply gave up on Mr. Park. Hence, her performance was clearly deficient.

2. Trial counsel's deficient performance at sentencing was prejudicial.

Trial counsel's failure to investigate, prepare for, or argue at sentencing prejudiced Mr. Park in that such actions would likely have persuaded the trial judge to take a more rehabilitative approach. This rehabilitative approach would have necessarily resulted in a shorter sentence for Mr. Park.

In *Crawford*, the Washington Supreme Court reversed the Court of Appeals' finding that trial counsel's inadequate performance had prejudiced his client when he failed to investigate out-of-state convictions. The Court reaffirmed the rule that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and "a reasonable probability is a probability sufficient to undermine confidence in the outcome."⁷⁸

⁷⁸ *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288, 1295-96 (2006) citing, *Strickland v. Washington*, 466 U.S. at 694.

The present case is different from *Crawford* in that *Crawford* dealt with a decision to go to trial or accept a plea deal, not investigation after trial for a sentencing hearing. Furthermore, in *Crawford*, the out-of-state convictions were demonstrable with or without a defense investigation, so a life sentence was the only likely post-conviction outcome. Here, rather than being presented with an inevitable sentence, the trial judge was asked to impose an exceptional sentence based on the free crimes principle which left her with considerable latitude to sentence the defendant anywhere from 60 to 540 months (the maximum term of all counts consecutive). Hence, a different outcome was much more probable in the present case.

While the application is different, the rule *Crawford* cites from *Strickland* governs whether there was prejudice to Mr. Park due to his attorney's inadequate performance at sentencing. There is a reasonable probability that were the trial judge presented with evaluations and facts to support Mr. Park's amenability to treatment she would have ordered a sentence which allowed community custody.⁷⁹ There is also a reasonable

⁷⁹ RP page 521 line 23. Trial judge states, "Nevertheless, there really isn't any good options to the court in terms of treatment. ...any treatment opportunities presented to the court for the limited time that he would be on community custody would probably hardly make a dent in the overall need." A psychological assessment may have returned a contrary assessment of Mr. Park's needs and amenability making this conjecture unnecessary.

probability that were the trial judge presented with evidence of Mr. Park's need for treatment, his lack of prior treatment, his diagnosed conditions, and the link between those conditions and the alleged criminal behavior, she would not have simply followed the State's sentencing recommendation.

In fact it is reasonable likely that were trial counsel to have made the most basic argument against the number of charges which the State asserted should have sentences run consecutively, the trial judge would have done something other than simply follow the State's recommendations. Hence, trial counsel's ineffective assistance at sentencing prejudiced Mr. Park.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO FIVE TIMES THE STANDARD RANGE BASED ON IMPROPER FACTORS.

Even where an appellate court determines that the reasons for an exceptional sentence are proper, the sentence may be overturned if it is clearly excessive.⁸⁰ Overturning a sentence on this ground requires a finding of abuse of discretion. A trial court abuses its discretion when that discretion is exercised on untenable grounds, for untenable reasons, or

⁸⁰ RCW 9.94A.585(4)(b).

when the trial court takes an action which no reasonable person would have taken.⁸¹

Here, one reason for the exceptional sentence was the free crimes principle.⁸² We concede that principle does apply in this case.

However, a trial court abuses its discretion when the exceptional sentence entered is a significant deviation from the standard sentence and an improper factor is considered in the length of sentence.⁸³ Future dangerousness is an improper basis for an exceptional sentence in a non-sexual offense case.⁸⁴ When entering the 300 month sentence, the trial judge made it clear that she was basing the total length of the sentence in large part on “repeat victimization,” the nature of the threats, and other facts which tended to show future dangerousness.⁸⁵

The trial court abused its discretion in sentencing Mr. Park to five times the standard range sentence. Therefore, if the case is not reversed or remanded for a new trial it should be remanded for re-sentencing.

⁸¹ *State v. Ritchie*, 126 Wn.2d 388, 392–93, 894 P.2d 1308, 1312 (1995).

⁸² CP 294. RCW 9.9A.535(2)(c).

⁸³ *State v. Post*, 118 Wn.2d 596, 616, 826 P.2d 172, 183 (1992).

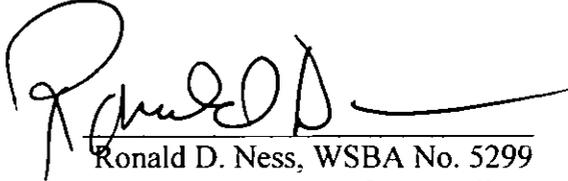
⁸⁴ *State v. Hillman*, 66 Wn. App. 770, 778, 832 P.2d 1369 (1992) (reversing a sentence because future dangerousness was the principle factor considered in ordering an exceptional sentence).

⁸⁵ RP page 517 line 23 (repeat victimization). RP page 497 line 17-page 498 line 2 (nature of threats).

D. Conclusion

Accordingly, this Court should reverse the convictions or in the alternative reverse the judgment and sentence and remand for further proceedings consistent with the Court's ruling.

RESPECTUFLY SUBMITTED this 6th Day of October, 2014,


Ronald D. Ness, WSBA No. 5299
Attorney for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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 Plaintiff/Respondent,)
)
 vs.)
)
 NICK IN YOUNG PARK,)
)
 Defendant/Appellant.)
 _____)

Case No.: 13-1-00564-4
Court of Appeals No.: 45962-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
 :
 COUNTY OF KITSAP)

The undersigned, being first duly sworn on oath, deposes and states:

That on the 6th day of October, 2014, affiant deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402--4454

containing the Appellant's Brief and a copy to the following:

Chad Enright
Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366

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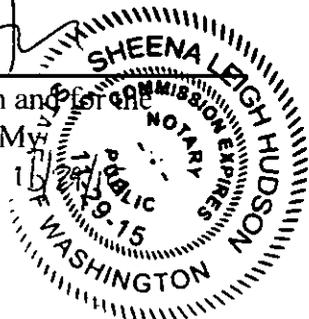
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Tricia Boyes
TRICIA BOYES

SUBSCRIBED AND SWORN to before me this 6th day of October, 2014.

Sheena Leigh Hudson
NOTARY PUBLIC in and for the
State of Washington; My
Commission Expires: 10/29/15



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