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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID RAMOS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Has the defendant rebutted the presumption that his lawyer's decision was tactical, after discussing the issue with the defendant, not to object to the defendant's prior acts of domestic violence against the victim, if the prior acts were used with the objective to undermine the victim's credibility?

2. Has the defendant met his burden to establish that an objection would have been sustained to the introduction of his prior acts of domestic violence against the victim if the acts were probative to explain the victim's delay in reporting the current abuse to law enforcement, to rebut a claim of consent regarding the rapes, and were probative of the victim's credibility?

3. Was the defense attorney's decision tactical not to object to introduction of text messages and phone call history contained on the victim's cell phone after the incident where the defendant's text message, left on the victim's cell phone after the incident, was potentially probative of a caring individual who would not commit the abuse against the victim?

4. Should the case be remanded to strike the domestic violence designation in the judgment and sentence if there is nothing contained in the record from the lawyers or the judge discussing the domestic violence designation and if the designation was not proved at trial?

5. Is the proper remedy to order the trial court to strike the domestic violence designation, rather than order a new sentencing, if the designation was not relied on by the court to increase the defendant's punishment?

II. STATEMENT OF THE CASE

The defendant was charged in the Spokane County Superior Court with first degree robbery, first degree kidnapping, first-degree rape, second degree rape, second degree assault, and violation of a no-contact order. CP 56-57. All counts involved the same victim, E.M.[1] CP 56-57. A jury convicted the defendant as charged and this appeal timely followed. CP 165-68, 170.

On December 7, 2015, Debra Piper and her husband, Stephen Piper, were at their home located at 108 East Garland in Spokane. RP 757-58. During the afternoon, the couple was in their living room putting up Christmas decorations. RP 760, 773. Around 4:30 p.m., it was dark outside and Ms. Piper observed an unknown car back into their driveway. RP 760-62, 767. Ms. Piper became concerned as the car remained in the driveway for at least ten minutes. RP 762. She and her husband then heard a loud car door slamming, which caused both to look out the front door. RP 762-64.

[1] Initials are used to protect the victim's identity.

Mr. Piper then saw that the passenger door and the trunk of the vehicle were open.[2] RP 776. Contemporaneously, a thin, lighter-skinned male, with no shirt, attempted to shove a woman into the trunk of the car. RP 776, 786-87. Mr. Piper described the event as follows:

> She's kicking with her legs and flailing with her arms. The male is doing the same thing with his hands, trying to get her in the trunk. Then he tried slamming the trunk on her. That didn't work. Then she said, Help me, help me. More flailing of the arms, more she's kicking. He tried slamming the trunk again, and it wouldn't close, a little bit more. And on the third attempt, the trunk closed.

RP 776.

Mr. Piper yelled to the male that he was calling the police and told Ms. Piper to call 911. RP 762-64, 776. Ms. Piper subsequently stepped outside, walked behind the unknown vehicle, and jotted down the vehicle license plate number. RP 765, 768. The vehicle hurriedly left the area at a high rate of speed.[3] RP 777-78. Officers immediately began to investigate the matter. RP 1083.

Later in the evening, at approximately 7:30 p.m., the victim, E.M., was located by the police and met with Detective Cory Thurman at a Burger

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[2] Mr. Piper believed the make of the vehicle was a Chrysler. RP 783.

[3] The next morning, Mr. Piper found a rubber grommet on his driveway, near the area of where the trunk of the unknown vehicle was parked, and gave it to the police. RP 778-80.

King restaurant.[4] RP 957, 1127-28. E.M. was reluctant to speak with the detective, fearing reprisal from the defendant. RP 957-58. E.M. attempted to mask her obvious injuries with her clothing. RP 958. Notwithstanding, E.M. had an obvious black eye forming on her left eye. RP 1129.

E.M. agreed to go to the police station for a further interview. RP 960, 1129-30. Again, E.M. sat, with no eye contact, and was very quiet and unresponsive to the detective's questions. RP 1132. The detective noticed additional injuries to E.M.'s neck. RP 1132. E.M. would not provide any statement during the interview. RP 1135-37. Later, that same evening and while still at the police station, E.M. began to shake uncontrollably, started crying, and the detective proceeded with the interview of her. RP 1138. Photographs were taken of E.M.'s injuries, which consisted of bite marks, black eyes, bruising on her face and neck, and the bruising on the legs. RP 961-62; Exs. 4-22; RP 799 (injuries), 800 (injuries), 802 (knife, urine stain, injury to ring finger). E.M. then relayed to the detective what occurred during the incident. RP 1140-42.

E.M., worked as a manager for a McDonald's restaurant, and hired the defendant in November of 2014. RP 880. E.M. and the defendant

[4] E.M. drove her car to the Burger King restaurant. RP 1128-30, 1178. The car was registered to E.M. and her husband. RP 1117. The license plate number given to the 911 operator by Ms. Piper was one digit off from the actual license plate number assigned to E.M.'s car. RP 1118-19.

became friends, which evolved into intimacy in 2015, after approximately six months. RP 882, 978. During their relationship, the defendant was unpredictable; in conjunction with hitting and kicking E.M, the defendant made threats to expose their relationship to her family. RP 883-84, 889. The defendant was married to E.M.'s sister, Laura. RP 882-83.

