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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

IVAN LEE AQUIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello
No. 17-1-00193-9

Brief of Respondent

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

1. Whether the trial court properly exercised its discretion in admitting evidence of defendant's prior acts of domestic violence under ER 404(b) to rebut a claim of consensual sex, defendant's state of mind, his motive, his intent and the res gestae of the charged offenses?
2. Did the trial court abuse its discretion in its same criminal conduct ruling where there was ample support for its finding that the strangulation assault and rapes were separate and distinct acts?
3. Should this court remand for the criminal filing fee and the interest accrual provision to be stricken?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On January 17, 2017, Ivan Lee Ahquin, hereinafter "defendant" was charged and arraigned in Pierce County Superior Court with rape in the first degree, assault in the second degree, burglary in the first degree, unlawful imprisonment, domestic violence court order violation, felony harassment, and unlawful possession of a controlled substance – methamphetamine. CP 3 - 6. Counts I through V included a domestic violence enhancement and Counts II and III included a sexual motivation enhancement. CP 3 – 6. All charges were alleged to have been committed against J.G.-E with the exception of count VI. CP 3 - 6.

Trial commenced before the Honorable Jerry Costello on January 25, 2018. RP 4. A CrR 3.5 hearing was held and the court found the defendant's statements made during an interview with law enforcement were admissible. RP 88 – 108. The court entered findings of fact and conclusions of law regarding admissibility of the statements. RP 108 – 111. CP 255 -257.

On January 29, 2018, the court heard arguments on motions in limine including the admissibility of ER 404(b) evidence. RP 118 – 142. CP 47 – 60, 61 62. The State was seeking to admit any prior acts of violence or domestic violence committed by the defendant against victim J.G.-E. After conducting a balance test under ER 403 and ER 404(b), the court found the probative value of the evidence to outweigh the possible undue prejudice to defendant. RP 156 - 174.

The case proceeded to trial before the Honorable Jerry Costello. The jury found the defendant guilty of the lesser included charge of rape in the second degree, assault in the second degree with sexual motivation, the lesser included crime of criminal trespass in the first degree, unlawful imprisonment with sexual motivation, domestic violence court order violation and unlawful possession of a controlled substance. The court sentenced the defendant to an indeterminate sentence of 280 months to life on count I in addition to two sentencing enhancements on counts II and IV

totaling another 36 months with all counts to run concurrent to each other but consecutive to the enhancements. CP 227 – 244. The defendant timely appeals. CP 254.

2. FACTS

Officer Joseph Arbiol is employed as a patrol officer for 2 years for the Lakewood Police Department. RP 1164. Officer Arbiol responded to an incident at 8956 Gravelly Lake Drive in Lakewood on December 30th, 2016 at about 10:07 p.m. RP 1165. Officer Arbiol contacted J.G.-E. at apartment 208. RP 1165. J.G.-E. reported a court order violation that happened through text messages. RP 1166. Officer Arbiol observed the text messages and took pictures of them. RP 1166.

Officer Dennis Harvey has been employed with the Lakewood Police Department since January 2014 and served as a corrections deputy in King County since 2008 prior to that. RP 991. On January 13, 2017, Officer Harvey responded to an apartment complex in Lakewood at approximately 7:26 p.m. in regard to a suicidal male identified as the defendant. RP 993 - 994. Officer Harvey received information that there was a no contact order listing J.G.-E. as the protected party and the defendant as the restrained party. RP 994. Officer Harvey confirmed that the order was valid and identified exhibit 147 as the no contact order

number 16L1448. The order was served on December 23, 2016. RP 994 – 995.

Officer Harvey contacted Ethel Cantrell and J.G.-E. in apartment 202. RP 993. Officer Harvey observed that J.G.-E. seemed high or intoxicated but did not smell any alcohol. J.G.-E. began sobbing when Officer Harvey asked her questions and was very emotional and slurred her words. RP 996, 999. Officer Harvey and his team went to apartment 208 and tried to open the door but there were tables blocking it. RP 997. The officers had to push the door forcefully to enter. RP 997. Once inside, Officer Harvey observed more than one table blocking the door and did not find the defendant inside. Officer Harvey observed a window towards the back of the living room was open. RP 998. Officer Harvey and other units attempted to locate the defendant that night but were unsuccessful. RP 998 – 999.

Officer Kenneth Henson has been employed as a police officer with the Lakewood Police Department for 14 years. RP 592 – 593. Prior to that he spent 6 years as a police officer in Kent, a year as a corrections deputy in Thurston County and seven years as a military police officer while in the U.S. Army. RP 593. He is currently serving as a neighborhood patrol officer. RP 594. In January of 2017, Officer Henson

was assigned to patrol The Center District on the day shift in Lakewood, Washington. RP 595 - 596.

At 9:35 in the morning on January 14, 2017, Officer Henson responded to a court order violation call at 8956 Gravelly Lake Drive Southwest apartment 208. RP 598. Officer Henson had been informed that other Lakewood Police officers had responded to the same location about 6 hours earlier for a similar complaint with the same suspect. RP 599, 613. Other units also responded to set up a perimeter around the apartment complex in case the suspect jumped out of the window. RP 599 - 600.

Officer Henson contacted the door along with Officers Bell and Russell. RP 600, 642. Ethel Cantrell let the officers inside the secured building and directed them to apartment 208, where the victim J.G.-E. lived. RP 600, 643 - 645. Officer Henson could hear voices inside the apartment and Officer Russell knocked on the door. RP 600 - 601, 642 - 643. A female voice asked, "Who is it?" and Officer Russell said, "It's management." Other officers had positioned outside of the building. RP 601, 643 - 645. Officer Russell observed that J.G.-E.'s demeanor appeared to be "guarded" and "scared." RP 645. J.G.-E. said, "He's in the bedroom." RP 645. Officer Henson left to go outside before the door was

opened. RP 601. When he returned he observed Officer Bell ushering a petite female out of the residence. RP 601.

Officer Henson entered the apartment and heard one of the other officers say “You in the bedroom, come out” or words to the that effect. RP 602 – 603. Officer Russell had entered the apartment and called out for the person in the bedroom to come out. RP 646. The person in the bedroom came out and identified as the defendant. RP 603, 647. Officer Henson placed the defendant in handcuffs and noted that he was wearing only blue jeans. RP 603, 647, 667. Officer Henson conducted a frisk and recovered a folding knife, some change, a bandana and a necklace in the defendant’s pockets. RP 603 – 604.

