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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2010 MAR -5 PM 3:58  
NO. 62552-7-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CLIFFTON BELL,

Appellant.

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REC'D  
MAR 05 2010  
King County Prosecutor  
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Charles Mertel, Judge

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BRIEF OF APPELLANT

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JOHN DORGAN  
ERIC BROMAN  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel because his attorney failed to: (a) renew the defense motion to sever counts before the close of evidence; (b) move for a separate proceeding to determine the aggravating circumstance alleged with Count 1; (c) object to the admission of medical records and testimony relating out of court statements made by the complaining witness to a hospital triage nurse; and (d) argue his convictions under Counts 1-3 constituted the same criminal conduct for sentencing purposes.

2. The trial court erred by admitting the complaining witness's out of court statements to an investigating police officer.

3. Appellant was denied his right to unanimous jury verdicts on the five witness tampering charges, Counts 4-8.

4. Appellant's five convictions for witness tampering violate constitutional protections against double jeopardy.

5. The domestic violence (DV) pattern of abuse aggravating circumstance, RCW 9.94A.535(3)(h)(i), is unconstitutional because it is: (a) vague, and (b) overbroad. CP 212. Copies of relevant instructions are attached in appendix A.

6 Appellant was denied his right to a unanimous verdict regarding the (DV) pattern of abuse aggravating circumstance.

7. The trial court erroneously defined the (DV) pattern of abuse aggravating circumstance for the jury. CP 212.

8. Jury Instruction No. 43 impermissibly commented on the evidence. CP 207.

9. Jury Instruction No. 6 impermissibly commented on the evidence. CP 169.

#### Issues Related to Assignments of Error

1. In a fourteen count prosecution, was defense counsel ineffective for failing to move for severance of the state's rape charge from the other thirteen counts where the state's evidence supporting the rape allegation was far weaker than for the other counts, the evidence relating to the separate counts was not cross-admissible, the court's instructions permitted the jury to consider evidence across multiple counts, and the defenses to the non-rape charges weakened his defense to the rape allegation?

2. In a fourteen count prosecution, was defense counsel ineffective for failing to move for severance of the three 2006 charges from the eleven 2007 charges where the state's case supporting the later counts was much stronger than for the earlier counts, the later charges were not admissible to prove the earlier charges, and the court's instructions permitted the jury to consider evidence across multiple counts?

3. In a fourteen count prosecution, should the domestic violence "pattern of abuse" aggravating circumstance alleged with Count 1 have been tried separately where evidence supporting the aggravator was not admissible to prove Count 1 and was severely prejudicial to the defense?

4. Should a triage nurse's notes of the complaining witness's out of court statements have been excluded under the Confrontation Clause because the nurse did not testify at trial?

5. Should the portions of the triage nurse's notes not pertaining to a current medical diagnosis also have been excluded under the rule against hearsay, ER 802?

6. Did the trial court abuse its discretion by admitting the complaining witness's out of court statements to an investigating police officer where there was no foundation established to admit the evidence under a hearsay exception?

7. Was appellant denied his right to unanimous jury verdicts on the five witness tampering charges where there was insufficient evidence to support each of the alternative means of committing witness tampering presented to the jury?

8. Do multiple witness tampering convictions stemming from a course of conduct directed to a single witness violate double jeopardy provisions of the state and federal constitutions?

9. Do multiple witness tampering convictions based on an accused's contacts with third parties, not resulting in contact with the witness, violate double jeopardy provisions of the state and federal constitutions?

10. Does the DV pattern of abuse aggravating circumstance, RCW 9.94A.535(3)(h)(i), fail to define what conduct is proscribed as "psychological abuse" and fail to protect against arbitrary enforcement?

11. Does punishment of "psychological abuse" under RCW 9.94A.535(3)(h)(i) prohibit constitutionally protected free speech?

12. Where the jury could rely on combinations of various acts to find a DV "pattern of abuse" under RCW 9.94A.535(3)(h)(i), and where no unanimity instruction was given, was appellant denied his right to a unanimous jury verdict?

13. Does a special verdict form asking the jury to determine whether there was a pattern of abuse "prior to" a domestic violence crime, as opposed to whether the crime was "part of" a pattern of abuse, erroneously define the aggravating circumstance specified in RCW 9.94A.535(3)(h)(i)?

14. In a fourteen count trial involving allegations of numerous charged and uncharged assaults, does a jury instruction

referring to the earlier allegations as “prior assaults” constitute a judicial comment on the evidence?

15. Where the state alleges the pattern of abuse aggravating circumstance defined in RCW 9.94A.535(3)(h)(i), does an instruction informing the jury it may consider “prior assaults” to “show” such a pattern of abuse constitute a judicial comment on the evidence?

16. When no evidence is offered to establish a testifying defendant’s criminal history, does the trial court impermissibly comment on the evidence by instructing the jury it may consider evidence the defendant has previously been convicted of a crime in assessing the defendant’s credibility?

17. Do two acts of assault and one act of unlawful imprisonment committed against the same DV victim in the same place during an unbroken sequence of events constitute the same criminal conduct for sentencing purposes?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Clifton Bell with fourteen domestic violence crimes against complaining witness Jaimi Freitas. The charges included in the Second Amended Information are summarized as follows.

Counts 1-3: second degree assault, unlawful imprisonment, third degree assault, all on September 23, 2007. Count 1 also alleges the aggravating circumstance that the crime was part of a DV pattern of abuse. CP 123-24 (RCW 9.94A.535(3)(h)(i)).

Counts 4-8: five counts of witness tampering covering separate time intervals between September 24, 2007 and December 3, 2007. CP 124-26. Counts 4, 5, 7, and 8 charged that Bell attempted to induce a witness "to testify falsely or, without right or privilege to do so, to withhold any testimony or absent himself or herself" from any official proceeding. CP 124-26. Count 6 omitted the false testimony alternative. CP 125.

Counts 9-11: three counts of misdemeanor violation of a no contact order on October 12, October 14, and November 11, 2007. CP 126-27.

Count 12: second degree assault on February 17, 2006. CP 128.

Counts 13-14: third degree assault and third degree rape, between February 1, 2006 and September 30, 2006. CP 128-29.

A jury convicted Bell on all counts and answered "yes" to the special verdict regarding Count 1. CP 211-25.

Bell's offender score for the Count 1 second-degree assault is eleven. CP 280. The superior court calculated the scores for

Bell's remaining felonies as ten. CP 280, 287. The court sentenced Bell to concurrent standard range sentences on felony Counts 2-8 and 12-14, and concurrent sentences on misdemeanor counts 9-11. CP 277, 280, 282, 287. These concurrent sentences ranged from 12 months for the misdemeanors to 72 months for the Count 12 second degree assault. CP 277, 282. The court imposed an exceptional consecutive sentence of 72 months on Count 1 based on the aggravating circumstance. CP 280, 282, 288-89. The court thus imposed total confinement of 144 months. CP 282. The court also required Bell to register as a sex offender. CP 293.

2. Pretrial Evidentiary Rulings.

Before trial, the state moved to admit evidence of alleged uncharged acts of domestic violence committed by Bell against Freitas. 2RP<sup>1</sup> 85; Supp.CP \_\_ (sub no. 108, State's Trial Memo, at 22-24). Freitas alleged that Bell anally raped her, that he assaulted her by grabbing her nose ring during an argument, and that he caused her to fall from a second story balcony during a separate argument. Id. The state argued this history was admissible (1) to prove the Count 1 aggravating circumstance and (2) as "other acts"

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<sup>1</sup> "RP" refers to the transcriptions of proceedings for the following dates. 2RP: June 17, 2008; 3RP: June 18, 2008; 4RP: June 19, 2008; 5RP: June 23, 2008; 6RP: June 24, 2008; 7RP: June 25, 2008; 8RP: June 30, 2008; 9RP: July 1, 2008; 10RP: July 2, 2008.

evidence under ER 404(b). 2RP 86; 3RP 7-8. Over objection, the court admitted the evidence on both grounds. 2RP 85; 3RP 19-21. The court ruled the evidence was relevant to Bell's self-defense claim regarding the Count 3 assault charge. 2RP 78-79; 3RP 20. The court stated generally that the uncharged acts were probative of "the victim's state of mind and the victim's credibility." 3RP 20. However, the trial judge subsequently clarified his ruling:

I did not make a specific finding . . . that these were admitted as a backdrop to explain her inconsistent acts under State v. Grant<sup>2</sup> and State v. Cook.<sup>3</sup> I did not make that finding.

4RP 7.

3. Defense Motion to Sever Counts.

On the day of jury selection, the defense moved to sever counts. 3RP 16-17. The court denied the defense motion to sever. 3RP 19. Defense did not renew the motion after the close of evidence.

4. Trial

a. The State's Evidence.

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<sup>2</sup> 83 Wn. App. 98, 920 P.2d 609 (1996), Gant's prior domestic assaults against the victim were admissible to evaluate the victim's credibility in light of her statements and acts that were inconsistent with her testimony.

<sup>3</sup> 131 Wn. App. 845, 129 P.3d 834 (2006), prior assaults were admissible to show a recanting victim's state of mind at the time of the recantations.

Complaining witness Jaimi Freitas testified she met Bell in the Seattle area in April 2005. 8RP 7-8. The two started dating a month later and in October 2005 they started living together in Freitas' Shoreline apartment. Freitas testified she and Bell drank, smoked pot, and consumed cocaine "quite a bit" during the first six to nine months they lived together. 8RP 9-12.

Freitas alleged an incident occurred a couple of weeks after she and Bell moved into the Shoreline apartment. 8RP 18-19. Several guests were visiting when one of Bell's friends "asked me to hand him something." 8RP 18. According to Freitas, Bell then interjected: "You don't ask her to hand you anything. You ask me to tell her to hand it to you." 8RP 18. Freitas testified Bell's comment made her angry because it was disrespectful to her. 8RP 19. After the guests left, she confronted Bell and told him "you can't talk to me like that." 8RP 19. According to Freitas, Bell became angry and shouted he can do "whatever he wants", and "if he doesn't want his friends talking to me, they don't have to." 8RP 19. Bell then grabbed her nose ring and ripped it out partially, causing her to bleed. 8RP 19.

Freitas next described an incident underlying the Count 12 second-degree assault charge. She testified she was at home with Bell on February 17, 2006 when one of Bell's friends called. 8RP

21-22. The caller wanted to drop his girlfriend off at Freitas's apartment while he went on an errand. 8RP 21-22. When Bell agreed, Freitas became angry. She testified she was angry because Bell "had his friends over all the time, and . . . I was cleaning up after them. And they were always smoking in the house. They were loud. I almost got kicked out because they were so loud." 8RP 21-22. She said police had been called twice for noise complaints and her landlord had spoken to her about it. 8RP 22. She said she and Bell argued over this issue "a lot." 8RP 22.