On the day of the incident, around 8:30 a.m., E.M. gave the defendant a ride to his mother's residence in Spokane, and then returned home. RP 888. Subsequently, E.M ran several errands with the defendant in her car, a 2004 Chrysler Sebring. RP 890-92. In the afternoon on that day, E.M. and the defendant were conversing when the defendant became irritated and then mad at E.M. RP 896. In response, E.M. prepared to exit her car and pay a bill; the defendant pushed her out. RP 896-97. After paying her bill inside a Safeway store, E.M. exited the store and noticed the defendant had left the parking lot in her vehicle. RP 897-98. E.M. waited at the store and eventually spoke with the defendant by phone. RP 898-99. The defendant remarked that if E.M. stopped acting the way she did, he would return to the store. RP 899. Belatedly, the defendant returned to the Safeway driving E.M.'s car, directed E.M. to get into the passenger seat and threatened to leave if she did not do so. RP 899-901. E.M. complied, and after leaving the parking lot, the defendant drove carelessly, at a high rate of speed, through several residential streets. RP 900-01. When E.M. tried to

get out of the car, the defendant dragged her back in, striking her head[5] with his hands and elbows, repeatedly calling E.M. "stupid," and then drove off with E.M. in the car. RP 901-03.

The defendant stopped at a park, and after much pleading, the defendant allowed E.M. to call her son's school regarding a parent/teacher conference scheduled at that time.[6] RP 916-17. After the phone call, the defendant told E.M. to say goodbye to her son because she would never see him again, which frightened E.M.[7] RP 917. E.M. implored the defendant to let her out of the car. RP 918. The defendant refused as he did not want anyone to observe E.M.'s injured face. RP 918.

Within this time frame, the defendant gnawed E.M.'s wrist as he forcefully took her wedding ring, from her finger, against her will, causing bruising and soreness that lasted for an extended time. RP 919. The defendant then called his brother, informed him that he had a "hostage,"[8] and he needed alcohol. RP 922-23. The defendant drove to his brother's

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[5] The elbow strikes caused E.M.'s head to hurt and ringing in her ears. RP 903.

[6] This telephone call was confirmed by a detective with phone records. RP 1173.

[7] The defendant told E.M. that "someone" had picked up her son from school, which further scared E.M. RP 921-22.

[8] While on the phone with his brother, the defendant referred to a "plan Z," which is a euphemism meaning to hurt a family member. RP 964-65. E.M. believed the defendant was referring to her sister. RP 965.

house, picked him up, and told E.M. to keep her eyes forward. RP 922-23. The defendant drove to a liquor store and purchased vodka. RP 923-24.

The defendant drove and eventually backed into an unknown driveway. RP 925. The defendant started crying, asserting that he wanted E.M.'s sister to love him in the manner E.M. did. RP 926. As the victim continually asked to be let out of the car, the defendant vacillated from agreeing to denying her requests. RP 926-27. Ultimately, E.M. attempted to open the passenger side door; the defendant responded by slamming the passenger door against E.M., and dragging and punching her head. RP 927-28. As they exited the car, the defendant continued to hit E.M. several more times in the head. RP 929. E.M. fell to the ground, and the defendant continued to strike and kick her. RP 929. The defendant informed E.M. that she "f—ked up," and she was going into the trunk of the car. RP 930. The defendant then lifted E.M., bit her stomach, and slammed the trunk door on E.M. multiple times. RP 932-34. The defendant ultimately closed the trunk lid, confining E.M. to the trunk. RP 930-33. As the defendant drove E.M.'s car from the area, with E.M. stowed in the trunk, she believed she was going to die. RP 932-34.

Eventually, the defendant drove to his mother's address in east Spokane. RP 934, 946. When the defendant and E.M. entered the home, the defendant retrieved a kitchen knife and held it against E.M.'s throat.

RP 935-36. The defendant ordered E.M. to go to his bedroom, where he instructed her to remove her clothing. RP 937-38. The defendant then straddled E.M, placing one hand on E.M.'s mouth and the other clutching her neck, as he continued to squeeze to the point that E.M. could not breath. RP 939-41. E.M. attempted to close her eyes, which caused the defendant to place the knife blade against her eye lids. RP 939-40. The defendant threatened E.M. that if she did not keep her eyes open and look at him, he would cut her. RP 940. E.M. continued to believe she was going to die. RP 940. The defendant then repeatedly stabbed the mattress of the bed, asserting it would not take much pressure to stab a person. RP 942.

E.M. then requested to use the restroom to urinate, which the defendant denied, and told her to urinate on the bedroom floor. RP 943. When E.M. was unable to urinate on the floor, the defendant placed the knife blade between her legs and partially into her vagina. RP 943-44. To avoid being cut, E.M. stood on the tips of her toes. RP 944. Ultimately, E.M. urinated and the defendant simultaneously drank her urine.[9] RP 944.