Officer Henson took the defendant to his patrol car and informed him that he was under arrest for violation of a no-contact order. RP 605 – 606, 649. A search incident to arrest revealed a baggie containing a crystal like substance that Officer Henson suspected was methamphetamine on the defendant’s person. RP 606. Officer Henson identified his signature and seal on a manila envelope marked as exhibit 22 that he opened in court. Officer Henson removed a baggie with a white substance and showed it to the jury. RP 608 – 610. The exhibit was admitted without objection. RP 610. The defendant was cooperative with the officers. RP 615, 667.

Officer Russell took photographs of the outside of the apartment building including the back of the building with the power boxes and air conditioner. The photographs were admitted without objection as exhibits 35 – 41. RP 651 – 652. CP 70 – 79. Officer Russell observed that the air conditioning unit, the power boxes and second story overhang formed a series of steps. RP 652. Officer Russell observed footprints and testified that it appeared as if someone had worked their way up to the apartment window. RP 652. The window was missing the screen. RP 652 -653, CP 70-79. The screen was located on the ground outside the building. RP 663 -664.

J.G.-E. was sitting on the stairway with her head in her hands and was sobbing. RP 655. J.G.-E. said “Thank you for arresting him” to Officer Russell. RP 655. J.G.-E. reported that she had been sexually assaulted by her boyfriend. RP 656. Her voice was hoarse and scratchy. RP 656. Officer Russell observed scratches along her jawline and a red finger-like abrasion on her neck. RP 657. J.G.-E. completed a handwritten statement. RP 660 – 661. Officer Russell has been a police officer for 17 years and has responded to more domestic violence calls that he can count. RP 640, 657. Officer Russell noted that J.G.-E. did not appear to be under the influence and was afraid, upset, fearful and crying. RP 662.

Detective Les Bunton has been employed by the Lakewood Police Department for 14 years and worked for the Pierce County Sheriff's Department for 5 and a half years before that. He has been a detective in the homicide unit for 12 years. RP 871. He was assigned to do the investigation in this sexual assault case and responded to the scene at approximately 11:10 a.m. RP 872 - 873. Detective Bunton contacted J.G.-E. and observed that she was upset, crying and physically shaking. RP 875. He spoke with J.G.-E. for about one hour. RP 875. Detective Bunton took pictures of the apartment and collected items of evidence. RP 876. The photographs and items of evidence were admitted without objection. RP 877 – 934, CP 70 – 79.

Detective Bunton was called as a witness by the defense in its case in chief. RP 1160. Detective Bunton testified that he interviewed the defendant on January 14, 2017 at the Lakewood Police Department. RP 1160. The defendant was read his rights and the interview was recorded. RP 1160 -1161. The defendant answered questions and was generally cooperative during the interview. RP 1162.

Officer Darrell Moore has been employed with the Lakewood Police Department for 5 years and previously served in the Bellevue Police Department for 2 years and with the Poulsbo Police Department for 6 years. RP 634 – 635. Officer Moore's involvement in this case was to

pick up a rape kit from St. Clare Hospital on January 14, 2017 at approximately 7:30 p.m. RP 636 - 637. Officer Moore identified exhibit 34 as the kit he retrieved and booked into an evidence locker at the Lakewood Police Department. RP 637 – 638.

Detective Bryan Johnson is the forensic services manager for Lakewood Police Department as well as being a commissioned detective. RP 1083 – 1084. Detective Johnson submitted items collected in a sexual assault kit in this case for DNA testing at the Washington State Patrol Crime Lab. RP 1085 -1086. He also submitted a curling iron and a blanket. RP 1086. Detective Johnson examined an HTC myTouch cell phone that was seized in this case. RP 1087. The was PIN locked. RP 1088. If a phone is PIN locked, it either greatly reduces or eliminates completely the possibility of anything being extracted from the phone. RP 1087 – 1088.

Detective Austin Lee is a police officer with the Lakewood Police Department. RP 1091. He has been employed with them for 13 years and currently is assigned to the special assault unit as a domestic violence investigator. RP 1091. Officer Lee collected a folding knife and a cut power cord for a curling iron at J.G.-E.'s apartment. RP 1094.

During the course of the investigation in this case, Officer Lee was made aware that there was a potential recording. RP 1100. He was

provided with some possible PIN numbers for the defendant's cell phone. Officer Lee tried to access the phone with the provided numbers but was unsuccessful. RP 1102. Officer Lee also collected the buccal swabs from the defendant for testing. RP 1102 -1103. J.G.-E. told Officer Lee that she believed the defendant had urinated in her mouth and that he had put his fingers in her vagina and anus as well as many more sexual acts. RP 1105 - 1106.

J.G.-E. testified that she lived at the Gravelly Lake Drive address in apartment 208 for 2 years. RP 707. It is a secured building and her apartment is upstairs. RP 708. There are about 10 units upstairs in her apartment building and about 5 units downstairs. RP 816. J.G.-E.'s is near the stairs and had neighbors on each side of her but not next to her bedroom. RP 816, 864. She became close friends with Ethel Cantrell who was "like a mother" and "looked out for her." RP 708 - 709. J.G.-E. was friendly with most of her neighbors. RP 817.

J.G.-E. has known the defendant since she was a teenager. RP 713. His family lived next door to her stepsister. The two knew each other but weren't close. RP 714 – 715. J.G.-E. ran into the defendant in 2016 at a store next to the casino in Fife. RP 716. The two kept in touch via social media and then started to see each other near the end of July. RP

719. The relationship became intimate at the end of August 2016. RP 720.

J.G.-E. and the defendant did not live together but spent the night together a lot. RP 720 – 721. The two visited friends, went to the casino, cooked, talked, and drove around. RP 721. The two spent time at the defendant's trailer on his mother's property but most of the time was spent at J.G.-E.'s apartment. RP 722 – 723. J.G.-E. described their sexual relationship as "basic" and that they did not engage in the use of "toys." RP 723 – 724. At first, the relationship was "good" but became violent. RP 724 – 725.