When Bell hung up the phone, they argued. 8RP 23. According to Freitas, Bell grabbed her left wrist with one hand and pushed her to the ground with his other hand. 8RP 23-24. Freitas felt a sharp pain in her shoulder and could not move it. 8RP 24. Freitas went to Northwest Hospital in Seattle and was treated by Dr. Marc DiJulio. 6RP 9, 13. DiJulio testified Freitas suffered a dislocated shoulder. 6RP 15-18. He stated a shoulder dislocation is typically caused when the arm is away from the body and "gets kind of pulled away and torqued out." 6RP 19-20.

Freitas alleged two incidents supporting Counts 13 and 14 (third degree assault and third degree rape). She testified they both occurred on the same day, sometime between February and September 30, 2006. 8RP 29-30. She and Bell were not getting

along well, and Bell was staying at a friend's house down the street from Freitas's apartment. 8RP 30, 34. Although they were not getting along, Freitas and Bell continued to sleep together. 8RP 36. On the day in question, they were watching television and eating when Freitas put her hand on Bell's leg. 8RP 30-31. Freitas testified, "he, for some reason, thought I had ketchup on my hand; and he yelled at me for getting ketchup on him." 8RP 31. Bell then stood up and threw a dinner plate that hit her in the head and caused her to bleed. 8RP 31-32. They then went to Bell's mother's house, arriving around 11:00 at night. 8RP 33, 35.

Freitas testified they spent the night at Bell's mother's house. 8RP 35. When they were alone together, Bell apologized. 8RP 35-36. They were lying together and kissing. 8RP 36. Freitas testified Bell wanted to have sex, but she did not. 8RP 36. She stated Bell removed her underwear, pinned her hands down, and had sexual intercourse with her, despite her telling him to stop. 8RP 38, 72.

The state presented corroboration testimony for the Count 13 assault charge involving the plate. Freitas's co-worker Ryan Anderson testified he observed Freitas with a cut on her forehead sometime between April and July, 2006. 6RP 49-50.

Freitas alleged a subsequent, uncharged rape by Bell after she moved to a new apartment in Lynnwood. 8RP 39-40. She

stated she was having vaginal intercourse with Bell when Bell indicated he wanted to have anal intercourse. 8RP 41. Freitas told Bell she did not want that, but he penetrated her anus with his penis anyway. 8RP 41-42. She did not identify the date, month, or season when this second incident took place.

Freitas described an additional uncharged incident at her Lynnwood apartment that occurred on September 26, 2006.<sup>4</sup> Although Bell was not living with her at the time, he had a key to the apartment. 8RP 46. Freitas testified she had an argument with Bell because she wanted him to surrender the key. 8RP 46. She explained, "He was . . . putting his clothes in the dryer and just . . . ignoring me." 8RP 46. Bell eventually told Freitas "just come and get the key." 8RP 48. When she approached him, "Clifton started hitting me." 8RP 49. Freitas said she tried to get away by running for the front door, but Bell shut the door, locked the deadbolt, and told her she was not going anywhere. 8RP 49. Freitas ran onto the balcony and gripped the railing. She testified that Bell followed her to the balcony, grabbed onto her, and pulled at her. 8RP 49-50. Bell eventually let go, and Freitas fell forward off the balcony to the

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<sup>4</sup> The prosecutor at one point referred to this incident as occurring on "July 26 of 2006." 8RP 42-43. The correct date is September 26, 2006. See 7RP 7-9, 25-28; 8RP 55 (medical care chronology).

ground below, landing on her back. 8RP 52. Freitas testified she could see Bell as she lay on her back: "He looked down at me, and, like -- like, oh, my god, like, that was his face; but he kind of was, like, laughed a little bit". 8RP 53. Freitas suffered a fractured pelvis and lacerated liver from the fall. 7RP 10, 13.

Around the time of the balcony incident, Freitas and Bell changed their drug habits. Freitas stopped using cocaine.<sup>5</sup> 8RP 82. She explained the drug drained her physically and she became very thin. 8RP 82. It gave her bad headaches and made her feel sick all the time. 8RP 83. Freitas testified that Bell also cut back during that period, using cocaine only sporadically. 8RP 83. For the year-long period between the September 26, 2006 balcony incident and September 23, 2007, Freitas did not allege any specific incident of abuse. She stated generally there was tension between them, and Bell "would end up hitting me or doing something. And we'd get in a fight." 8RP 85. Freitas provided no details about these fights. 8RP 85.

Freitas described a sequence of events on September 23, 2007 that was the basis for Counts 1-3. By that time, Freitas was living in an apartment in the Lake City neighborhood. 8RP 85. By

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<sup>5</sup> Freitas testified she stopped using "about a year" before September 23, 2007. 8RP 82.

prior arrangement that day, Bell came over to the apartment at 3:00 a.m. Freitas testified that when she let him in, things were fine initially. 8RP 87-88. However, she stated Bell began to mistreat her ten-week old puppy. Bell was rubbing the puppy's ears in a manner it didn't like, and the dog was trying to get away. Freitas stated she told Bell to stop, but "he was just kind of brushing me off like, you know, it's fine, why does it even matter." 8RP 88. Freitas became "really mad" and they argued. Freitas eventually stepped outside and called the dog to her. She testified the puppy could not come to her because Bell was still holding him roughly. 8RP 88-89.

Freitas eventually reentered the apartment. 8RP 91. Shortly thereafter, Bell threw her cell phone on the ground, breaking its screen. 8RP 113-14. Freitas said Bell hit her in the ear with an open fist, then punched her in the eye. She said Bell pinned her on the ground, 8RP 91, 124-25, and said he put his hands around her neck and squeezed, restricting her ability to breathe. 8RP 92-94.

Bell stopped squeezing her neck and they both stood up. 8RP 95. She said his demeanor changed and he "kind of . . . got nice." 8RP 95. Freitas said Bell put his arm around her and asked, "Why do you have to act like that?" Like it was my fault that he was acting like that." 8RP 95.

Freitas testified Bell's mood changed again: he grabbed her hair and pulled her to the floor. 8RP 96. She could hear her hair ripping "and there was hair all over the floor." 8RP 97.

Freitas testified she wanted to go to the bathroom to look at her swollen eye, but Bell would step toward her, causing her to flinch and not go to the bathroom. 8RP 98-99. Bell got some ice for her, which she applied to her eye. 8RP 100. When Freitas tried to leave the apartment, Bell stood between her and the door, saying she was not going anywhere. 8RP 100-01. Freitas said he also removed the key from the locked interior deadbolt on the apartment front door. 8RP 104-05.

Bell poured a shot of rum for each of them. She told him she did not want any, but Bell insisted it would calm her down. 8RP 102. Freitas said she drank the shot after Bell threatened to "go upside my head with the bottle" if she refused. 8RP 101-102.

Bell eventually suggested they lie down together and watch a DVD. But when they were making up the bed, he kicked her. 8RP 102-03.

They eventually went to bed and Bell fell asleep. Freitas left the apartment, drove to a nearby Safeway and called 911. She was able to leave because she had an extra key to the front door deadbolt attached to her car keys. 8RP 109-13, 119-20.

Freitas called 911 from the Safeway. She told the 911 operator her boyfriend had punched her and strangled her. She said she got away when he fell asleep. Ex. 1.

Seattle Fire Department Lieutenant Raymond Hammer responded to the 911 dispatch at 4:23 a.m. and contacted Freitas at the Safeway. 5RP 92. He testified Freitas was upset and had been crying. 5RP 92. Freitas stated her boyfriend hit her with his fists, choked her, and pulled out some of her hair. 5RP 92-93. She told Hammer her boyfriend prevented her from leaving, but she left when he fell asleep. 5RP 92. Hammer observed Freitas had a swollen left eye and there were marks on her neck. 5RP 92. She complained of head, neck, and back pain. 5RP 92.

Seattle Police Officer Derek Norton arrived at the Safeway shortly after the fire department personnel. 5RP 18, 21. Norton spoke to Freitas and arranged for her transport to Northwest Hospital. 5RP 22, 24. He assisted in Bell's arrest at Freitas's apartment, then went to Northwest Hospital. 5RP 27-31.

At the hospital, a triage nurse examined and interviewed Freitas at 5:35 a.m. Ex. 12, p. 4. Norton took a statement from Freitas immediately after the triage exam at 5:45 a.m. 5RP 25-26. Norton was not asked about Freitas's demeanor when he took her statement an hour and twenty minutes after she called 911. 5RP

23-26. Over the defense hearsay objection, the trial court permitted Norton to recount what Freitas told him at the hospital. 5RP 26. Freitas told Norton she and her boyfriend had argued about her puppy, her boyfriend had struck her and strangled her, prevented her from leaving, and kicked her into a wall. 5RP 26.

Emergency room physician Dr. Abel Tewodros treated Freitas that morning. 5RP 62, 66. He testified at trial, stating Freitas had a facial contusion with bruising around the left eye. 5RP 70. He also described observations of “petechia” above the upper chest near the neck region. 5RP 68. Petechia is bleeding from capillaries under the skin that can be caused by “anything that disrupts the integrity of that capillary. . . .” 5RP 68.

The prosecutor asked Tewodros about the triage nurse’s notes from the initial examination and interview of Freitas. 5RP 64, 73-74. Tewodros described the notes as a document where “the nurse puts her information about the patient, their brief history, past medical history, allergies . . . .” 5RP 73. Tewodros then read from the triage notes. 5RP 73-75.

It says at the top of the patient report that she had been punched in the head, kicked in the abdomen by her boyfriend. It mentions a couple other areas of pain: in the left eye, the right ear, the neck, the tailbone.”

5RP 74. The prosecutor asked him about a separate page:

Q. Tell about those notes? What do those notes say?

A. Well, there's -- at the top portion, there's a brief physical exam performed by the nurse, and then below that she mentions that she describes the edema and bruising around the left eyelid, the left forehead, the left cheek; and then she noted some scratch marks to the neck, chest, shoulders--

5RP 77.

Tewodros was also asked about the "domestic violence questionnaire portion of those medical records." 5RP 79. He testified the records indicated Freitas had answered "yes" to the question, "Have you ever been forced by someone to have sex when you did not want to?" 5RP 79-80.

Asked about the nurse's notation "SPD on scene," Tewodros said it meant either the police were present when the patient was picked up or were in the room during the examination. 5RP 75.

Bell's counsel did not object to Tewodros' testimony about the triage notes. The notes were offered and admitted without objection as Exhibit 12. 5RP 80; Ex. 12.

The fourth page of Exhibit 12 contains some of the notations described by Tewodros. On that page the triage nurse marked an "x" in the box "Domestic Violence: Yes." Ex. 12, p. 4. The same page includes the "SPD on scene" notation described above. *Id.* Page six of the exhibit includes the question about forced,

unwanted sex that forms part of a "Domestic Violence" questionnaire. Ex. 12, p. 6. The triage nurse who authored the notes did not testify at Bell's trial.

The court admitted various photographic exhibits offered by the state. These included self-portraits taken by Freitas on September 24, the day after she called 911, depicting injuries to her neck and chest. 8RP 145, 151-54; Ex.'s 13, 14, 44. Exhibit 23 showed the interior deadbolt lock in Freitas's apartment, requiring a key to lock and unlock the door. 7RP 49; 8RP 104-05.