Within a short time, the defendant was on his bed, and placed the knife between himself and E.M., and told E.M. that "this was [E.M.'s]

[9] A detective confirmed a damp spot on the flooring in the bedroom/bathroom area, in the location described by E.M. RP 1175-76. A detective also found E.M.'s leggings in the location in the bedroom as described by her.

chance," implying she could take the knife. RP 948. E.M. did not grab the knife out of fear. RP 948. E.M. agreed to have sex with the defendant because she did not want to make him angry. RP 948-49. The defendant placed his hands and penis into her vagina and engaged in oral sex with her. RP 950.

E.M. showered and again the defendant remarked, while laughing, that E.M. was not going to see her son. RP 953. After the event, the defendant demanded one-hundred dollars from E.M.,[10] and she complied so that defendant would not get angry. RP 956.

That evening, E.M. went to the emergency department at Sacred Heart Medical Center, and was treated by a registered nurse, Esther Jung Wallace. RP 838-49. E.M. reported that she had been physically and sexually assaulted, and she was seeking treatment for her wounds. RP 842. Specifically, E.M. stated that she had been struck with fists, elbows, kicked, choked, and that she had been sexually assaulted in a variety of different ways, in addition to being shoved into a trunk. RP 842-43, 849, 851. The nurse documented two black eyes and multiple bruising over E.M.'s body.

[10] Upon the defendant's arrest, he had $88.00 dollars (one fifty-dollar bill and other lesser denominations) on his person, less $14.00 paid in cash to a Walgreens store earlier in the evening on December 7, 2015. RP 1147-48. Upon the defendant's demand, E.M. had given the defendant two fifty-dollar bills as described above. RP 956.

RP 854. E.M.'s injuries were consistent with the nature of the attack as reported to the nurse. RP 856. E.M. further indicated that an eight-inch knife had been used. RP 843. Regarding the sexual assault, E.M. said that she had been both penile and digitally penetrated in her vagina and anus. RP 849-50. During the physical examination, the nurse observed bite marks on both of E.M.'s wrists and stomach. RP 853-54; Exs. 9-15. While the nurse did not observe any physical injuries to the vagina, that is not uncommon for this type of examination. RP 874.

E.M. told the nurse that the defendant threatened that she would never see her son again; that every member of her family would be harmed. RP 844, 848-49. E.M. also remarked to the nurse that she thought she was going to die and had started to pray. RP 846. The nurse opined that E.M.'s injuries were consistent with the nature of the attack as reported by E.M. to the nurse. RP 856.

On December 11, 2015, E.M. returned to Sacred Heart Emergency complaining of a persistent headache; her ears were not draining and she only heard muffled sounds (as if she was underwater). RP 1046-48. Nurse Practitioner Charity Elmendorf concluded that E.M.'s left and right ears had minor ruptures, which could have been caused by trauma to the ear. RP 1044-46, 1050-52. Consequently, the ruptured ear drums could have potentially resulted in permanent hearing loss. RP 1053. The nurse

practitioner confirmed E.M.'s statement of what occurred, which was consistent with her injuries. RP 1052. The nurse practitioner further observed E.M. had bruising surrounding her left eye, scattered around her right eye, and bruising on her neck. RP 1053-54. The nurse practitioner recommended a follow-up in six-weeks. RP 1053

After the defendant was located and taken into custody[11] at 12:05 a.m., on December 8, 2015, he was transported to the police station, and a search incident to arrest of the defendant occurred. RP 1068, 1071, 1087-88. A small plastic bag was in the defendant's mouth and, per protocol, he was transported to the hospital. RP 1088-89. At the hospital, the defendant reported to medical staff that he had swallowed a ring. RP 1105. An officer asked a follow up question regarding the defendant swallowing a ring, and the defendant smirked and smiled, but did not respond.[12] RP 1105-06. The ring, as described by E.M., was later recovered after the defendant's bowel movement, pursuant to a search warrant. RP 1153, 1155-58.

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[11] Upon an initial pat down of the defendant, officers located three steak knives. RP 1072, 1150. Officers located a steak knife in the defendant's residence which was consistent with E.M.'s description. RP 1152-53.

[12] Defense counsel and the State stipulated pretrial that a CrR 3.5 hearing was unnecessary regarding the admissibility of the statement as the circumstances did not warrant it. RP 455, 460.

A no-contact order was issued against the defendant by the superior court on December 8, 2015, prohibiting contact with E.M. RP 1184. While incarcerated, the defendant called E.M. in May of 2015, and the defendant wrote E.M. a letter, as he had done in the past, informing her that he loved her, that she was "beautiful," and that he was sorry for hurting her. RP 967, 1187-88. E.M. continued to have contact with the defendant because she still loved him; however, E.M. stopped communicating with the defendant in June of 2016. RP 969-70.