The first instance of physical abuse happened on September 11, 2016. RP 724. Everything just snapped on that day and it got violent all of a sudden. RP 725. J.G.-E did not leave because the defendant apologized so she decided to give him another chance. RP 725. The violence did not stop, and J.G.-E. tried to leave the defendant after the third or fourth time. RP 725. She went back to the relationship because she loved him and did not want to be alone. RP 725 – 726.

J.G.-E. recalled that on October 14, 2016 she was pretty badly abused by the defendant. RP 727. J.G.-E. remembered that the defendant strangled her and bounced her head by shaking her neck. RP 729. Her head got caught in-between the footboard and the mattress and she got a

black eye. RP 729. The police were called, and J.G.-E. completed a handwritten statement about what happened. RP 727 - 729. When J.G.-E.'s voice escalated, the defendant grabbed her neck and would squeeze while telling her to "shut up." RP 730. The defendant did not punch her but would strangle her, force intimacy and would hold her down causing bruises. RP 730 – 731. The defendant would tell her he was "doing this because I love you." RP 731. The defendant had left but J.G.-E. could not recall how. RP 737.

J.G.-E. remembered that she came into her apartment on December 30, 2016 to find the defendant inside. He immediately started in on her physically by pushing her into a chair and grabbing her neck. RP 738. The defendant held her in the chair while strangling her and yelling at her. RP 740. When the defendant went into the kitchen, J.G.-E. ran out of her apartment and down to her neighbor's house. RP 738. J.G.-E. did not know how the defendant was able to enter her apartment. RP 738 – 739. The defendant did not have a key but had taken her keys before. RP 739. J.G.-E. may have left her door unlocked. RP 739. J.G.-E. spoke to the Police that day and completed a handwritten statement. RP 740.

There was a no-contact order in place at that time, but J.G.-E. was not sure when it had been issued. RP 741. J.G.-E. continued to have voluntary contact with the defendant through phone calls, text messaging,

and social media but could not say why. RP 741 - 744. J.G.-E. had a friend, Bill Payne, who stayed at her apartment with her for a couple of weeks because of his health. RP 751, 834. Bill left in the morning, perhaps a day or two before the assault happened, but J.G.-E. couldn't be sure of the specific day. RP 751, 799 – 800, 820.

On January 13, 2017, the defendant was at J.G.-E.'s apartment and he was scaring her by talking "suicidal." RP 746 – 747. J.G.-E. could not remember how the defendant came to be there but knew he was there "for awhile" before she got away and went to her neighbor's apartment to call for help. RP 747. The police arrived quickly, and J.G.-E. gave the officers her key so they could enter the apartment. RP 749. J.G.-E. was in the hallway and observed the officers have to push on the door to open it. RP 749. The defendant was not in the apartment and had never accessed the apartment by any other means than the door prior to that day. RP 749.

J.G.-E. went to bed before midnight and awoke to her dog barking at about 2:00 a.m. RP 752. When J.G.-E. went into the living room, she saw the defendant climbing through the window. RP 753. The defendant was wearing dark clothes and had a bag with him. RP 760. J.G.-E. went back into her bedroom and laid down on the bed. RP 754. The defendant followed her to the bedroom and the two started to argue. RP 755.

The defendant accused J.G.-E. of cheating and called her “a slut” and “a ho.” RP 755. J.G.-E. raised her voice and the defendant grabbed her throat and pinned her down. RP 755 – 756. J.G.-E. was in the back corner by the window when the defendant grabbed her throat. RP 756. The defendant was squeezing her throat hard enough to restrict her breathing and so she couldn’t make a sound. RP 756. J.G.-E. could not recall if the defendant used one hand or two at that time because there were multiple incidents that night. RP 756. The defendant had his hands on her throat for a few seconds. RP 756. The defendant threw J.G.-E. onto the bed and forced her clothes off. RP 761 – 762. The defendant did not take his clothes off right away. RP 762.

J.G.-E. was fighting for her safety and trying to get the pain and throat grabbing to stop. RP 764. The defendant would put her down on the bed and sit on top of her while holding her arms. RP 764. The two continued to argue and at one point, J.G.-E. needed to use the restroom. RP 756. The defendant “walked” her to the bathroom and then stayed between J.G.-E. and the door. RP 756. Their arms were interlinked while walking to the bathroom. RP 756. J.G.-E. sat on the toilet and the defendant grabbed her throat and was squeezing it again. RP 757. J.G.-E. was able to urinate, but the defendant had one hand around her neck and would not let her wipe herself. RP 757 – 759. The defendant wiped J.G.-

E. and then walked her back to the bedroom. RP 759. J.G.-E. was scared and tired of “going through it.” RP 759 -760.

A glass had fallen from the bedpost and there was broken glass on the floor. RP 760 – 761, 765. The defendant forced J.G.-E. to clean up the broken glass. RP 765. While she was cleaning up, the defendant was pacing and looking out of the window. RP 766. The defendant was paranoid that people were listening to him and talking about him. RP 766, 773. The defendant was talking in terms of somebody else having control of him and calling that person “Ivan.” RP 773 – 774. The defendant “tacked up” curtains on the bedroom window that night by putting blankets over the window. RP 768, 773 836. J.G.-E. identified exhibit 44 and fairly and accurately showing how her bedroom looked on the night of January 14, 2017. RP 767 - 768, CP 79 -79.

At some point, the defendant tried to access J.G.-E.’s cell phone. RP 766. The cell phone fell to the floor and broke into pieces. RP 766. The battery went sliding somewhere and the defendant wanted J.G.-E. to find it. RP 766, 774. J.G.-E. was naked and down on the floor and was still being grabbed, tossed on the bed, or with the defendant’s hands on her neck. RP 774. J.G. -E. was not able to find the battery. RP 775. While looking for the battery, J.G.-E. saw pepper spray under her bed. RP 840. She considered using it against the defendant but worried it would not

affect him and she would get hurt more. RP 840 – 841, 861 - 862. At this point, J.G.-E. was standing next to the bed and the defendant had his hands around her throat. RP 775. J.G.-E's legs started to get weak from being strangled and losing her strength from fighting and trying to get the defendant off her. RP 775.