The prosecutor asked Freitas why she stayed with Bell despite the events described in her testimony. Her answer was not that she feared Bell, but that she loved him:

Q. . . So you first met him, you're 18. He beats you, and he promises you he's not going to do it again. And then he does it again. Why didn't you leave him the second time or the third time or the fourth time?

A. I didn't -- I didn't really have anybody else, like, right when I moved here. I was, like -- he was who I was with. Like, a lot of people that I knew, it was from him.

. . .

Q. Why did you continue to sleep with him after he forced himself on you sexually?

A. He said he didn't mean it.

Q. Why did you continue to sleep with him after he did it again even worse?

A. Because I just -- I didn't -- I just thought every time he was, like, sorry, that he wasn't going to do it anymore; and I wanted that to be true. Like, I loved Clifton a lot.

8RP 158-59.

Freitas similarly explained why she did not report the Count 14 rape allegation. She didn't report it because she enjoyed an ongoing, consensual sexual relationship with Bell:

I didn't call it [rape], not because that there was no witnesses, but it was because that was my boyfriend, and I had sex with him other days when I wanted to, just that time was against my will.

8RP 169.

The state's case included numerous audio recordings of telephone calls placed by Bell during his post-arrest confinement at the King County Jail. The state offered the recordings to corroborate Freitas's testimony, to prove the five witness tampering charges, and to prove the Count 1 aggravating circumstance.

One conversation was from September 23, 2007, a few hours after Bell's arrest. Bell apologized after Freitas told him, "My fucking throat's all fucked up. My hair is falling out." 5RP 102; 10RP 97-98. Bell apologized again after Freitas accused him of

blacking both my eyes most of the time, fucking broke my hip, broke my shoulder, messed my neck up, messed my throat up, fucked up my head, put a plate in my head because you thought I wiped ketchup on you when I didn't.

5RP 117. On November 11 Bell asked Freitas if she missed him:

[MS. FREITAS:] [D]o I miss my shoulder dislocation every time I fucking try to wash my hair and shit because you fucking threw me by my arm? Is that what I miss? Is that what you're talking about? . . .

MR. BELL: I'm telling you that I've changed.

7RP 71-72; 10RP 73-74.

Count 4 covers the period September 24 to October 3, 2007. On September 24, Bell left a voice message for Freitas, stating: "all you have to do is just give the prosecutor a call and just tell him that nothing happened and their number is 296-9000." 6RP 57; 9RP 75-76. On October 1, Bell spoke to his friend "Delano." Bell told Delano that Freitas can "retract" her allegations. Ex. 3. Bell explained, "She can take it back . . . and drop it." Ex. 3. Bell then gave Delano the prosecutor's number to give to Freitas. 6RP 66. Bell told Delano, "if she has a price, ask it." 6RP 68. At the end of the call Bell told Delano, "tell her to call the prosecutor." Ex. 3. Bell spoke to Delano again on October 3. Delano asked, "You want me to pass her that number or what do you want me to tell her?" Bell answered, "give her that fuckin' number." Ex. 3.

The Count 5 charging period is October 4, 2007. That day, Bell asked his mother, "Can you like offer her some money so she can drop it?" Ex. 3.

Count 6 covers October 12, 2007. That day Bell spoke to Delano and suggested that Delano offer Freitas "five bills." 6RP 120. Bell added, "she could call in and be like . . . I want to take it all back." 6RP 121.

Count 7 charges tampering on November 11, 2007. That day Bell spoke to Delano and stated, "she's coming around." Ex. 5. Bell told Delano, "when you talk to her . . . just make it seem like I still like her." Ex. 5. Bell encouraged Delano, "whatever you do keep it up." Ex. 5. He added:

[I]f she doesn't show . . . I don't see how the prosecution can move forward . . . . [T]hat's what the lawyer said.

Ex. 5.

[I]f she says she's not gonna go, then they'll make her go. But . . . if she acts like she's going then . . . they'll believe her. Then if she doesn't then they can't do anything about it.

Ex. 5.

Count 8 covers November 20 to December 3, 2007. On November 20 Bell expressed his impatience with Delano. Referring to Freitas, Bell told Delano, "You know you gotta . . . someone gotta talk to that fucking idiot." Ex. 6. Delano told Bell he would visit Freitas "tomorrow" and assured Bell, "I'm on it like chippers." Ex. 6. Delano later referred to the charges pending against Bell and

asked, "And if she don't show up all three of them bullshits will drop?" Bell answered, "All that shit goes away." Ex. 6. On December 3 Bell called and asked, "Did you talk to that bitch or what son?" Ex. 6.

Bell's friends and family never acted on his repeated requests to contact Freitas. The prosecutor acknowledged this fact in closing argument:

In fact, for most of the witness tampering charges, Jaimi was in the dark. Despite the defendant's efforts, despite him telling his friends "I love you, dog," they never followed through with anything they said they were going to do.

10RP 69.

At various times during his phone calls from the jail Bell told Freitas he missed her, he loved her, and he wanted to marry her. *E.g.* 5RP 113, 117; 7RP 63. However, he referred to her as "bitch" when speaking with his friends. *E.g.* 6RP 59.

b. The Defense Evidence.

Bell testified and denied Freitas's allegations. Regarding September 23, 2007, he said Freitas was wide awake and "moving real swiftly" when he arrived at her apartment in the middle of the night. 9RP 14-15. Bell explained Freitas was smoking hash laced with "meth" or "sherm" that night. 9RP 16-17, 34-35.

Freitas became angry when he refused to let her see his cell phone, including phone numbers, pictures, and text messages. Freitas challenged him to view the contents of her phone and let her look at his phone. When she poked at him with her phone, Bell tossed it against the wall. Freitas then grabbed the dog leash and took the dog outside for a walk. 9RP 19-22.

Bell stated he was resting on the bed with his eyes closed when Freitas returned. As he rested, he felt a "sharp drag and pull" on his hand. When he opened his eyes, Freitas was there with a kitchen knife. She poked the knife into his wrist, and Bell charged her and grabbed the knife. 9RP 22-24.

Freitas tripped over some shoes on the floor and fell. 9RP 24. He pried the knife from her hand and it fell to the ground. She then kicked him in the groin and reached again for the knife. Bell responded by punching her in the face. 9RP 27.

At that point they calmed down. Freitas went into the bathroom; when she emerged Bell saw that her face was swollen. 9RP 28. He suggested she drink a shot of rum, which she did. 9RP 29. Before going to sleep, Freitas said they should go to counseling, that he should stop talking to his friends, and stop going to his mother's restaurant. Bell testified he responded: "You know what? I don't have time or money to go to counseling. I'm

never going to stop going to my mom's restaurant, and I like my friends just fine." 9RP 37. Freitas gave him a cutting look and started laughing. Bell threatened to leave, but Freitas persuaded him to stay, and he fell asleep. He awoke to find police officers in the apartment placing him under arrest. 9RP 38-40.

Bell denied preventing Freitas from leaving the apartment that night. 9RP 43-44. The court admitted a medical "kite" from the jail documenting a cut on Bell's right ring finger shortly after his arrest. 9RP 113-14; Ex. 55.

Bell disputed Freitas's version of the events of February 17, 2006 culminating in the shoulder injury. He confirmed he and Freitas argued because he had agreed, without asking Freitas, to host his friend's girlfriend at Freitas's apartment. 9RP 46-47. Bell said he eventually agreed to cancel the plan. 9RP 48. When his friend called again, Freitas "wanted to be the one to tell him that Kristen couldn't stay over." 9RP 49. Freitas ran for the phone, but tripped over the coffee table and crashed into the couch. 9RP 49.

Bell disputed Freitas' account of her forehead injury and the dinner plate. He testified he was renting the bottom level of a house in Shoreline. On the day in question, he was watching a movie at home with some female childhood friends. 9RP 54. The movie belonged to Freitas. 9RP 53-54. Freitas came over, angry,

and told Bell, "Give me my movie. I don't want whores watching my movie." 9RP 56. Bell stated he handed her the movie through a window, but would not let her in. 9RP 56. He then turned his back, heard a sound, turned back toward Freitas, and saw her hands and forehead bleeding. 9RP 56. Freitas went to her car and drove away. 9RP 56-57.

Bell denied having sex with Freitas against her will. 9RP 57. He denied assaulting Freitas when she fell from the Lynnwood balcony. He and Freitas were having an argument over apartment keys. 9RP 57-59. Freitas was upset because he had a key to her apartment, but she did not have a key to his. 9RP 57-59. Freitas ran out onto the balcony in anger, but collided with the closed screen door. She stumbled, knocking the screen door off its tracks and fell off the balcony. 9RP 58-59.

Bell did not contest the audio recordings of phone calls he placed from jail. 9RP 72-84. He admitted he called Freitas after a no-contact order was issued. He did not challenge her telephonic claims he had harmed her physically, explaining "I wasn't trying to argue. I was trying to get her to drop the charges." 9RP 101-02. He falsely told Freitas he wanted to get married, admitting, "I was pretty much willing to lie to her to get out of jail." 9RP 114-15.

c. Jury Instructions.

The jury heard no evidence Bell had been convicted of a prior crime. However, the court gave the following jury instruction:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

CP 169 (Instruction 6).

The tampering instructions informed the jury of two alternative means of committing the crime: attempting to induce a witness to (1) testifying falsely or withhold testimony, or (2) absent herself from an official proceeding.<sup>6</sup>

The court gave the following limiting instruction regarding the "other bad acts" evidence offered by the state:

Evidence has been introduced in this case on the subject of prior assaults against Jaimi Freitas and should be consider [sic.] only insofar as it assists you in understanding her state of mind at the time of her inconsistent acts, to evaluate a claim of self-defense and to show an ongoing pattern of psychological, physical or sexual abuse against Jaimi Freitas by the defendant. You must not consider this evidence for any other purpose.

CP 207 (Instruction 43).

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<sup>6</sup> Instruction 23 defined witness tampering as an attempt to induce a witness "to testify falsely or, without right or privilege to do so, to withhold any testimony, or absent herself from any official proceeding." CP 187. The "to-convict" instructions mirrored the "testify falsely," "withhold any testimony," and "absent herself" language of the tampering definition. CP 188-92 (Instructions 24-28).

The court also instructed:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 210 (Instruction 45).

The court gave the jury a special verdict form addressing the aggravating circumstance charged with Count 1. The first question on the form asked whether Count 1 involved domestic violence.

CP 212. The second question asked,

Did the State prove, beyond a reasonable doubt, that prior to the commission of the offense of Assault in the Second Degree charged in count one, there was an ongoing pattern of psychological, physical or sexual abuse of the victim by the defendant, manifested by multiple incidents over a prolonged period of time?

CP 212.

d. The State's Closing Argument: Progression From Stronger To Weaker Counts.