III. ARGUMENT

A. DEFENSE COUNSEL'S DECISION TO FOREGO OBJECTING TO THE DEFENDANT'S PRIOR ACTS OF DOMESTIC VIOLENCE AGAINST E.M. WAS TACTICAL IN THAT THE PRIOR ACTS WERE USED BY THE DEFENSE IN AN EFFORT TO DIMINISH THE VICTIM'S CREDIBILITY. FURTHERMORE, THE DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT AN OBJECTION TO THAT EVIDENCE WOULD HAVE BEEN SUSTAINED BY THE COURT. FINALLY, THE DEFENDANT HAS FAILED TO ESTABLISH HOW HE WAS PREJUDICED AT THE TIME OF TRIAL.

Standard of review.

Ineffective assistance of counsel claims are reviewed de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). To prevail on an ineffective assistance claim, a defendant must show that defense counsel's performance was deficient and this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant must make both showings of deficient performance and prejudice to prevail on an ineffective assistance claim. *Thomas*, 109 Wn.2d at 226. There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Id.* To establish prejudice, the defendant must show that there is a reasonable probability that the trial's outcome would have differed absent counsel's deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To prevail on a claim that defense counsel's failure to object to ER 404(b) testimony constituted ineffective assistance, the defendant must establish that (1) no legitimate strategic or tactical reasons supported the challenged conduct, (2) an objection to that evidence would likely have been sustained, and (3) the outcome would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Prior to trial, the State presented argument as to why the prior instances of domestic violence were relevant and admissible under ER 404(b). RP 305-11. Specifically, the State moved for admission of the defendant's past acts, in part, to establish lack of consent for the rapes and

to demonstrate E.M.'s level of fear during the event. Thereafter, defense counsel remarked:

> Now, I am already agreeing that the victim's comments that he -- my client has been abusive in the past. We're not objecting to that. That's fine. And I'm not making an objection. *We've thought and talked about it.* So, if she wants to testify that he's been abusive with her throughout the course of the relationship, we actually are fine with that coming in.

RP 312 (emphasis added).

The defendant contends his trial counsel was ineffective by stipulating to the State's evidence of his prior acts of domestic violence as claimed by E.M., as such behavior was inadmissible ER 404(b) evidence. This argument is unavailing as the defense attorney's decision to stipulate to the evidence, after consultation with the defendant, was a reasonable, tactical choice. Moreover, he cannot establish an objection would have been sustained, and he fails to establish he was prejudiced as discussed below.

1. Tactical decision.

Matters of trial strategy cannot constitute ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In this context, the decision of when or whether to object is a classic example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989), *review denied*, 113 Wn.2d 1002 (1989). Accordingly, an appellate court presumes that the failure to object was the product of

legitimate trial strategy or tactics, and the burden is on the defendant to rebut this presumption. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Only in egregious circumstances on testimony central to the State's case, will counsel's failure to object constitute incompetence justifying a reversal. *Madison*, 53 Wn. App. at 763. Further, counsel's actions pertaining to the defendant's theory of the case do not constitute ineffective assistance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Here, the record is clear that the defense attorney's decision to stipulate to the prior acts was tactical. Defense counsel's strategy at trial was that E.M. fabricated her statements to the detective, and attempted to buttress those allegations by claiming prior acts of unreported violence by the defendant, all for the true purpose of making it easier to reveal her hidden relationship with the defendant to her family. The defense also intimated that because E.M. did not provide any specifics to the police and jury regarding past acts of violence by the defendant, the jury could infer she was being untruthful about the entire circumstance. To support those theories, defense counsel questioned E.M:

> Q. All right. And you indicated that my client had previously been violent to you, but you never reported it to the police; correct?
>
> A. Yes.

Q. Okay. Never reported it to the police. Why?

A. Hoping that it wouldn't happen again.

RP 980.

Q. I mean, stating this to the police, that all of these horrible things occurred, would you agree it sort of makes it a little easier when you talk to your mom about the mistake you made by having an affair with your sister's husband?

A. Did it make it easier?

Q. Would you agree?

A. No.

Q. I mean, isn't it sort of easier for your family to accept you back if you -- you demonize Mr. Ramos and say all of these things and you were always under his spell and it really wasn't your fault?

A. No.

Q. That you were always a victim of his abuse and you could never get away with it?

A. No.

RP 1004.

During closing argument, defense counsel's remarked:

What occurred before she met the detective [on the day of event]? She didn't contact the police. She testified that my client had been abusive in the past, but she had never called the police. State's theory is because she's always been afraid and that's why she never contacted the police.

She didn't give any specifics about when this [prior] abuse occurred. She didn't give any dates about when this [prior] abuse occurred. She just indicated that it occurred and it

generated fear, which is an explanation for why she didn't want to come in and make statements about my client in the first place.

What happened after this alleged incident and after she had talked to the police? She continued to have contact with my client in violation of the no-contact order, in violation of the protection order. The order was designed to protect her. He was arrested and he was incarcerated. She didn't care. She just hung out at his mother's house to make sure she received his phone calls. She testified, I didn't get retraining orders, because everybody can just walk through them. That's why I didn't get them. When asked, because she described the history of abuse between the two, Why didn't you ever get a restraining order, Well, because they don't matter. People just walk -- she's the one that walked through the restraining order. My client was in jail. He didn't walk through anything. She's the only -- the only proof of anybody walking through a restraining order, at least initially, is her. It was designed to protect her. She didn't care. She didn't want it…

…She hired him. She -- he worked under her. She didn't fire him if he committed this abuse against her. He kept working with her. They spent time together, notwithstanding her statement. You have to, with all due respect, test her statement, test what she said on the stand, test what she said to law enforcement, with other facts to determine if something is true.