J.G.-E. slid down the bed to the floor and the defendant pulled his penis out and put it in her mouth. RP 777. J.G.-E. was crying and begging him not to do it and asked him why he was doing this to her. RP 777. J.G.-E. tried pulling her head back when the defendant first put his penis in her mouth. RP 778. Strangulation had not been related to anything sexual between them until that time. RP 777. The defendant was telling J.G.-E. that she was a baby because she was crying. RP 777. The defendant was videotaping with his phone. RP 777, 838. The defendant then picked up J.G.-E. and threw her on the bed and told her to stay there. RP 777 - 778. The defendant left the room. RP 778.

J.G.-E. could hear the water on in the bathroom and heard the defendant "messaging" with something. RP 778 - 779. The defendant returned to the bedroom and came back with J.G.-E.'s daughter's curling iron. RP 779. J.G.-E. had never seen the defendant with the curling iron before. RP 780. The defendant towards J.G.-E. and lifted her legs up while she begged him not to use it. RP 780. The defendant was still

videotaping and telling her she was disgusting for crying. RP 780. The defendant put the curling iron into J.G.-E.'s vagina while she was on her back. RP 780. J.G.-E. identified the curling iron, marked as exhibit 43, as the one that the defendant used. RP 781, CP 70 – 79. Exhibit 43 was admitted without objection. RP 781. The use of sex toys was not utilized in J.G.-E.'s relationship with the defendant. RP 799.

The defendant penetrated J.G.-E. with the curling iron for a couple of minutes and inserted it as far as the vagina went. RP 782. J.G.-E. felt pain and described as “too big” for her. RP 782 – 783. After penetrating her vagina with the curling iron, the defendant then used it to penetrate J.G.-E.'s “backside” or her “anal.” RP 783. J.G.-E. was on the bed, on her back and the defendant was holding her legs up. RP 783. J.G.-E. was unable to resist when the defendant was penetrating her anally because it “hurt too much. RP 784. The defendant continued to strangle J.G.-E. “off and on” during the penetration so that she would shut up. RP 784. The anal penetration lasted “a couple of minutes.” RP 784 – 785. The defendant continued to tell her she was “being a baby” and to “be a woman.” RP 785. The defendant told her that she was disgusting for crying and asked her “you think that turns me on?” RP 785. After the defendant removed the curling iron, he put it on the dresser. RP 785. CP 70 – 79 exhibit 73.

When the defendant was done penetrating J.G.-E. with the curling iron, he then penetrated her vagina with his penis. RP 784, 787 - 788. When the defendant was ready to ejaculate, he pulled his penis out of J.G.-E. and put it in her mouth. RP 784, 787 - 788. The defendant ejaculated in J.G.-E.'s mouth and she gagged and spit. RP 790. Once the defendant ejaculated, his mood changed to "happy go lucky." RP 790. The defendant got up and took some of their clothing, like their undergarments, and hand washed them. RP 791. J.G.-E. asked to take her dog outside and the defendant told her to "go ahead" but that she had better come back. RP 791. J.G.-E. had tried to leave the apartment before the incident happened, but the defendant would not let her. RP 806.

J.G.-E. took her dog and a phone and went out of the front of the building. RP 791. She was able to alert her neighbor, Ethel Cantrell, that the defendant was back at her house. RP 791. J.G.-E. did not run away because she didn't want the defendant to run away from the cops again. RP 792. J.G.-E. went back to her apartment and went into the bathroom. RP 792. About five minutes later there was a knock at the door. RP 792 - 793. J.G.-E. came out of the bathroom and the defendant asked, "who is it?" RP 794. J.G.-E. asked who was there and the person said "management." RP 794. The defendant told her to open the door. J.G.-E. opened the door and saw the police there. She was removed from the

apartment. RP 794. The defendant was in J.G.-E.'s apartment for hours and the majority of time was in nonsexual in nature. RP 802. The sexual portion was about 15 to 20 minutes and was "pretty brief." RP 802.

J.G.-E. spoke to the police that day about the incident. RP 795. She remembered talking with multiple officers but could not remember their names. RP 796 - 797. J.G.-E. remembered telling the police about a "warm gush" and thought it was from the defendant ejaculating. RP 794. J.G.-E. wasn't sure if she had said it was from urine at the time or not. RP 795, 842. J.G.-E. reported that she spit the ejaculate on the comforter on her bed. RP 795. The comforter had been taken off the bed and put in the closet by the defendant. RP 795. After forensics left the apartment, J.G.-E. was taken to the hospital for a rape kit. RP 796.

On cross examination, J.G.-E. testified that she knew many of the defendant's family members and some lived at his mother's house. RP 811. J.G.-E. knew where some members lived and how to get ahold of them. RP 812. J.G.-E. admitted that she had contacted the defendant by text, social media, and in person despite the no-contact order. RP 831 - 814. J.G.-E. contacted the defendant for help in fixing her car after the issuance of the order. RP 814 - 815. J.G.-E. admitted that it was possible that she consumed marijuana, methamphetamine or alcohol the day before Bill had left but was not high or intoxicated when speaking with the

police. RP 821 – 822. J.G.-E. may have texted the defendant that she was suicidal before he was arrested. RP 822 – 824. J.G.-E. loved the defendant but would go back and forth on whether to reunite with her husband or not. RP 827, 833 – 834, 862.

J.G.-E. testified that she did not remember telling Detective Lee that the defendant put his fingers in her vagina and in her anus. RP 842. J.G.-E. could not remember some of the details but could have said that. RP 842. It was also possible that she told the detective that the defendant penetrated her anally with his penis but she did not remember it. RP 843. The defendant strangled J.G.-E. quite a bit during this event and had his hands around her neck multiple times throughout those hours to the point where she could not breathe. RP 845. The defendant was in her apartment around 2 or 3 a.m. and the police arrived at 9:00 a.m. RP 845 – 846. J.G.-E. was jealous of the defendant seeing other women and he was jealous regarding her. RP 847.

Kathleen Lewis is employed as a registered emergency room nurse and also as a SANE nurse in the Tacoma – South King County area. RP 947. SANE stands for “sexual assault nurse examiner” who perform medical forensic evaluations on patients who report a sexual assault. RP 948. One has to be a registered nurse for 2 years and then has to complete a 40 hour didactic course with testing to become a SANE nurse. RP 949.

Since October of 2014, Ms. Lewis has conducted over 90 SANE examinations. RP 952. Ms. Lewis reviewed her charts in preparation for testifying about the examination she performed on J.G.-E. RP 953 - 955.