The state started its closing with the charges relying exclusively on undisputed audio recordings of Bell's jail calls. 10RP 55-68. The state progressed to charges supported by Freitas's testimony in conjunction with corroborating evidence. 10RP 69-106. The state concluded with the charge depending entirely on Freitas's credibility, the rape allegation. 10RP 107-14.

Beginning with the tampering counts, the prosecutor replayed segments of Bell's conversations and commented, "We are seeing the crime as it's going down." 10RP 57.

Moving to the assault and unlawful imprisonment charges, the state focused on Freitas's credibility, and how her testimony was corroborated by independent evidence. The state replayed the audio segments where Bell adopted an apologetic tone when Freitas confronted him about her injuries, 10RP 73-74, about the plate incident, 10 RP 81, and about the strangulation incident, 10RP 97-98. The state referred to Dr. Dijulio's testimony as corroborative of Freitas's account of how her shoulder was dislocated. 10RP 71. Concerning Count 2, unlawful imprisonment, the prosecutor said, "we know it's true because [Freitas] told us so" and called the jury's attention to her frantic demeanor during the 911 call and to the photographs of her injuries from that night. 10RP 91. The prosecutor referred to the testimony of Freitas's coworker Ryan Anderson as proof supporting Freitas's testimony that Bell assaulted her with a plate. 10RP 83-84.

The prosecutor also argued "we know" Bell strangled Freitas "because Jaimi told us so." 10RP 95. He argued the photographs and medical testimony supported her account. 10RP 96. The

prosecutor argued Freitas's account of September 23, 2007 was credible because she told it repeatedly to others that day:

[O]n the 911 tape she says that she was strangled, that her boyfriend didn't let her out of her house, that she was punched in the eye. She says that. When she sees the officers for the first time, she told them the same thing. She saw the firefighter, she told the same thing. She saw the doctors, she told the same thing. The chain was unbroken.

10RP 96.

Finally, the prosecutor addressed the rape charge for which there were no corroborating admissions, tape recordings, medical records, medical testimony, photographs, excited utterances, or independent witnesses. The state addressed this circumstance by assuring the jury, "if you believe Jaimi, that's enough." 10RP 108. To encourage the jurors to believe Freitas, the prosecutor reminded them of evidence supporting her credibility in connection with the strangulation charge:

What about when she's talking to the firefighters and they ask her about the strangulation and they say, "Did you pass out? Were you unconscious?" She could have said yes. She could have said whatever. She certainly had the injury. She said, "No, no. He didn't make me unconscious. He just strangled me."

10RP 113.

The state also reminded the jury of the evidence accumulated on the other charges:

Defense counsel is going to tell you, "Well, she [accused Bell of rape] because she wanted to get him in trouble." . . .

But let's think about that for a second. She wants to get him in trouble? He confessed to punching her in the face and blowing up her eye like a balloon. He confessed to Counts 4, 5, 6, 7, and 8, all counts of witness tampering that he confessed to on the stand yesterday. He confessed to three additional violations of a no-contact order. The defendant is in plenty of hot water without Jaimi's help.

10RP 110-11.

The prosecutor also urged the jury to make a connection with Freitas's uncharged allegation that Bell raped her anally in Lynnwood. Addressing the fact that Freitas did not report the charged rape, the prosecutor argued it was unlikely a 20-year-old girl would report nonconsensual sex with her boyfriend. 10RP 108-09. To prove the point, the prosecutor asserted, "In fact, he did it again. The next time, he raped her anally and she still stayed with him and she never told anybody." 10RP 110.

e. The State's Argument Addressing Alternative Means For The Witness Tampering Counts

Regarding the five witness tampering counts, the state called the jury's attention to both alternative means listed in the instructions. The prosecutor argued Bell either attempted to induce Freitas to testify falsely or to withhold testimony or to absent herself. 10RP 54-56. After replaying segments of audio recordings

pertaining to each tampering count, the prosecutor again referred the jury to the elements listed in the jury instructions. 10RP 63-65.

f. The State's Argument Regarding The Pattern of Abuse Aggravating Circumstance.

In addressing the Count 1 aggravating circumstance, the prosecutor referred to the "counts" alleged by Freitas that were not submitted to the jury. The prosecutor suggested some of these incidents were dealt with in a different jurisdiction:

You've heard testimony about some *counts* that weren't charged. *Some that occurred in Snohomish County, some that simply weren't charged.* The nose ring incident, the choking incident that went along with that. You heard about the anal rape. You heard about Jaimi, as the defendant put it, bouncing off the balcony. Those weren't charged for various reasons. But they're up for your consideration.

10RP 102 (emphasis added).

The state urged the jury that Bell's phone calls to Freitas proved the "psychological abuse" alternative of the pattern of abuse aggravator. 10RP 101-06. The prosecutor argued Bell manipulated Freitas by telling her he loved her and wanted to marry her and take care of her, only to mock her and call her "bitch" when speaking with his friends. 10RP 104-06. The prosecutor characterized these words as "hypocritical venom."<sup>7</sup> 10RP 105.

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<sup>7</sup> The state reiterated this theory at sentencing: "The phone conversations themselves and the defendant's own testimony at trial reveal a sinister

The jury convicted Bell on all counts and answered “yes” to the two questions posed in the special verdict form. CP 211-25.

C. ARGUMENT

1. SEVERAL DEFICIENCIES DENIED BELL HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied this right and is entitled to reversal of his conviction when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2D 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. 466 U.S. at 694.

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level of psychological abuse leveled at Jaimi . . . . In the calls, the defendant can be heard engaging in a subtle manipulation, where he tells Jaimi he loves her, he needs her, and he is going to change for her." Supp. CP \_ (sub no. 139 State's Sentencing Memo at 11).

a. Counsel's Failure to Renew the Severance Motion Prejudiced Bell.

Bell's trial counsel was ineffective for failing to renew the defense severance motion at the close of evidence. A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcomes of trials on severed charges would have been different.

CrR 4.4 governs severance of counts in a criminal trial. Counts that are properly joined may be severed "to promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A defendant's motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2).

Washington courts recognize joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). The defendant can be prejudiced in the following ways:

(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of

the various crimes charged and find guilt when, if considered separately, it would not so find.

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (quoting Drew v. United States, 331 F.2d 85, 88 (D.C.Cir.1964)); accord, State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). A less tangible “but equally persuasive” prejudicial effect may be present in a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” Harris, at 750 (quoting Drew, at 88.)

The Washington Supreme Court recently reiterated joinder “can be particularly prejudicial when the alleged crimes are sexual in nature.” Sutherby, 165 Wn.2d at 884 (citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)). In such cases “there is a recognized danger of prejudice to the defendant *even if the jury is properly instructed to consider the crimes separately.*” Sutherby, at 884 (emphasis added) (citing Harris, at 750).

In determining whether to sever charges, the trial court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. Sutherby, at 884-85.

Sutherby reversed convictions for child rape and child molestation that were joined with charges of child pornography possession. The court that Sutherby did not receive effective assistance of counsel because his attorney failed to move for severance. Weighing the four factors listed above, the court concluded the counts would have been severed if requested. 165 Wn.2d 884-86.

First, the state's evidence of the rape and molestation charges was weaker than for the child pornography counts. 165 Wn.2d at 885. While a search of Sutherby's home uncovered computer files containing child pornography, the rape and molestation charges relied on testimony and statements of the six year old child, plus inconclusive medical evidence. 165 Wn.2d at 876, 885.

Second, Sutherby offered separate defenses on the different counts. He claimed he unintentionally acquired images of children when downloading adult pornography. He asserted inadvertence and/or confusion on the part of the child witness regarding the rape and molestation accusations. The state attacked the credibility of Sutherby's pornography defense and argued it undermined his rape and molestation defenses. 165 Wn.2d at 885.

Third, Sutherby found the trial court's jury instruction to decide each count separately was neutralized by the prosecutor's use of the child pornography evidence to argue the rape and molestation charges. See Sutherby at 885-86. The court also observed, "there was no limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime." 165 Wn.2d at 886.

Fourth, the court stated it was likely the child pornography evidence would have been excluded from a separate trial on the rape and molestation charges, and vice versa. 165 Wn.2d at 886-87. The court explained the potential for prejudice when "other acts" sex crimes are admitted into evidence "at its highest." 165 Wn.2d at 886. The court added, "In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence." 165 Wn.2d at 886-87 (citations and internal quotation marks omitted); see also, Ramirez, at 228 (error not to sever indecent liberties counts where evidence was not cross-admissible); Harris, at 750 (cross-admissibility mitigating factor was "glaringly absent" for two rape counts).

In Bell's trial, the superior court would likely have granted a renewed motion for severance. At minimum, the court would have severed the rape count from the remaining thirteen charges. The

court's examination of the four severance factors would have involved the following considerations.

Regarding the first factor, there was a conspicuous asymmetry in the strength of the state's evidence on the rape charge compared to its proof for the other counts. Impeachment-proof, unchallenged audio recordings supported the witness tampering and no-contact order charges (Counts 4-11). The 911 call, Freitas's statements to emergency personnel, expert medical testimony, medical records, photographs, and Bell's own admissions during his phone calls supported the September 23 assault and unlawful imprisonment charges (Counts 1-3). Medical testimony and Bell's recorded admissions supported the assault count for the February 17, 2006 dislocated shoulder. Bell's recorded admissions and Freitas's co-worker testimony concerning her forehead injury supported the third degree assault charge involving the dinner plate.

No such corroborating evidence existed to support the rape charge. When the jury listened to the audio exhibits and heard Freitas recite the wrongs she had suffered from Bell, she never mentioned a rape. In contrast to the other counts, the rape charge depended entirely on Freitas's testimony and the willingness of the jury to believe her. It is abundantly clear the jury was willing to

believe her on the strength of the evidence supporting the other thirteen counts. The prosecutor relied on those other charges to build the case for Freitas's veracity, intoning count by count that the jury could find the elements proven because Freitas "told us so." When the prosecutor came to the rape allegation at the end of his argument he reminded the jury of evidence supporting her credibility on the other charges. The prosecutor also referred to the uncharged anal rape allegation—evidence admitted for the Count 1 aggravating circumstance allegation. In essence, the prosecutor's proof of the Count 14 rape consisted of Counts 1 through 13. In weighing a renewed severance motion, the trial court would undoubtedly have found the first factor sharply prejudicial to Bell.

The second factor, clarity of defenses, also favored severance. Bell denied injuring Freitas's shoulder, assaulting her with a plate, or strangling her. Yet he testified he did not challenge her accusations on these points during his phone calls because he did not want to argue with her. He avoided argument in the hope that Freitas would "drop the charges." 9RP 101-02. He similarly admitted he lied to Freitas, telling her he wanted to marry her. 9RP 115. Bell's defense to the assault charges thus involved his concession that he was not truthful in his phone conversations with Freitas, conduct the prosecutor characterized as "hypocritical

venom.” Bell’s defense to the assault charges thus undermined his credibility regarding his rape defense. The jury was more likely to conclude Bell’s denial of the rape was self-serving and not credible because he admitted dissembling to Freitas for self-serving purposes.