Sometimes, in my mind anyway, the truth makes sense, that that's how you tell. But you have to have the right facts and put everything in order, and in the end, if it makes sense, maybe that's the truth. Maybe not. I don't know. But you have to test her particular statement in this particular case. Her statement doesn't fit. It isn't consistent with what you know about their relationship. What she said the relationship was doesn't -- is not consistent with the statement made in the confines of speaking to a law enforcement officer and then speaking to a law enforcement officer a couple of days

> later, who seized your phone, seized your car, and your primary concern is your son.

RP 1327-28.

> Now, prior to this moment in time, [E.M.] never reported to anybody she was a victim of my client. She never fired my client. She -- from McDonald's. She continued to reside with my client. She had him at her home. Her son would be around. Knock on the door, husband walks through the door.

RP 1328-29.

It is obvious from the record that defense counsel stipulated to the defendant's prior acts against E.M. to substantiate his theory of the case that E.M. fabricated the defendant's current crimes, she claimed past acts of domestic violence, which went unreported, to give credibility to her statements to the police. In effect, the defense theory was that E.M.'s allegations to the police were a continuing course of deception (past and present conduct), to make it easier for E.M. to reveal her relationship with defendant to her family. Accordingly, the decision to stipulate to the defendant's conduct was a reasonable trial strategy and tactical in nature, and the defendant did not suffer from ineffective assistance of counsel.

Even if this Court finds defense counsel's stipulation to the prior acts deficient, other than a bare allegation of prejudice, the defendant does not attempt to meet his burden to establish that he was prejudiced by introduction of the evidence, and how it affected the jury's verdict. In that

regard, the several, unspecified prior acts of domestic violence alleged by E.M. played a minor role in the overwhelming evidence presented to the jury. Accordingly, this prong also fails. The defendant fails to meet his burden to establish ineffective assistance of counsel.

2. An objection to the prior acts would not have been sustained.

Furthermore, the defendant cannot establish that an objection to the prior acts of domestic violence would likely have been sustained by the court. Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

ER 404(b)[13] bars the admission of evidence of prior bad acts for proving a person's character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). But the same evidence may be admissible for another

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[13] ER 404 states:

> (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:
>
> …
>
> (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.

purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice. *Id.*

Prior acts of domestic violence under ER 404(b) have been admitted for several purposes. For instance, such evidence has been admitted to assist the jury in assessing the credibility of a victim who recants or makes inconsistent statements or to explain the victim's delay in reporting an offense. *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008); *see also State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014) (prior acts admissible when "the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events"); *State v. Baker*, 162 Wn. App. 468, 474-75, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011) (prior acts of domestic violence between defendant and victim are admissible to assist jury in assessing credibility of victim who delays reporting, changes her story, or minimizes the degree of violence due to fear of the defendant); *State v. Grant*, 83 Wn. App. 98, 105-06, 920 P.2d 609 (1996) (evidence of defendant's prior assaults against victim admissible under ER 404(b) if relevant and necessary to assess victim's credibility as a witness and prove that the charged assault occurred); *State v. Wilson*, 60 Wn. App. 887, 888-90, 808 P.2d 754 (1991) (evidence of prior acts against the victim was

relevant to explain the victim's delay in reporting the abuse and to rebut the implication that the current sexual assault did not occur).

In *Gunderson*, the State brought a domestic violence charge against the defendant. At trial, one of the alleged victims testified that no such incident took place. 181 Wn.2d. at 920. There was no evidence that the victim had any physical injuries and before trial, she was not asked to provide any statement to the police. *Id.* The State sought to introduce evidence of the defendant's prior acts of domestic violence against the victim to impeach the victim's trial testimony. *Id.* at 921. The trial court concluded that the evidence was relevant to the victim's credibility and admitted it. *Id.* The Supreme Court reversed, holding that evidence of prior bad acts is not admissible to impeach a victim's credibility when "there is no evidence of injuries to the alleged victim" and the victim "neither recants nor contradicts prior statements." *Id.* at 925. Nor was the evidence of past domestic violence admissible to explain a conflict between the victim's account and "evidence from a different source." *Id.* at 924.

Here, there was evidence of physical injuries and trauma sustained by the victim after the event. Furthermore, although E.M. was not a recanting witness, she delayed reporting the crimes. The defendant's prior acts of domestic violence against E.M. were relevant to establish E.M.'s recalcitrance and fear to explain what had occurred when initially meeting

with the detective at the Burger King and later at the police station. The prior incidents of domestic violence would also have been admissible to assess E.M.'s credibility with the jury, as it was the defense strategy to attack E.M.'s credibility at trial. *See Baker*, 162 Wn. App. at 474-75; *Grant*, 83 Wn. App. at 105-06. The decision not to object to the testimony was tactical. The defendant cannot establish an objection would have been sustained by the trial court and, in effect, he cannot demonstrate either deficient performance or prejudice. His ineffective assistance of counsel fails.