Ms. Lewis noted injuries to J.G.-E. and took photographs. RP 968 – 976. Ms. Lewis noted bruising to J.G.-E.'s left upper arm, her left forearm, her right upper arm, her right forearm and scratches to her right hand and her right thigh. RP 969 - 970. Ms. Lewis documented that J.G.-E. had tenderness on both sides of her neck, her head and the upper part of her back. RP 971. There was a two-centimeter scratch to J.G.-E.'s left jaw line. RP 971. The photographs were admitted without objection. RP 972, CP 70 – 79. J.G.-E. told Ms. Lewis that her legs had been held down, that she was scratched, and that she had been injured when she was choked. RP 967 – 968.

Ms. Lewis documented a half centimeter laceration and an abrasion on J.G.-E.'s vagina, three small lacerations on her rectum, and a small one centimeter tear on her cervix with some slight bleeding in that area. RP 973 – 975. The cervical area was reddened, and it is uncommon to see lacerations on the cervix. RP 975. To cause a tear to the cervix, there would have to have been something with an edge and a deep enough penetration for that to occur. RP 975. The injuries to the outside of the vagina can be caused by pressure or stretching. RP 976.

J.G.-E. used the terms choked or choking and forced multiple times during the exam and reported that she felt weak but did not lose consciousness. RP 977, 985, 987. J.G.-E. reported that she had a sore throat and a headache. RP 979. Ms. Lewis documented that there was no swelling or redness in her throat or neck area and J.G.-E. swallowed without difficulty. RP 986 - 987. J.G.-E. reported that the defendant put his fingers in her vagina and her butt. RP 984. J.G.-E. reported that she had "smoked some weed a couple of days ago. RP 985. J.G.-E. was alert and cooperative but tearful during the examination. RP 979. The examination began at 2:00 p.m. and ended when Ms. Lewis locked the kit up at 6:00 p.m. RP 979 – 980.

Jennifer Hayden is employed by the Washington State Patrol as a forensic scientist. RP 1018. Ms. Hayden has worked in the DNA section for four and a half years. RP 1018. Ms. Hayden holds a Bachelor's Degree in Science and a Master's of Science Degree and completed extensive training including competency testing before she was signed off to do case work. RP 1018 – 1019. Ms. Hayden has testified ten times before this. RP 1019. Ms. Hayden explained the process of collecting samples and testing for DNA for the jury. RP 1020 – 1025.

Ms. Hayden tested the swabs from the sexual assault kit and found the presence of semen on the perineal, vulvar, anal, and oral swabs in

addition to J.G.-E.'s DNA. RP 1028 – 1030, 1032. Ms. Hayden deduced a male profile from the sperm fraction that matched the reference profile of the defendant in the sexual assault kit samples. RP 1031. The statistical probability of this profile being linked to the defendant in one in 16 decillion. RP 1032. Ms. Hayden swabbed the handle of the curling iron and found DNA consistent with the profiles of the defendant and J.G.-E. RP 1035. Ms. Hayden tested one area, identified for her by a sticker, on the blanket and did not find any indication of semen. RP 1036, 1038 - 1039. Ms. Hayden did not test for the presence of saliva. RP 1039.

Ethel Cantrell testified that she lived in the apartment building on Gravelly Lake Drive for about three years in apartment number 202. RP 1066. J.G.-E. was her neighbor and they became close, considering each other as best friends. RP 1066. Ms. Cantrell knew J.G.-E. was in a relationship with the defendant. RP 1067. Ms. Cantrell had pleasant and unpleasant contact with the defendant. RP 1074. J.G.-E. did not always complain when the defendant was at her apartment. RP 1075.

On December 30, 2016, Ms. Cantrell was in her apartment with her daughter Amanda. RP 1068. J.G.-E. came running into her apartment and was frantic, upset, scared and crying. RP 1069. J.G.-E. told her that the defendant was in her apartment and would not leave. RP 1070. Ms. Cantrell and her daughter went to J.G.-E.'s apartment and told the

defendant to leave. RP 1070. Ms. Cantrell told the defendant he was not allowed on the property and was aware that there was a no-contact order between the defendant and J.G.-E. RP 1070. Ms. Cantrell called 911. RP 1068.

On the morning of January 14, 2016, Ms. Cantrell called 911 again. RP 1070. J.G.-E. called her and told her that the defendant was back at her house. RP 1071. J.G.-E. was upset and hiding in the bathroom to call her. RP 1071. J.G.-E. was crying and asked Ms. Cantrell to call 911. RP 1071. Ms. Cantrell called 911 and observed the police remove him from J.G.-E.'s apartment. RP 1072. Ms. Cantrell held J.G.-E. who was crying and upset. RP 1073. J.G.-E. told her that the defendant had raped her with a curling iron. RP 1073.

Amanda Stone testified that she knows J.G.-E. and the defendant. RP 1060. J.G.-E. is Ms. Stone's mother's neighbor. RP 1061. On December 30, 2016, Ms. Stone was at her mother's apartment when J.G.-E. running into the apartment saying, "he's in my apartment; he's in my apartment." J.G.-E. was very emotional, crying and distraught. RP 1062. Ms. Stone had seen J.G.-E. earlier that day when they were smoking. RP 1062.

Ms. Stone was aware of the no-contact order between J.G.-E. and the defendant and knew there had been altercations before. RP 1062. Ms.

Stone and her mother went to J.G.-E.'s apartment and "beat" on the door. RP 1062. The defendant answered and she told him to get out. RP 1062. The defendant's eyes were "huge", and he was sweaty. RP 1063. He appeared under the influence. RP 1063. Ms. Stone watched the defendant walk down the stairs and out of the door. RP 1063.

The defense called Ruby Sandvigen, Joleen Ahquin, Irene Aho, and Glen Condon who were all family members of the defendant. Each testified that the couple argued, that J.G.-E. would come over to the defendant's residence after the no-contact order was issued. RP 1119 – 1138, 1225 – 1240. Ms. Aho and J.G.-E. argued when J.G.-E. was told to leave the property. RP 1236 – 1240. The defense also called Robert Kramer, the defendant's friend, who testified consistently with the family members about the couple's relationship and also that he had given the defendant a ride to the area near J.G.-E. apartment on the night of the incident. RP 1141 – 1151.