The third factor also supports severance despite the instruction to “decide each count separately.” The prosecutor urged the jury to convict Bell of rape on the basis of evidence admitted for the Count 1 aggravating circumstance. The prosecutor argued, “In fact, he did it again. The next time, he raped her anally and she still stayed with him and she never told anybody.” 10RP 110. In addition, the court instructed the jury it could consider “prior assaults” in weighing Bell’s self-defense claim related to Count 3 and to find a pattern of abuse in connection with Count 1. CP 207. The jury could thus rely on Counts 12-14, the 2006 “prior assaults”, to convict Bell on Counts 1 and 3, the 2007 assault charges. The court’s instructions invited the jury to consider evidence interchangeably; the admonition to decide charges “separately” therefore carried little meaning. As in Sutherby, the jury was not instructed that evidence of one crime could not be used to decide guilt for a separate crime.

The fourth factor would have favored severance because there was no cross admissibility between the rape charge and the other counts.

The crimes charged in Counts 1-13 would not be admissible in a separate rape trial. In a domestic violence prosecution, evidence of prior assaults may be admitted as relevant to a recanting victim's credibility. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). Prior assaults may also be admitted to show a victim's fearful state of mind and thus explain the delayed reporting of a crime, if the delay becomes an issue at trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Neither of these circumstances was present at Bell's trial. Freitas never recanted her rape accusation—the *Magers* rationale for admitting prior acts does not apply. Freitas testified she delayed reporting the rape because she loved Bell and continued to have sex with him because she "wanted to." Thus, the Fisher rationale also does not apply. In addition, Counts 1-11 were alleged to have occurred a year or more *after* the alleged rape.

Conversely, the rape allegation would be excluded from trials of the other charges because it is irrelevant and highly prejudicial. Nothing in the record suggested the alleged rape caused Freitas to recant an allegation or delay reporting a crime.

And as Sutherby recognized, the potential for prejudice is “at its highest” when other sex crimes are admitted into evidence.

A renewed motion should also have resulted in severance of the 2006 assault charges from the 2007 counts. The later allegations would not be admissible to prove events occurring over a year earlier. In addition, the state’s evidence supporting the 2006 charges was weaker than for the 2007 counts. Unlike the 2007 counts, the earlier charges lacked 911 evidence, photographs, triage evidence, and Freitas’s repeated telling of her account to emergency and medical personnel.

There is a reasonable probability the outcomes in trials on severed counts would have been different. It is questionable whether the state would even have pursued the rape charge standing alone due to the paucity of evidence supporting it. Convictions in a separate trial of the 2006 assaults charges cannot be assumed: the state would have to overcome the staleness of the accusations and lack of compelling evidence—such as the 911 tape—in order to secure a unanimous verdict to convict. The conglomeration of all fourteen counts in one trial severely prejudiced Bell’s defense. As in Sutherby, defense counsel’s failure to request severance constituted ineffective assistance.

Counts 12-14 (the 2006 rape and assault counts) should be reversed for the reasons argued above. Counts 1-11 (the 2007 charges) should also be reversed because Bell was prejudiced by the admission of Freitas's rape testimony. As noted in Sutherby, the risk of prejudice due to the admission of other sex crimes is "at its highest." 165 Wn.2d at 886.

b. Counsel's Failure to move for a Separate Proceeding for the Count 1 Aggravating Circumstance Prejudiced Bell.

RCW 9.94A.537(4) provides for separate proceedings when the domestic violence pattern of abuse aggravator is alleged:

the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

Some of the evidence supporting the state's pattern of abuse allegation was admissible for the Count 1 assault charge, and some was not. The trial court concluded that prior assaults were admissible on the issue of Bell's self-defense claim asserted for Count 3 (punching Freitas). Counts 1 and 3 were part of an unbroken sequence on September 23, 2007. However, as previously argued, the charged and uncharged rape allegations

were not “otherwise admissible” to prove Count 1. And the uncharged anal rape, admitted to prove the aggravating circumstance, was extraordinarily prejudicial to Bell’s defense on the charged Count 14 rape.

If defense counsel had moved for a separate proceeding on the aggravating circumstance, the trial court could and should have required the state to elect to drop the “sexual abuse” alternative from its pattern of abuse allegation or offer its sexual abuse evidence in a separate proceeding under RCW 9.94A.537(4). Such a procedure would have prevented the unfair prejudice wrought by introducing the uncharged and irrelevant anal rape allegation at Bell’s trial. Uncharged sexual misconduct would be prejudicial in any circumstance; in Bell’s trial the prejudice was amplified by the fact the accused was on trial for rape.

c. Counsel’s Failure to Object to the September 23<sup>rd</sup> Triage Evidence Prejudiced Bell.

The triage nurse’s notes from September 23, 2007 and Dr. Tewodros’s testimony about the notes should have been excluded under the Confrontation Clause. Some of the evidence was also inadmissible hearsay under ER 802. Bell was denied effective assistance when his attorney failed to object to this evidence.

The Sixth Amendment Confrontation Clause prohibits the admission of testimonial hearsay. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Hopkins, 134 Wn. App. 780, 790, 142 P.3d 1104 (2006). Crawford's rule against out-of-court statements applies when (1) a statement is offered for the truth of the matter asserted (hearsay), (2) the statement is testimonial, and (3) the defendant has not had an opportunity to cross examine the declarant. Hopkins, at 790. "Testimonial" statements include those "made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." Hopkins, at 790-91 (citing Crawford, 541 U.S. at 51-52).

The state charged Hopkins with child rape molestation. A nurse examined the victim and produced a report that detailed Hopkins' sexual abuse. The nurse did not testify; her supervising doctor testified in her place and conveyed the contents of her report. Hopkins held the doctor's testimony violated Crawford because the report was testimonial and the Hopkins did not have the opportunity to cross-examine the nurse. Hopkins, at 790-91.

State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009),<sup>8</sup> reached a different result in different circumstances. In *Lui* the trial court admitted a medical examiner's expert opinion of a homicide victim's cause of death. The expert had not performed the autopsy, but he supervised the examiner who conducted the autopsy and he reviewed the report and the evidence supporting it. He discussed with the other examiner the report's wording to describe the victim's injuries. He signed the report, indicating he agreed with its findings and found it accurate. *Lui*, 153 Wn. App. At 306-07. Emphasizing that the examiner offered his own expertise and independent review of the autopsy materials, the court rejected Lui's Crawford challenge because the expert was not acting as a "mere conduit" for the testimonial assertions of another. Lui, at 320-21.

The triage notes admitted at Bell's trial should have been excluded under Crawford. The notes were testimonial because an objective triage nurse would know those statements would be available for use at a later trial. The use of medical testimony in trials is commonplace, particularly in criminal trials, and most particularly in criminal trials involving domestic violence. See e.g., State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007)

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<sup>8</sup> A petition for review in Lui, No. 84045-8, has been set for accelerated consideration on March 30, 2010.

(statements identifying domestic violence perpetrator are admissible under medical diagnosis hearsay exception). The nurse was aware of the ongoing domestic violence investigation; the notes indicate “yes” for domestic violence and also record the police were “on scene.” Ex. 12, at 14. The record shows Officer Norton was at the hospital because he interviewed Freitas immediately after the triage exam. In addition, the triage procedures undoubtedly include an investigative component extending beyond the collection of information for medical diagnosis. The DV questionnaire probes for crime related information unrelated to current medical condition.

The notes and Tewodros’s testimony about them were not admissible under *Lui* because Tewodros did not supervise or participate in the triage examination, and he had no involvement in drafting the notes or filling out the related forms. Tewodros simply read from the notes. His testimony was a “mere conduit for the testimonial assertions” of the triage nurse. *Lui*, at 320. In these circumstances the trial court would have excluded the testimony and notes on the basis of a timely Crawford objection. All of the notes were inadmissible as a violation of Bell’s confrontation right. Freitas’s responses to the domestic violence questionnaire were

also inadmissible hearsay under ER 802 because they were not made for the purpose of medical diagnosis.

Defense counsel's failure to object to this evidence affected the outcome. As discussed above, the state's rape charge was unique among the fourteen counts for lacking any corroborative evidence to support Freitas's testimony. Her affirmative answer to the "unwanted sex" question on the domestic violence questionnaire implied her rape testimony was credible by virtue of repetition. See *State v. Alexander*, 64 Wn. App. 147, 152-53, 822 P.2d 1250 (1992) (testimony that victim's description of sex abuse "remained consistent" impermissibly bolstered victim's credibility). Given the absence of other evidence to support the rape count, there is a strong probability that Freitas's answer on the questionnaire influenced the guilty verdict on Count 14.

The triage evidence similarly reinforced by repetition Freitas's account of the September 23, 2007 events, as discussed in the following section.

For all these reasons, counsel's deficient performance prejudiced Bell. His convictions should be reversed and the case remanded for a fair trial.

2. THE COURT ERRED BY ADMITTING NORTON'S HEARSAY TESTIMONY REPORTING FREITAS'S STATEMENTS ON SEPTMEBER 23, 2007.

Over defense counsel's timely hearsay objection, the court admitted Officer Norton's testimony reporting what Freitas told him at Northwest Hospital immediately after the triage exam. Norton interviewed Freitas an hour and twenty minutes after Freitas called 911. Freitas's statements to Norton were undoubtedly offered for the truth of the matters asserted and were therefore inadmissible hearsay. ER 801, 802. The state did not lay a foundation to admit this evidence under a hearsay exception.

A trial court's ruling on the admissibility of evidence should be reversed when the court abuses its discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Darden, 145 Wn.2d at 619. The admission of Norton's hearsay was manifestly unreasonable without a hearsay exception.

This evidence combined with the triage evidence to improperly inform the jury that Freitas twice repeated her accusations against Bell after arriving at the hospital. The inevitable effect was to strengthen Freitas's credibility by imbuing her testimony with the virtue of consistency. The state

understandably took full advantage of the situation, reminding the jury of Freitas' several consistent statements in the aftermath of her 911 call and thus declaring, "The chain was unbroken." 10RP 96.

There is an unbroken thread of prejudice stemming from the repetition of Freitas's account. The repetition strengthened the state's case regarding the September 23 charges. And as previously argued, to obtain convictions on all fourteen counts it was incumbent on the state to establish Freitas's credibility in the context of the stronger charges so that the jury would believe her on the weaker charges. The repetition evidence concerning Freitas's September 23 statements facilitated that strategy.

3. BELL WAS DENIED HIS RIGHT TO UNANIMOUS JURY VERDICTS ON COUNTS 4-8 BECAUSE INSUFFICIENT EVIDENCE SUPPORTS EACH ALTERNATIVE MEANS OF WITNESS TAMPERING.

Washington protects the constitutional right to a unanimous jury verdict. *State v. Lobe*, 140 Wn. App. 897, 903, 167 P.3d 627 (2007) (citing Wash. Const. art. 1, § 21). When alternative means of committing a crime are presented to a jury, "[u]nanimity is not required, ... as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means." *Lobe*, at 905 (quoting *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (second emphasis added)).