B. THE DEFENSE ATTORNEY'S DECISION NOT TO OBJECT TO THE TEXTS AND PHONE CALL HISTORY CONTAINED ON THE VICTIM'S PHONE AFTER THE INCIDENT WAS TACTICAL IN THAT A TEXT SENT BY THE DEFENDANT TO E.M. AFTER THE INCIDENT PORTRAYED THE DEFENDANT AS AN INDIVIDUAL WHO WAS IN A NORMAL RELATIONSHIP AND WHO CARED ABOUT THE VICTIM. IN THE ALTERNATIVE, THIS COURT SHOULD DECLINE TO REVIEW THE MERITS OF THE DEFENDANT'S CLAIM AS THE RECORD BELOW WAS NOT DEVELOPED FROM WHICH THE COURT CAN DECIDE THE ISSUE.

The defendant appears to argue his lawyer was ineffective by not objecting to and alleging a right to privacy violation under the Washington State Privacy Act, RCW 9.73.030,[14] when Detective Thurman advised E.M.

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[14] The act states, in pertinent part:

> [I]t shall be unlawful for ... any individual, … the state of Washington, its agencies, and political subdivisions to intercept, or record any:

that she could not leave the police building unless she turned over her cell phone to the detective in an attempt to find her abductor.

At the time of the detective's interview of E.M. at the police station, E.M. remained reserved and unwilling to speak about the incident. RP 1135. To facilitate a conversation, the detective told E.M. that he was going to seize her cell phone to potentially assist in finding her abductor. RP 1135, 1137. E.M. was allowed to use her phone to call her sister and husband. RP 1136. Subsequently, after a give and take between the detective and E.M., E.M. emotionally broke down, and the interview proceeded. RP 1138-39. Although the record has not been developed as to when, the detective had a forensic digital download conducted for the text messages and telephone calls on E.M.'s phone. RP 1171. Likewise, after obtaining a search warrant, the defendant's cell phone was seized and downloaded in the same manner. RP 1171-72.

> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication[.]

RCW 9.73.030(1). Evidence obtained in violation of the act is inadmissible for any purpose at trial. *State v. Roden*, 179 Wn.2d 893, 898-99, 321 P.3d 1183 (2014).

When reviewing text messages and phone calls from E.M.'s phone, the detective attempted to find any corroboration for E.M.'s statement to him, such as "being on the phone with her insurance company for an hour, calling her son, being allowed to call her son at the elementary [school], receiving the text message from her boss, having conversations with [the detective]." RP 1172. In this respect, the detective subsequently found an extended phone call with E.M.'s insurance company, a call to E.M.'s son's school, a text to her work (all of which corroborated her statement to the detective), and a text from the defendant. RP 1173.

With regard to the defendant's passing Fourth Amendment analysis that E.M.'s phone was unlawfully seized, vicarious attempts to assert Fourth Amendment violations of others have been routinely rejected by the United States Supreme Court.[15] *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Brown v. United States*, 411 U.S. 223, 230, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Salvucci*, 448 U.S. 83, 86, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

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[15] Although not present here, a defendant has automatic standing to challenge a search if: (1) possession is an essential element of the offense with which the defendant is charged and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007).

Likewise, the defendant has not provided any authority or argument as to how he has a privacy interest, under the statute, regarding E.M.'s private communications with a third party (here, E.M.'s boss, her son's school, etc.) on her cell phone. To the extent the defendant argues that officers used E.M.'s cell phone to eventually locate him, that assertion is nothing more than conjecture and is not supported by the record.[16]

Furthermore, a lack of an objection by defense counsel is presumed tactical as discussed above. Here, there was no legitimate reason to object to the testimony. Specifically, there was no basis upon which to object to E.M.'s private conversations with third parties as contained on her phone, and the defendant's several texts to E.M., after the incident, were tactically viewed as evidence tending to show the defendant was a considerate individual. As such, defense counsel could have reasonably assumed that the defendant's several text messages to E.M. were not inculpatory of the defendant, but rather potential impeachment of the victim, as the several texts portrayed the type of text messages exchanged in a normal relationship, which could potentially rebut E.M.'s statements to the detective. The defendant fails to rebut the presumption that his lack of

[16] Additionally, the record was not developed as to when the detective took physical possession of E.M.'s cell phone and under what circumstance.

objection was tactical and he further fails to establish the first prong of the *Strickland* test that his lawyer was deficient.

Regarding any prejudice by a lack of objection, the admission of evidence obtained in violation of the Privacy Act is not constitutional error and may be held harmless unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Kipp*, 179 Wn.2d 718, 733, n. 8, 317 P.3d 1029 (2014).