The defendant testified on his own behalf. RP 1167. The defendant testified that he worked in construction and in plumbing. RP 1168. The defendant has four children and was living on his mother's property in a trailer during July of 2016. RP 1169. The defendant first met J.G.-E. over 30 years ago when they lived next door to each other. RP 1170. The defendant would see J.G.-E. periodically over the years. The

defendant and J.G.-E. started dating in August of 2016. RP 1171. The two ran into each other at a store near the casino in Fife. RP 1171. The two became intimate about 2 weeks later. RP 1171.

The defendant testified that they had sex frequently and would get together about five or six days a week typically at J.G.'E.'s apartment. RP 1172. The defendant testified that they used sexual toys, like vibrators or dildos, throughout their relationship and had anal sex "off and on." RP 1172. J.G.-E. willingly consented to the use of the toys that would go inside her vagina. RP 1173. They also engaged in light bondage. RP 1173. The defendant testified that they used handcuffs that belonged to J.G.-E. RP 1173 – 1174. They used handcuffs a few times and it was J.G.-E.'s idea. RP 1174.

The defendant testified that J.G.-E. initiated him using his hands on her throat during sex. RP 1174. The defendant testified that it "turned her on" and he would use only one hand. RP 1174. J.G.-E. never indicated that she could not breathe or lost consciousness. RP 1175. The couple did not have a safe word and the defendant usually stopped beforehand. RP 1175. The defendant testified that J.G.-E. liked to have her hair pulled and to be spanked. RP 1175.

J.G.-E. would be jealous on multiple occasions during their relationship. RP 1175. J.G.-E. was jealous of other females and would go

through the defendant's phone and look at his text messages. RP 1175. In mid-October, J.G.-E. started to get "really, really" jealous. RP 1176. J.G.-E. would get in a "big uproar" and start screaming and accusing him of cheating. RP 1176. The defendant admitted to having an argument with J.G.-E. on October 14th and spent the night with her. RP 1176. J.G.-E. walked out of the apartment, came back in and stated "It's too late, Ivan." RP 1177.

On December 30th, 2016, the defendant was at J.G.-E.'s apartment and they were going to "hang out," "have a few drinks" and smoke some weed that the defendant had. RP 1178. J.G.-E. started smoking pills and then they got into an argument about him being with other females. RP 1179. J.G.-E. left the apartment and Ethel Cantrell came to the door and told him to leave. RP 1182. The defendant left and moved some furniture in front of the door. RP 1183. The defendant moved the furniture to give himself time to get away because he knew "they" would call the cops. RP 1183. The defendant climbed out of the back window. RP 1183. The defendant denied assaulting, pushing, shoving, or choking J.G.-E. RP 1183.

The defendant was served with a no contact order by a judge about two weeks before December 30, 2016. The defendant signed the order. RP 1183 - 1184. The defendant testified that he and J.G.-E. ignored the

order. RP 1184. They both initiated contact with calls and texts. RP 1184 – 1185. The defendant testified that he was letting her know that he wanted to see her. RP 1185. They both wanted the relationship to continue. RP 1185 – 1186. The two were intimate with the same frequency as before the order was issued. RP 1186. J.G.-E. came to the defendant's trailer "dozens" of times after the order was issued. RP 1186. Sometimes the defendant would act like he wasn't home and other times he would tell J.G.-E. to leave. RP 1187. The defendant knew that J.G.-E. was married but she did not tell him that she wanted to get back together with her husband. RP 1193.

J.G.-E. picked the defendant up on January 12, 2017 and they spent the night together. RP 1194. The next day they had breakfast and then got into another argument. RP 1194. The defendant then testified that J.G.-E. picked him up on the 13th in the evening with her friend Bill. Back at the apartment, they had something to eat and then went into the bedroom and had sex. RP 1195 - 1196. The defendant testified that he had oral, vaginal, and anal sex with J.G.-E. RP 1200. The two of them were videotaping on their phones of each other giving oral. RP 1201. The two came out of the bedroom and got into another argument. RP 1198. J.G.-E. was yelling and screaming in front of Bill, so Bill left. RP 1199.

Before the defendant left, J.G.-E. expressed suicidal thoughts by writing a goodbye letter to her daughter and threatening to take a bunch of pills. RP 1201-1202. J.G.-E. eventually calmed down and the defendant left. RP 1199. He walked to a friend's house a few miles away. RP 1200. The defendant arrived at his friend Charlie's house around 10:00 p.m. RP 1203. After 45 minutes or so he called Bob to come pick him up. RP 1204. The defendant stayed at Bob's house and then to Bob's friend's house to fix a plumbing problem. RP 1205. J.G.-E. sent a text between mid-night and 1:00 a.m. saying she was going to overdose. RP 1205.

The defendant had Bob drop him off near J.G.-E, apartment. RP 1205. The defendant tried to call and text J.G.-E. but there was no response. RP 1206. He was concerned that J.G.-E. had gone through with her threats, so the defendant decided to climb up the back of J.G.-E.'s apartment building. RP 1206. The defendant knocked on J.G.-E.'s window and the dog started barking. RP 1207. J.G.-E. came out of the bedroom and let him in. RP 1207.

The defendant testified that J.G.-E. was "groggy" and said she had taken some pills. RP 1207. The two laid on the bed cuddling and talking. RP 1207 -1208. They eventually became intimate and had oral sex and sex with what looked like a "toy" that was on the nightstand. RP 1208. The defendant testified that it was the same curling iron that had been

entered into evidence at trial. RP 1208. The defendant did not engage in anal sex with J.G.-E. or ejaculate at this time. RP 1208 – 1209.

The defendant denied ejaculating in J.G.-E.'s mouth and that she spat onto the bed. RP 1209. The defendant testified that it was his idea to use the curling iron vaginally on J.G.-E. but denied using it on her anally. RP 1209. J.G.-E. did not express any resistance or objection to it being used. RP 1209 – 1210. The defendant did not use lubrication. RP 1210. The defendant testified that he asked to use the curling iron on J.G.-E. anally and she said “no”, so he stopped. RP 1210. The defendant testified that he did put four of his fingers inside J.G.-E.'s vagina and anus and that she did not voice any objection. RP 1211.