There are three alternative means of committing witness tampering, by attempting to induce a witness to “(1) testify falsely or withhold testimony, (2) absent him- or her-self from an official proceeding, or (3) withhold information from a law enforcement agency.” *Lobe*, at 902-03 (citing RCW 9A.72.120(1)(a)-(c)). The Court of Appeals reversed *Lobe*’s two tampering convictions because the jury was instructed on all three alternatives, but the state presented evidence and argument for only two.

Addressing *Lobe*’s first tampering count, the court stated there was sufficient evidence for the two means argued by the state. *Lobe*, at 906. However, “no evidence or argument was resented as to the third means charged and described in the jury instructions.” The court reversed, observing that the state “is invoking two different presumptions to establish unanimity.” *Lobe*, at 906. In order to affirm the conviction, “we would be required to both (1) find unanimity based on the substantial evidence supporting each of two alternative means, and (2) *presume that the jury relied only on the alternatives for which evidence was presented.*” *Lobe*, at 906 (emphasis added).

In the context of a case where the jury was also improperly instructed on another similar count<sup>9</sup> and

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<sup>9</sup> *Lobe*’s second tampering count involved a similar alternative means error. The court reversed both counts. *Lobe*, at 906-07.

where simple changes in the jury instructions could have avoided the error, we find there is too unstable a foundation to permit us to affirm the conviction.

*Lobe*, at 906.

Under *Lobe* and Kitchen, Bell was denied his right to unanimous jury verdicts for the tampering counts because the evidence was insufficient to support each alternative means presented to the jury.<sup>10</sup>

During the Count 4 charging period, Bell's efforts to affect Freitas's testimony focused on the possibility she could contact the prosecutor and tell him "nothing happened." 6RP 57; 9RP 75-76. Bell told Delano she could "retract" her allegations, and she could "take it back . . . and drop it." Ex. 3. Thus, Bell urged Delano to tell Freitas to "call the prosecutor." Ex. 3. This evidence was relevant to the "testify falsely or withhold testimony" means of committing witness tampering, but it was insufficient to support the "absent herself" alternative.

The state's evidence supporting Count 5 (October 4) consisted of Bell's request to his mother, "Can you like offer her

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<sup>10</sup> Bell did not raise this issue in the trial court. However, a manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Errors are "manifest" for purposes of RAP 2.5(a)(3) when they have "practical and identifiable consequences in the trial of the case." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

some money so she can drop it?” Ex. 3. Bell had used the phrase “drop it” three days earlier when he told Delano on October 1 that Freitas could “retract” her allegations and “take it back . . . and drop it.” Ex. 3. There was no evidence under Count 5 to support the “absent herself” means of committing witness tampering.

Count 6 relates to October 12. In mid-October Bell was still focused on persuading Freitas to retract her allegations. He suggested Delano offer her “five bills” and stated, “she could call in and be like . . . I want to take it all back.” 6RP 121. There was insufficient evidence under Count 6 to convict Bell under the “absent herself” means of witness tampering.

Count 7 covers November 11. After the passage of a month, Bell’s strategy had shifted. Bell explained to Delano that if Freitas “doesn’t show”, the prosecution would not be able to “move forward.” Ex. 5. The state’s evidence was relevant to the “absent herself” means of witness tampering; however, the state did not offer sufficient evidence to convict Bell according to the “testify falsely or withhold testimony” means.

The record relating to the Count 8 charging period, November 20 through December 3, confirms Bell had shifted to contemplating that Freitas might absent herself from a proceeding. He told Delano that if Freitas did not “show up”, “All that shit goes

away.” Ex. 6. There was insufficient evidence to convict Bell under the “testify falsely or withhold testimony” means.

The jury instructions presented two alternative means of committing witness tampering for each of Counts 4-8. However, the state’s evidence for each count supported only one of the alternatives. As in *Lobe*, to affirm these convictions would require the court to “presume that the jury relied only on the alternatives for which evidence was presented.” Lobe and Kitchen preclude such a presumption. Bell’s convictions under Counts 4-8 should be reversed.

4. BELL’S MULTIPLE WITNESS TAMPERING CONVICTIONS FOR A SINGLE COURSE OF CONDUCT VIOLATE CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS.<sup>11</sup>

Under the double jeopardy provisions of the United States and Washington constitutions, a person may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006).

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<sup>11</sup> Bell did not raise this issue in the trial court, but it is a constitutional challenge that may be raised for the first time on appeal. State v. Hall, 147 Wn. App. 485, 488 n.1, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (2009). In Hall, this court rejected the defense argument that double jeopardy protections preclude multiple tampering convictions from a course of conduct directed to a single witness, but the Supreme Court granted review. Oral argument was heard January 26, 2010.

The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). In determining the unit of prosecution, a court must interpret the statute as it is written, and not construe the statute in a manner the court determines to “best accomplish [the] evident statutory purpose.” Id. If the legislature fails to define the unit of prosecution or its intent is unclear, any ambiguity must be resolved against turning a single violation into multiple offenses. Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955); Tvedt at 711. Review is de novo. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). The court analyzes the statute and its history, and examines the facts in a particular case to determine if more than one unit of prosecution is present. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

a. The Witness Tampering Statute Is Ambiguous.

A statute is ambiguous if a reasonable person can interpret it in more than one way. State v. Watson, 146 Wn.2d at 954-55, 51 P.3d 66 (2002). Words in a statute are given their plain and ordinary meaning, unless a contrary intent is evidenced in the statute. State v. Lilyblad, 163 Wn.2d 1, 7, 177 P.3d 686 (2008).

The witness tampering statute, RCW 9A.72.120 (1), provides in relevant part:

A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings;

RCW 9A.72.120(1) (emphasis added).

The statute does not expressly define either an “act” or a “course of conduct” as the applicable unit of prosecution. The statute addresses behavior that a person could take to thwart the administration of justice in an official proceeding, and criminalizes the conduct of attempting to induce such behavior. It focuses on a particular “witness or person,” thereby prohibiting the attempt to influence *a single individual*. In addition, the statute addresses “any official proceeding,” meaning “every” official proceeding or “all” official proceedings. See Sutherby, 165 Wn.2d at 882. Thus, the statute is fairly construed as prohibiting a course of conduct – the obstruction of justice – directed at a particular individual relating to any and every official proceeding. This construction is consistent with the analysis in State v. Root, 141 Wn.2d 701, 707-10, 9 P.3d 214 (2000). Root held the unit of prosecution under RCW 9.68A.040 (sexual exploitation of

a minor) was the course of conduct of posing a child in a photo session, as opposed to each photograph or each pose made during the session. See also, People v. Salvato, 285 Cal. Rptr. 837, 234 Cal. App.3d 872 (1991) (California witness tampering statute addresses a course of conduct).

Under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses. Tvedt, 153 Wn.2d at 711. The language of RCW 9A.72.120 does not unambiguously show legislative intent to punish a single act, rather than a course of conduct. Where the statute is ambiguous and Bell's interpretation is reasonable, Bell's interpretation should prevail.

The constitutional prohibitions against double jeopardy preclude: Bell's five convictions for a single course of conduct directed toward a single witness. Four of the five tampering convictions should therefore be reversed. Varnell, 162 Wn. 2d at 172.

- b. State v. Hall Is Not On Point Because Bell Was Convicted Of Four Witness Tampering Counts For Contacts With Third Parties.

State v. Hall rejected the argument that the unit of prosecution is a course of conduct toward a single witness. "The statute prohibits any attempt to induce a witness or potential witness to do any of the actions enumerated." Hall, at 489. The court thus affirmed Hall's three tampering convictions based on

telephone calls to his girlfriend during which he directly asked her to either not testify or testify falsely. Hall, at 487.

Division Two followed Hall in State v. Thomas, 151 Wn. App. 837, 214 P.3d 215 (2009). Thomas affirmed the eight counts of witness tampering based on thirty-six calls he made to his girlfriend over an eight-day period. Citing Hall, the court explained the eight counts were supported by separation of time as well as Thomas's increasing coercion directed to his girlfriend and the evolving story he suggested she tell. Thomas, at 845.

Unlike those circumstances, four of Bell's five tampering convictions were not based on direct contact. As the prosecutor acknowledged, "for most of the witness tampering charges, Jaimi was in the dark." 10RP 69. While Count 4 involved contact with Freitas (Bell's voice message asking her to call the prosecutor), the other charges rely on Bell's communications with *others* (primarily Delano), asking them to contact Freitas.

A conviction for witness tampering does not require actual contact or communication with a witness. In State v. Williamson, 131 Wn. App. 1, 86 P.3d 1221 (2004), the court upheld the conviction even though a third-party message was never conveyed to the witness. Actual contact with the witness is not required because the tampering statute criminalizes any "attempt" to alter a

witness's testimony. Citing RCW 9A.28.020(1) (defining criminal "attempt") the court explained that a defendant's substantial step toward inducing a witness not to testify satisfies the elements of witness tampering. Williamson, at 6.<sup>12</sup>

The question presented in Bell's case, one not answered by Hall, Thomas, or Williamson, is whether every "substantial step" can support a separate tampering count, even if the witness is never contacted. To comport with the double jeopardy limitation on the state's prosecuting power, the answer must be that multiple acts that fail to produce any contact with a witness do not support multiple tampering charges. To hold otherwise would give the state near unlimited authority to maximize a defendant's offender score (as in Bell's case) by replicating "attempt" crimes whenever a defendant has engaged in a course of conduct toward a failed criminal objective.<sup>13</sup>

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<sup>12</sup> State v. Whitfield, 132 Wn App. 878, 897-98, 134 P.3d 1203 (2006), also cited RCW 9A.28.020(1) in affirming two tampering convictions. The court held the defendant's two conversations with a witness, where he urged her to testify falsely, were "substantial steps" supporting separate tampering counts.

<sup>13</sup> To illustrate the point, if the state's position is correct, a jewel thief who obtains lock-picking tools on Monday, a ski mask on Tuesday, a getaway car on Wednesday, and a plane ticket to Bolivia on Thursday could thus be convicted of five attempted burglary charges when caught trying to break into the jewelry store on Friday.

Double jeopardy principles require that a line be drawn in tampering cases to curb the state's discretion to replicate charges. Where multiple steps fail to produce a single contact with the witness, the line is drawn at one count.

5. THE PATTERN OF ABUSE AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE.<sup>14</sup>

a. "Psychological Abuse" Provides No Fair Warning Of What Conduct To Avoid And Is Subject To Arbitrary Enforcement.

A statute is void for vagueness under the Fourteenth Amendment if, "(1) the statute 'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed'; or (2) the statute 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (quoting *Lorang* at 30). In practical terms, a statute is vague "if persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." *Williams*, at 204 (quoting *State v. Lee*, 135 Wn.2d 369, 393, 957 P.2d 741 (1998)). The Due Process Clause forbids statutes "that contain no standards and

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<sup>14</sup> Bell did not raise this issue in the trial court. A vagueness challenge to a criminal statute may be raised for the first time on appeal as a potential manifest error affecting a constitutional right. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30 n.6, 992 P.2d 496 (2000); RAP 2.5(a)(3).

allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” Williams, at 205 (quoting Lorang, at 31).