In that context, if the defense attorney was deficient, the defendant's ineffective assistance of counsel claim fails since he cannot establish, as required by *Strickland*, that he was prejudiced by trial counsel's failure to object to the evidence given the overwhelming independent evidence of his guilt, outside the evidence gathered from E.M.'s phone. For example, the victim sustained trauma and physical injuries consistent with her statements to the detective, a wet spot was located in the defendant's bedroom consistent with E.M.'s statement that she was ordered to urinate in that area, two homeowners observed part of the commission of the crimes in the manner described by E.M., the defendant possessed and swallowed the victim's wedding ring after his commission of the crimes, which was also consistent with the victim's statement, all of which independently provide sufficient corroboration of the defendant's commission of the crimes,

outside of what was gathered from E.M.s' phone. The defendant is unable to meet his burden to establish prejudice and fails to demonstrate the second prong of *Strickland*. Accordingly, this claim fails.

In the alternative, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a). However, under RAP 2.5(a)(3), an appellate court will consider an unpreserved claim if the claim involves a manifest error affecting a constitutional right. A claim of error is not manifest if the facts necessary to adjudicate the claim are not in the record. *McFarland*, 127 Wn.2d at 333. Furthermore, as indicated above, a violation of the privacy act is not of constitutional magnitude.

This Court's reasoning in *State v. Torres*, 198 Wn. App. 864, 879-80, 397 P.3d 900, *review denied*, 189 Wn.2d 1022 (2017), is instructive in analyzing the defendant's claim of ineffective assistance of counsel. In that case, Torres alleged that her trial counsel was ineffective for not bringing a suppression motion to challenge a warrantless entry into her home. This Court noted that a claim of ineffective assistance is a two-pronged analysis, with the latter prong requiring the defendant to establish prejudice. *Id*. To establish prejudice, Torres was required to show that the motion to suppress likely would have been granted. *Id*. at 880. This Court reasoned that the defendant's trial counsel's failure to bring a motion to suppress prevented the development of important facts necessary to determine whether the

warrantless entry was constitutionally permissible. *Id*. Because the facts necessary to adjudicate her claim were not in the record, this Court concluded that the claim of error was not manifest and the court refused to consider it.

Where, as here, there was no objection, the facts necessary to address the underlying unmade objection are not sufficiently in the record on appeal and prevents the defendant from establishing prejudice – the necessary second prong of an ineffective assistance of counsel argument. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest); *Torres*, 198 Wn. App. at 875 (defendant forfeited appellate review of claim raised for first time on appeal that she was seized in violation of Fourth Amendment because the facts necessary to adjudicate the claimed error were not in the record on appeal).

Had the defendant objected to introduction of the evidence, the State would have supplied facts in response to the objection. Because the record was not developed below, it is unclear as to when the detective took possession of E.M.'s cell phone and under what circumstance, whether consent was obtained or a warrant was later authorized, and which specific text exchanges and telephone calls were reviewed by the detectives. This

Court should refuse to consider the issue. If necessary, the defendant's remedy is to raise this claim in a personal restraint petition. *McFarland*, 127 Wn.2d at 339.

C. THE DOMESTIC VIOLENCE DESIGNATION IN THE JUDGMENT AND SENTENCE IS A SCRIVENER'S ERROR. THIS COURT SHOULD REMAND TO THE TRIAL COURT WITH THE INSTRUCTION TO STRIKE THE DESIGNATION FROM THE JUDGMENT AND SENTENCE.

The defendant lastly argues that he is entitled to a new sentencing hearing based upon the sentencing court inadvertently designating his felony convictions as domestic violence related. It is unclear on what the defendant bases his claim for a new sentencing, as opposed to an order directing the trial court to strike the designation, as neither party nor the court relied on the domestic violence designation at sentencing, there was not a determination by the jury that the crimes were domestic violence related, and the designation did not impact the defendant's sentence as discussed below.

Relying on the special verdict form which was left blank by the jury, the defendant next argues the domestic violence designations in his judgment and sentence must be stricken because there was no jury finding that any of the crimes he was convicted of were crimes of domestic violence. CP 163 (special verdict form). In addition, the defendant argues that count four of the information (first degree rape) did not allege that the

crime was committed against a family or household member, which was also included in the special verdict form. CP 147 (instruction), 163.

At the time of sentencing, neither party nor the court discussed the domestic violence designations as contained within § 2.1 of the judgment and sentence. RP 1364-96; CP 190. For the designation to apply to the convictions, RCW 9.94A.525(21) requires the State to plead and prove that the parties involved are members of the same family or household. Since the jury apparently could not agree as to whether the State had proved that requirement, the designation in the judgment and sentence appears to be a scrivener's error, and it should be stricken from the judgment and sentence.

Regarding the defendant's argument that if this Court finds error and remands to the trial court, the defendant is entitled to be resentenced based upon the erroneous designation, this argument has no merit.