The defendant testified that the black bag containing the flashlight and screwdriver was his but that it had been at the apartment for a couple of days. RP 1211. The blue bag belonged to J.G.-E. RP 1211 – 1212. The defendant denied that the folding knife belonged to him and denied cutting the cord off the curling iron. RP 1212. The defendant washed his underwear and socks because he didn't have any clean ones and showered. RP 1213. The defendant admitted that the methamphetamine in his pocket belonged to him and that he had used some in the morning around 8:00 a.m. and that J.G.-E. used some with him. RP 1214.

J.G.-E. left the apartment with her dog and then came back and left with a box of garbage. RP 1215. J.G.-E. came back and went into the bathroom. RP 1216 – 1217. There was a knock at the door and J.G.-E. answered it. RP 1217. It was the police and the defendant came out of the bedroom and was handcuffed. RP 1217. The defendant denied being suicidal. RP 1218. The defendant denied grabbing J.G.-E.’s neck on January 13th or 14th that would prevent her from breathing. RP 1218. The defendant did grab J.G.-E.’s neck with one hand during sex with her consent. RP 1218. The defendant denied threatening to kill J.G.-E., her family and other people in the apartment. RP 1219. The defendant denied preventing J.G.-E. from leaving the apartment and to restraining her in the bathroom. RP 1219. The defendant denied injuring J.G.-E. on October 14, 2016 and was not angry that J.G.-E. had called the police multiple times on him. RP 1246 – 1250.

C. ARGUMENT.

1. THE TRIAL COURT’S RULING ADMITTING PRIOR DOMESTIC VIOLENCE INCIDENTS EVIDENCE WAS NOT MANIFESTLY UNREASONABLE NOR BASED ON UNTENABLE GROUNDS NOR MADE FOR UNTENABLE REASONS AND WAS THEREFORE CORRECT.

ER 404(b) generally prohibits admitting evidence of “other crimes, wrongs, or acts” to “prove the character of a person in order to show

action in conformity therewith.” Evidence of prior misconduct is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). However, the rule does allow admission of such evidence for other purposes, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). “This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Before the trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The third and fourth elements of this rule ensure that admission of the evidence does not violate ER 403.¹ *Gresham*, 173 Wn.2d at 421. The proponent of the evidence has the

¹ ER 403 provides that relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.”

burden demonstrating that the evidence has a proper purpose. *Gresham*, 173 Wn.2d at 420. If the trial court admits the evidence, it must give upon request an appropriate limiting instruction to the jury. *Id.* at 420.

The trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, then the appellate court reviews the ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* "A trial court abuses its discretion where it fails to abide by the rule's requirements." *Id.*

Here, the State moved to admit evidence of the defendant's prior physical abuse of J.G.-E. for the purpose of showing the victim's reasonable fear, *res gestae*, intent, and opportunity. The defendant opposed the admission of the ER 404(b) evidence. After hearing the offered evidence outside of the presence of the jury, the trial court granted the State's motion in part. RP 156 -174. The court did not find that the State's proffered evidence of reasonable fear was persuasive. RP 158. The court did not allow specific evidence from the September 11, 2016, the October 21, 2016, or the January 10, 2017 incidents to be presented. RP 160. It found that the potential for confusion on the part of the jury and prejudicial potential outweighed the probative value. RP 160.

In contrast, the court found the evidence from the October 14, 2016 incident to be highly probative of the defendant's intent and motive to unlawfully imprison the victim and for forcible compulsion. RP 164. The court ruled that evidence from the December 21, 2016 incident would be probative in rebuttal of consent if it was raised by the defendant. RP 167. The court found that the probative value of the December 30, 2016 incident outweighed any prejudice in proving the burglary in the first degree and was relevant to the defendant's intent to violate the no-contact order. RP 168. The evidence of the January 13, 2017 incident occurred hours before the charged incident and would be probative of the res gestae of the crimes committed on January 14, 2017 except for the possession of a controlled substance. RP 172.

Further, the trial court limited the State's use of this evidence and gave the jurors the following limiting instruction:

Certain evidence has been admitted or is going to be admitted here in this case for only a limited purpose. This evidence consists of the October 14, 2016 alleged incident. This evidence may be considered by you only to the extent that you find relevant to the following issues: Number 1, the defendant's motive or intent as to the charge of unlawful imprisonment; No. 2, the defendant's state of mind or motive as to the charge of rape, and 3, the alleged victim's state of mind as to the charge of harassment.

You may not consider the evidence for any other purpose. The evidence about the defendant's alleged actions on October 14, 2016, has not been admitted and cannot be

considered to prove the character of the defendant in order to show that he acted in conformity therewith. The evidence cannot be considered by you to prove propensity, proclivity, predisposition, or inclination to commit rape of assault or unlawful imprisonment or harassment or violation of a no-contact order. Any discussion of the evidence during your deliberations must be consistent with the limitation.

RP 726 – 727.

A similar limiting instruction was read before any evidence was presented regarding the other previous incidents. RP 737 – 738, 745 – 746, 772. Juries are presumed to follow the court’s instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Thus, the trial court did not abuse its discretion when it admitted evidence of defendant’s prior acts of domestic violence.

- b. Any cognizable error was harmless given the substantial evidence of defendant's guilt.

However, even if the trial court improperly admitted the prior misconduct evidence, any error was harmless. The admission of evidence that does not implicate a constitutional right is not error of a constitutional magnitude. *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002); *State v. Cole*, 54 Wn. App. 93 97, 772 P.2d 531 (1989). Such evidentiary error is only a ground for reversal if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted). An error is

prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.* Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. *Id.*; *see also State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980).

J.G.-E testified that the defendant strangled her, raped her orally, vaginally, and anally. RP 755 – 784. The SANE nurse noted injuries consistent with the victim’s reported version of the events and the defendant’s DNA was found on the victim’s body and on the handle of the curling iron. RP 948 – 988, 1019 – 1040. There is no reasonable probability that the outcome of the trial would have been different had the trial court not admitted this evidence. Accordingly, any error was harmless, and defendant’s convictions should be affirmed.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS SAME CRIMINAL CONDUCT RULING AS THERE WAS AMPLE SUPPORT FOR ITS FINDING THAT THE ASSAULT AND RAPE WERE SEPARATE AND DISTINCT ACTS.