Washington courts “are especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.” Williams, at 204 (quoting Lorang, at 31.)

Williams held that Washington’s former harassment statute<sup>15</sup> was unconstitutionally vague because it criminalized threats to harm a person’s “mental health.” 144 Wn.2d at 202-03. The statute did not define “mental health”, and therefore did not distinguish between “threats which cause others mere irritation or emotional discomfort” and “threats which cause others to suffer a diagnosable mental condition[.]” 144 Wn.2d at 204.

[T]he average citizen has no way of knowing what conduct is prohibited by the statute because each person's perception of what constitutes the mental health of another will differ based on each person's subjective impressions. To avoid this quandary is the very reason the vagueness doctrine exists.

144 Wn.2d at 206. See also Lorang, 140 Wn.2d at 30-31 (city’s telephone harassment ordinance prohibiting calls made “without purpose of legitimate communication” is unconstitutionally vague).

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<sup>15</sup> RCW 9A.46.020(1).

The pattern of abuse aggravating circumstance for domestic violence offenses is defined in relevant part as follows:

The offense was part of an ongoing pattern of *psychological*, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

RCW 9.94A.535(3)(h)(i) (emphasis added). The statute fails under Williams, because “psychological abuse” and threats to “mental health” are identical twins.

“Psychological abuse” is not defined in RCW 9.94A.535 or elsewhere in Chapter 9.94A. In the absence of a statutory definition, words are given their ordinary meaning ascertained from a standard dictionary. State v. M.C., 148 Wn. App. 968, 971, 201 P.3d 413 (2009). “Psychological” means “relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind.” Webster's Third New Int'l Dictionary, 1833 (1993). The many definitions of “abuse” include:

1a: to attack or injure with words: reproach coarsely: disparage. . . . 4: to use or treat so as to injure, hurt, or damage: maltreat . . . treat without consideration or fairness. . . .

Webster's Third New Int'l Dictionary, 8 (1993).

The pattern of abuse aggravating circumstance is unconstitutionally vague because “psychological abuse” is impossibly broad and subjective. People of common intelligence

must guess at its meaning, and, as is poignantly clear from Bell's trial, it is subject to arbitrary, ad hoc enforcement. According to the state, Bell should have years added to his sentence because he told Freitas he loved her, and he didn't mean it.

It is impossible to determine what the jury may have considered "psychological abuse." Freitas described numerous examples of coarse, disparaging words used by Bell, and numerous occasions when he treated her "without consideration or fairness." These incidents all influenced her mind.

Freitas found offensive Bells' coarse comment to his friend: "You don't ask her to hand you anything. You ask me to tell her to hand it to you." 8RP 18. She resented the way Bell treated her by repeatedly having loud, messy, smoking friends over. 8RP 21-22. In February 2006 she became angry when Bell agreed to host the friend of a friend without first consulting her. 8RP 21-23. A juror might conclude a pattern of repeatedly disregarding another's concerns qualifies as psychological abuse. Bell disparaged Freitas in the ketchup episode. 8RP 31. He ignored her and went about his business doing his laundry in her apartment, even as she demanded her key. 8RP 46. He laughed after she fell off the balcony. 8RP 53. He handled her dog in a manner that upset her. 8RP 88. After punching and allegedly strangling Freitas he asked

her “Why do you have to act like that?” 8RP 95. According to Freitas, Bell coerced her to drink a shot of rum. 8RP 102. A rational juror could find any of these acts met the ordinary meaning of “psychological abuse.”

The state’s theory went in yet a different direction. In the state’s view, Bell abused Freitas because he told her insincerely he loved her and wanted to marry her. 10RP 101-06.

This case highlights the Due Process concerns arising from a vague criminal statute. It is impossible for the ordinary citizen to predict what conduct may increase a prison sentence as “psychological abuse.” The statute provides a blank slate for prosecutors to argue in favor of a special verdict for any manner of disagreeable behavior. The state’s conception of “psychological abuse” can easily be tailored case-by-case, even to the point where the words “I love you” are punishable by six years in prison.

The special verdict should be reversed because RCW 9.94A.535(3)(h)(i) is unconstitutionally vague.

b. A Statutory Aggravating Circumstance May Be Challenged As Unconstitutionally Vague.

In 2003 the Washington Supreme Court held that sentencing procedures governing the imposition of exceptional sentences were not susceptible to vagueness challenges. State v. Baldwin, 150

Wn.2d 448, 78 P.3d 1005 (2003). The court examined those procedures under former RCW 9.94A.120 and former RCW 9.94A.390 (recodified as RCW 9.94A.505 and RCW 9.94A.535 respectively) and found they included no liberty interest to which the vagueness doctrine could be applied. Baldwin, at 459-61.

The court based its decision on the discretionary nature of then existing exceptional sentencing procedures. *Baldwin* explained that exceptional sentences could be supported by both statutory and nonstatutory factors. Thus, the statutory factors were “illustrative only.” Baldwin, at 458-59. *Baldwin* emphasized that a sentencing court was “free to exercise discretion in fashioning a sentence” and the exceptional sentencing statutes provided no “substantive predicates” dictating a particular outcome. Baldwin, at 460. The court concluded the statutes created “no constitutionally protectable liberty interest.” *Baldwin*, at 461.

Baldwin is not binding in this appeal because it applies to a sentencing regime that no longer exists. The discretionary sentencing procedures analyzed by *Baldwin* were invalidated by Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).<sup>16</sup> Under Blakely, facts that increase the penalty for a

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<sup>16</sup> Baldwin's post-Blakely validity is an issue pending in State v. Stubbs, No. 81650-6, oral argument to be heard March 9, 2010.

crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 124 S.Ct. at 2536-38. That rule is implemented in RCW 9.94A.535 and RCW 9.94A.537(3). Facts that may legally support a sentence above the standard range are limited to an “exclusive” statutory list. RCW 9.94A.535(3). Thus, the discretionary procedures examined and relied on by *Baldwin* are gone. The current statutes indeed guarantee a specific sentencing outcome based on a substantive predicate. The guarantee is a standard range sentence. The predicate is a criminal conviction. Without an additional special verdict finding a *statutory* aggravating circumstance, there can be no exceptional sentence. Baldwin does not preclude Bell’s vagueness challenge because its holding applies to a statutory mechanism unrecognizable under current sentencing law.

6. THE PATTERN OF ABUSE AGGRAVATING CIRCUMSTANCE IS OVERBROAD.<sup>17</sup>

A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. Williams, at 206 (quoting Lorang, at 26-27). Overbreadth doctrine may invalidate a law on its face if the law is substantially overbroad. *Id.* In

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<sup>17</sup> Bell overbreadth claim may be raised for the first time on appeal. State v. Regan, 97 Wn.2d 47, 50, 640 P.2d 725 (1982).

determining overbreadth, a court first determines whether a statute reaches a substantial amount of constitutionally protected conduct. Id. Criminal statutes receive particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct. Id. Speech will be protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” Id.

Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny. Id. The government must show impairment of a constitutionally protected right is necessary to serve a compelling state interest. Williams, at 208-09, 211.

Williams held that Washington’s harassment statute, criminalizing threats to harm a person with respect to his “mental health,” was overbroad. Williams, at 212. Statute regulates protected speech because such acts are not “true threats” expressing intent to inflict bodily harm, and they do not present a clear and present danger of imminent lawlessness. Williams, at 208-11. Legislative finding that prevention of personal harassment is an “important government objective” did not satisfy the compelling state interest standard. Williams, at 211.

Overbreadth analysis in the present case is straightforward. RCW 9.94A.535(3)(h)(i) reaches a substantial amount of speech because the ordinary meaning of “abuse” involves speech directly. Furthermore, this speech is protected, as there is nothing in the statute limiting “psychological abuse” to true threats, and “clear and present danger” principles do not apply in this context. The burden is therefore on the government to establish a compelling state interest in regulating protected speech that spans a broad spectrum of human behavior, from insults to false declarations of love and devotion. The state cannot meet this burden. Because “psychological abuse” reaches a substantial amount of protected speech, RCW 9.94A.535(3)(h)(i) is constitutionally overbroad both on its face and as applied in Bell’s case. The special verdict should be reversed.

7. THE SPECIAL VERDICT SHOULD BE REVERSED  
BECAUSE BELL WAS DENIED HIS RIGHT TO A  
UNANIMOUS JURY VERDICT.

An accused has the right to a unanimous jury verdict based on the same act proved beyond a reasonable doubt. State v. York, 152 Wn. App. 92, 94, 216 P.3d 436 (2009). When the prosecution presents evidence of multiple acts that could form the basis for a criminal charge, the state must elect which act it relies on for a conviction, or the court must instruct the jury to agree on a specific

act. York, at 94 (citing State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007)). As the number of acts increases, so does the risk of a non-unanimous verdict:

“The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them....”

York, at 95 (quoting State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984)). The right to a unanimous verdict applies to an aggravating circumstance submitted to a jury. State v. Price, 126 Wn. App. 617, 647, 109 P.3d 27 (2005). Failure to give a unanimity instruction in a multiple acts case may be raised for the first time on appeal. Kitchen, 110 Wn.2d at 411.

Prejudice is presumed in a multiple acts case where there is neither an election nor a unanimity instruction. Coleman, at 510. A unanimity error requires reversal unless the error is harmless beyond a reasonable doubt. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, at 512.

With respect to the aggravating circumstance alleged with Count 1, the jurors in Bell’s trial were required to determine whether there was a “pattern of psychological, physical, or sexual abuse” manifested by “multiple incidents” over a “prolonged period of time.”

The state did not elect which acts it relied on to prove the aggravator, and the jury was not instructed it must agree unanimously on specific acts. Each juror was thus free to settle on any combination of “psychological”, physical, or sexual acts; subject to her individual conception of how many acts form a “pattern”; subject to her additional individual opinion of what constitutes a “prolonged” period of time. The possibility that Bell received a unanimous verdict is remote.

Some jurors may have answered “yes” to the special verdict because they agreed with the prosecutor that Bell’s declarations of love after he was arrested qualified as psychological abuse. Others may have disagreed and concluded the phone calls from the jail did not satisfy the “prolonged period of time” element. Some jurors may have settled on Freitas’s two rape allegations, while others may have disagreed in the belief that more than two incidents are required to form a “pattern.” Various jurors may have concluded the absence of evidence establishing *when* the alleged rapes occurred precluded a “prolonged period of time” finding. Some jurors may have mixed and matched different categories of evidence, perhaps settling on one alleged rape, one alleged assault, and Bell’s treatment of Freitas’s puppy to find a “pattern of psychological, physical, or sexual abuse.” The possible

combinations of acts the jurors could have relied on appear limitless, especially because it is impossible even to identify the acts the jury may have considered as “psychological abuse.”