First, as discussed above, there is no evidence the trial court relied on the designation to enhance the defendant's sentence. Second, it appears from the defendant's offender scores that none of the crimes were impacted by the designation, as none of the defendant's prior convictions qualified to increase the offender score. Under RCW 9.94A.525(21), in the circumstance where prior adult convictions involving domestic violence were pled and proved and where the current conviction is one of domestic, which has been pleaded, a sentencing court is required to add two points,

rather than one point, to the current offender score for each qualifying current conviction. However, there is no evidence the trial court added points to the offender scores based upon the domestic violence designation. Indeed, the defendant does not assign error to the court's offender score calculation.

Furthermore, even assuming the lower court had added points to the offender score based upon an erroneous designation, the defendant's offender score would remain the same, a "9+," for all current felony convictions, counts one through five.

At sentencing and without the domestic violence designation, the defendant's offender scores[17] for his prior felony convictions were as follows: felony criminal mischief (one point),[18] second degree assault (two

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[17] RCW 9.94A.525(8) states: "If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction."

Likewise, RCW 9.94A.525(9) states: "If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction."

[18] A nonviolent offense is one which is not a violent offense. RCW 9.94A.030(34). Felony criminal mischief is a nonviolent class "C" offense if the offender is armed with a deadly weapon. RCW 9A.84.010(2)(b). Error has not been assigned to this classification.

points),[19] third degree assault (one point),[20] vehicular assault (juvenile-two points),[21] and first degree possession of stolen property (juvenile-½ point).[22] The prior convictions count as six points toward all current felony convictions.

Regarding the current convictions, first degree robbery is a class "A" violent offense. RCW 9A.56.200(2); RCW 9.94A.030(55)(i). First degree kidnapping is a serious, violent class "A" offense. RCW 9A.40.020(2); RCW 9.94A.030(46)(vi). Second degree rape is a violent class "A" sex offense. RCW 9A.44.050(2); RCW 9.94A.030(55)(i), 9.94A.030(47)(a)(i). First degree rape is a serious, violent class "A" sex offense. RCW 9A.44.040(2); RCW 9.94A.030(46)(vii). Finally, second degree assault is a violent class "B" offense. RCW 9A.36.021(2)(a); RCW 9.94A.030(55)(viii). Accordingly, including prior convictions and

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[19] Second degree assault is a violent class "B" offense. RCW 9.94A.030(55)(viii); RCW 9A.36.021(2)(a).

[20] Third degree assault is a nonviolent class "C" offense. RCW 9.94A.030(34); RCW 9A.36.031(2).

[21] Vehicular assault is a violent class "B" offense. RCW 9.94A.030(55)(xiii); RCW 46.61.522(1) and (2).

[22] First degree possession of stolen property is a nonviolent class "B" felony. RCW 9.94A.030(34); RCW 9A.56.150(2).

other current convictions, the defendant has the following offender scores (without regard to the domestic violence designation) for each conviction:

First degree robbery (6 + 8)	=	"14" offender score;
First degree kidnapping (6 + 9)	=	"15" offender score;
Second degree rape (6 + 8)	=	"14" offender score;
First degree rape (6 + 9)	=	"15" offender score; and
Second degree assault (6 + 8)	=	"14" offender score.

The defendant was sentenced to the high end of the standard range on all counts, except count four (first degree rape), which was 12 months less than high end. CP 194-95. As indicated, there is no finding by the trial court for the domestic violence designation or any evidence in the record that trial court relied on the designation when passing sentence on the defendant. Even if the designation was included to add points to the defendant's offender score, each score would remain unaffected and continue to remain above a "9+" for sentencing.

The defendant further asserts that he has the right to a resentencing if this Court remands to strike the designation. A defendant has the right to be present at sentencing when the sentencing court has authority to exercise discretion in the sentence. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). In *Ramos*, our high court held that Ramos had a right to be present and heard at his resentencing after the Court of Appeals remanded to the trial court "to correct the judgment and sentence to state the exact term of community placement and specify any special conditions of placement." *Id.*

Ramos had the right to be present at the hearing because the trial court was directed to "specify the 'special terms of the placement,'" which required the trial court to "impose certain conditions of placement unless it waived those conditions, and it had discretion to impose additional special terms, such as crime-related prohibitions." *Id.* at 49. The action taken by the trial court on resentencing was necessarily discretionary and not a ministerial correction. *Id.* However, "when a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present." *Id.* at 48; *see also State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (appellate courts have remanded solely for correction of a scrivener's error in a judgment and sentence to ensure that the document "accurately reflects the sentence the trial court intended"); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (appellate court has authority to remand to correct a judgment and sentence on an obvious scrivener's error, where there is nothing to suggest that the defendant was prejudiced by the error).

Here, if remanded, striking the domestic violence designation would be a ministerial correction, which does not allow the trial court to exercise any discretion. There is no requirement that the sentencing court impose a different sentence or different conditions. Accordingly, the defendant does not have a constitutional right to be present or to be resentenced. The State

would request this Court remand with instructions to strike the domestic violence designations as contained within the judgment and sentence.

IV. CONCLUSION

Based upon the foregoing analysis, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 27 day of November, 2018.

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

STATE OF WASHINGTON, Respondent, v. DAVID RAMOS, Appellant.	NO. 35843-7-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 27, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley
marietrombley@comcast.net

11/27/2018	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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