In Washington, with a few exceptions, felony sentencing depends on a defendant's offender score and the resulting standard sentencing range. RCW 9.94A.510, .525 and RCW 9.94A.530(1). The State has the

burden of proving the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500(1). *State v. Hunley*, 175 Wn.2d 901, 909–10, 287 P.3d 584 (2012), citing *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999). The standard of review for a sentencing court's calculation of an offender score is *de novo*. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007), citing *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). However, its “determination of whether crimes constitute the same criminal conduct is reviewed for abuse of discretion.” *State v. Israel*, 113 Wn. App. 243, 294, 54 P.3d 1218 (2002), citing *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

A defendant's criminal history together with other current offenses comprises the bulk of the defendant's offender score. RCW 9.94A.589(1)(a). “[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score” *Id.* Other current offenses are not inevitably counted as criminal history but instead when “the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” *Id.*

Under RCW 9.94A.589(1)(a), two crimes shall be considered the “same criminal conduct” only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court’s decision on whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. *See Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant’s subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. “In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively

viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215. The Supreme Court of Washington has held that objective intent is “measured by determining whether one crime furthered another.” *Lessley*, 118 Wn.2d at 778. Defendant argues that the assault in the second degree with sexual motivation in the instant case was incidental to the rape in the second degree charge. However, the evidence does not support this conclusion.

Defendant’s actions in this case constitute separate and distinct criminal conduct. In *State v. Grantham*, 84 Wn. App. 854, 932 P.3d 657 (1997). Grantham was convicted of two counts of second degree rape. After Grantham and his victim attended a party together, he took her to an apartment and tried to kiss her, but she resisted and asked to go home. *Id.* at 856. Grantham slapped his victim, called her names, forcibly removed her clothes, and repeatedly slammed her head into the wall. *Id.* He then forced his victim to her knees facing into the corner of the room and anally raped her. *Id.*

After Grantham withdrew his penis from his victim’s anus, she remained crouched in the corner. *Id.* Grantham began kicking her and telling her to get up and turn around. *Id.* When she still did not comply, Grantham forced her to turn around by grabbing her face and chin. *Id.* He demanded his victim perform oral sex on him and when she kept her

mouth closed, he slammed her head against the wall and forced her to comply. *Id.*

The trial court found Grantham's two convictions were separate and distinct criminal conduct. *Id.* at 857. In addressing the issue of whether the two counts were same criminal conduct, the reviewing court noted that while the crime occurred at the same place and against the same victim, the two crimes were committed "not simultaneously, although relatively close in time." *Id.* at 858. The court framed the critical issues as:

the question is whether the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes, is sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape.

Id. The court also mentioned that it was important to consider the impact of repeated sexual penetrations on the victim: Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, -- an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Id. at 861 (quoting *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979)). A period of time between assaults, therefore, not only defeats the

“same time” prong of the same criminal conduct test, it also defeats the “same objective intent” prong, because:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting the risk whether he in fact knew of it or not.

Grantham, 84 Wn. App. at 861 (again quoting *Harrell*, 88 Wis.2d at 466).

The court noted *Grantham* finished one act of rape before committing the other, that he had the presence of mind between rapes to threaten his victim not to tell, and that he used new physical force to gain the victim’s compliance a second time. *Grantham*, 84 Wn. App. at 859. That evidence was sufficient to establish that *Grantham* “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.* *Grantham* “chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous.” *Id.* Thus, the trial court properly concluded the crimes were not same criminal conduct because they did not occur at the same time and did not involve the same objective intent. *Id.*, at 661.

In this case, it should be noted that the strangulation took place before the rape. The events took place over the course of 4 or more hours.

J.G.-E. testified that the sexual part of the encounter was “pretty brief” and lasted about 15 to 20 minutes. RP 802. The defendant entered the apartment at approximately 2:00 a.m. and almost immediately began to argue with the victim calling her names. RP 755. The defendant choked the victim multiple times over the course of the night with the intent to “shut her up.” RP 756. The choking has not been related to their sexual relationship, and the defendant usually employed the tactic to keep the victim quiet when they argued. RP 802.

Even after being thrown on the bed and with her clothing removed, the rape did not start until after the defendant and victim returned from the bathroom. RP 778 – 780. The defendant then forced his penis into J.G.-E.’s mouth. RP 777. Another break in time occurred when the defendant left the room to get the curling iron. RP 778-779. The force used to accomplish the rape using the curling iron was that the victim’s legs were held in the air. RP 783. When the defendant completed assaulting the victim and left the bedroom twice, he had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. The defendant’s actions parallel the actions in the *Gratham* case.

Here the trial court correctly determined that the defendant’s intent in strangling the victim and/or assaulting her during the commission of a

felony was different from his intent in committing sexual intercourse by forcible compulsion. The assault did not further the rape and *vice versa*. They were two different and sequential types of infliction of pain to two different parts of the victim's body. The trial court found there were many different forms of force used in this case. Its judgment that there were different intents as well as different elements is supported by both the law and the facts. This court should not hold that the trial court abused its discretion under these circumstances.

3. THIS COURT SHOULD ORDER THAT THE IMPOSITION OF THE CRIMINAL FILING FEE AND THE INTEREST ACCRUAL PROVISION BE STRIKEN.

In this case, the trial court found the defendant to be indigent. CP 223 - 224. The defendant's direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on nonrestitution legal financial obligations.

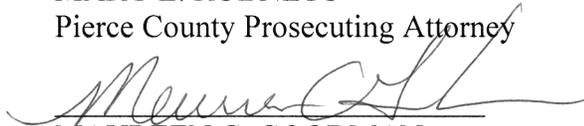
The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the \$200.00 criminal filing fee and the interest accrual provision should be stricken.

D. CONCLUSION.

The State respectfully requests this court affirm the defendant's convictions and sentence and remand for the trial court to strike the imposition of the \$200.00 filing fee and the interest accrual provision.

DATED: March 1, 2019

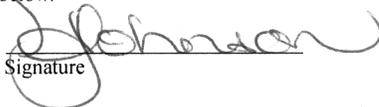
MARY E. ROBNETT
Pierce County Prosecuting Attorney



MAUREEN C. GOODMAN
Deputy Prosecuting Attorney
WSB # 34012

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} 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.

3/1/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 01, 2019 - 11:17 AM

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