The violation of Bell’s right to a unanimous verdict is presumed prejudicial. The error was not harmless for numerous reasons that have been addressed in this brief. At the outset, it is not even feasible to conduct a harmless error analysis because, as explained above, it is impossible to identify the universe of acts the jurors could have relied on to answer “yes” to the special verdict query. Furthermore, there is no question a rational juror could have a reasonable doubt regarding some of the incidents alleged by the state. For example, a juror could doubt that Bell ever raped Freitas: there was no corroborating evidence, Freitas did not report these incidents, and she never mentioned them in the recorded telephone conversations when she confronted Bell with the things he had done to her. Or, a juror could rationally doubt that Bell’s declarations of love qualified as psychological abuse, and so forth.

The denial of Bell’s right to a unanimous jury verdict was not harmless. The special verdict should be reversed.

8. THE SPECIAL VERDICT FORM PROVIDED AN ERRONEOUS DEFINITION OF THE AGGRAVATING CIRCUMSTANCE.

A trial court errs by failing to accurately instruct the jury as to each element of a charged crime. State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007).<sup>18</sup> “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Harmless error analysis applies to the omission or misstatement of an element in jury instructions. Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). The reviewing court examines “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” 527 U.S. at 19.

The special verdict form in Bell’s trial provided an erroneous definition of the Count 1 aggravating circumstance. The form required the jury to determine whether there was a pattern of abuse “prior to” the commission of the underlying assault. CP 212. This language strayed from the statutory definition requiring a finding

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<sup>18</sup> Failure to instruct the jury of every element of a charged offense is an error of constitutional magnitude that may be raised for the first time on appeal. Williams, 136 Wn. App. at 492 n.3.

that the underlying crime is “part of” a pattern of abuse. RCW 9.94A.535(3)(h)(i).

Bell was prejudiced by the erroneous definition because the record contains evidence “that could rationally lead to a contrary finding” under the correct definition of the aggravating circumstance. Freitas testified she stopped using cocaine a year before September 23, 2007. She stated Bell also reduced his consumption during that period. Significantly, Freitas did not testify to any specific instance of abuse during this twelve-month interval. A juror could rationally conclude there was a connection between the changed personal habits of these individuals and the absence of incidents worthy of the state’s attention during this period. This evidence suggested the pattern established in 2006, if any, did not extend into 2007. A properly instructed juror could have concluded that the Count 1 assault was not “part of” a pattern of abuse. The trial court’s failure to include the statutory “part of” language was not harmless. The special verdict should be reversed.

9. INSTRUCTION 43 IMPERMISSIBLY COMMENTED ON THE EVIDENCE.

Instruction 43 commented on the evidence because it suggested to the jury that the 2006 incidents alleged by Freitas, charged and uncharged, were proven facts. It also dovetailed with

the erroneous special verdict definition to suggest the state had proven the Count 1 aggravating circumstance.

Washington's constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. It is thus error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn. App. 587, 592-93, 141 P.3d 92 (2006). The court's personal feelings need not be expressly conveyed to the jury; it is sufficient if they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The prohibition forbids comments that permit the jury to infer whether the judge believed or disbelieved certain testimony. State v. Eaker, 113 Wn. App. 111, 117, 53 P.3d 37 (2002). Whether a comment on the evidence is improper depends on the facts and circumstances in each case. Eaker at 117-18.

Judicial comments are presumed prejudicial. The burden is on the state to show the record affirmatively shows no prejudice could have resulted. Levy, at 723.

[T]he burden is not carried, and the error therefore prejudicial, where the jury *conceivably could have determined the element was not met* had the court not made the comment.

134 Wn. App. at 593 (emphasis added).<sup>19</sup>

Instruction 43 stated, “Evidence has been introduced in this case on the subject of prior assaults against Jaimi Freitas. CP 207 (emphasis added). The instruction further informed the jury that the “prior assaults” could be considered by the jury “to show an ongoing pattern of psychological, physical or sexual abuse against Jaimi Freitas by the defendant.” CP 207.

The instruction’s reference to “the subject of prior assaults” applies to the 2006 incidents described by Freitas.<sup>20</sup> This language informed the jury that the uncharged incidents described by Freitas and denied by Bell were in fact “assaults.” The language also informed the jury that the *charged* incidents described by Freitas and denied by Bell were in fact “assaults” and therefore *proved*. In effect, Instruction 43 communicated to the jury that Bell committed the 2006 crimes alleged in Counts 12-14, as well as the uncharged acts alleged by Freitas.

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<sup>19</sup> A claim alleging judicial comment on the evidence raises an issue involving a manifest constitutional error and may be raised for the first time on appeal. Levy, 156 Wn.2d at 720.

<sup>20</sup> This is so because Instruction 43 permitted the “prior assaults” to be considered in relation to Bell’s self-defense claim (Count 3) and to the pattern of abuse aggravator (Count 1). Counts 1 and 3 both pertain to September 23, 2007.

The instruction also dovetailed with the erroneous special verdict language (discussed in the previous section) to suggest the state had proven the Count 1 aggravating circumstance. In case the jurors pondered whether the 2006 incidents alleged by Freitas were sufficient to establish a qualifying pattern of abuse “prior to” the Count 1 assault, this instruction assured them the “prior assaults” were admitted to “show” such a pattern.

Instruction 43 was severely prejudicial because it suggested to the jury that the state had proven Counts 12-14 and the special verdict aggravating circumstance. These verdicts should be reversed.

10. INSTRUCTION 6 IMPERMISSIBLY COMMENTED ON THE EVIDENCE.

Instruction 6 advised the jury it could assess Bell’s credibility based on evidence that he had a previous criminal conviction. CP 169. It was error to give this instruction because the state did not present evidence that Bell had a previous conviction.

The error was prejudicial because it invited the jury to conclude Bell had been convicted for some of the acts described by Freitas that were not charged in this case. A juror could logically infer that the uncharged “prior assaults” alluded to in Instruction 43 had resulted in convictions. The state’s closing argument fueled

this misconception by referring to the anal rape allegation and the balcony incident as “counts . . . that occurred in Snohomish County . . . .” 10 RP 102.

From the instructional error, the jury could easily have concluded Bell was convicted of rape and assault in Snohomish County. Instruction 6 informed them they could discredit Bell’s testimony on the basis of such previous convictions. This error prejudiced Bell’s defenses to Counts 1-3 and 12-14. The verdicts on these counts should be reversed.

11. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT COUNTS 1-3 WERE THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

At sentencing, current offenses encompassing the same criminal conduct are counted as one crime in the calculation of a defendant’s offender score. RCW 9.94A.589(1)(a). Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*

Current offenses are treated as a single crime when “one criminal event is ‘intimately related or connected to’ the other.” State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (1990) (quoting State v. Dunaway, 109 Wn.2d 207, 214, 743 P.2d 1237

(1987)). “The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). “Intent” in this context “is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” Adame, at 811; accord State v. Flake, 76 Wn. App. 174, 180 n.4, 883 P.2d 341 (1994). Stated differently, “[t]he SRA's single criminal conduct analysis has approached a single intent as entailing numerous offenses committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective.” Flake, at 180 (quoting State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); *but see* State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007) (comparing statutory elements of assault and harassment)).

To determine whether separate crimes involve the same intent, courts often consider whether one crime furthered another. *E.g.*, State v. Anderson, 72 Wn. App. 453, 864 P.2d 1001 (1994) (assault and escape). However, it is not a requirement that two crimes further one another in order to find they involve the same intent. See Adame, at 810.

Counts 1-3, pertaining to 23 September 2007, qualified as same criminal conduct for sentencing purposes. These charges

involved the same victim and were committed at the same time and place. They involved the same intent, as the three crimes were intimately related to one another. Viewed objectively, Bell's intent to control and intimidate Freitas did not change. In addition, the assaults facilitated the unlawful imprisonment.

Bell's counsel was ineffective for failing to raise this issue before the sentencing court. The court would likely have found Counts 1-3 were the same criminal conduct for purposes of calculating Bell's offender score. The finding would have reduced his offender score for second degree assault from eleven to nine and for the remaining felony counts from ten to eight. This difference would not likely have affected the sentence imposed because the longest standard ranges (for the second degree assault counts) would have remained the same. However, if left uncured, the error will be prejudicial if Bell obtains relief in this appeal and faces resentencing on fewer felony counts.

D. CONCLUSION

This case originated in the events of September 23, 2007. Over time, the state became motivated to add charges. This included the charges for past acts alleged by Freitas and the five counts of witness tampering. The witness tampering charges appear particularly calibrated to bring Bell's offender score to the

maximum level for scoring purposes.<sup>21</sup> Although the state may have discretion to make these prosecuting decisions, it runs the risk that such a conglomeration of multiple, diverse charges will lead to reversible error. Such is the case presented here.

All of Bell's convictions are tainted by prejudice resulting from trying the 14 counts together. Freitas's two rape allegations were not relevant to Counts 1-13 and were severely prejudicial on those charges. The 2007 counts were not relevant to the 2006 counts. Count 14, the rape charge, would probably not have reached court, but for the state's other charges. The punishment imposed on Bell – a lengthy prison sentence and the requirement to register as a sex offender – calls for a fairer procedure.

The special verdict should be reversed on several grounds. RCW 9.94A.535(3)(h)(i) is vague and overbroad. The state cannot show a unanimous verdict because there are dozens of possible combinations the jurors could have used to answer "yes" on the special verdict form. The court provided an erroneous definition of the aggravating circumstance. Instruction 43 informed the jury it could consider "prior assaults" to "show" a pattern of abuse.

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<sup>21</sup> The state likely anticipated that Counts 1-3 would be scored as same criminal conduct, in which case Bell's offender score for second degree assault would be nine.

Bell's five witness tampering convictions should be reversed because he was denied his right to a unanimous verdict. The state's evidence was insufficient to support each of the alternative means presented to the jury. Bell's multiple tampering convictions also violate double jeopardy.

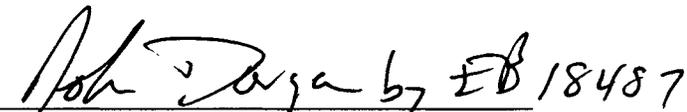
Additional errors affected the outcome of Bell's trial. The erroneous admission of Freitas's out of court statements improperly bolstered her credibility, while the instruction implying Bell had a prior conviction improperly undermined his credibility. These errors paved the way for convictions on Counts 1-3 and 12-14.

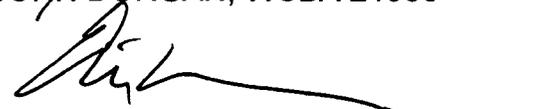
For the reasons presented above, Bell's convictions should be reversed.

DATED this 5<sup>th</sup> day of March, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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JOHN DORGAN, WSBA 21930

  
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ERIC BROMAN, WSBA 18487  
OID No. 91051  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62552-7-1
	)	
CLIFFTON BELL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5<sup>TH</sup> DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLIFFTON BELL  
DOC NO. 893908  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 5<sup>TH</sup> DAY OF MARCH, 2010.

x *Patrick Mayovsky*

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STATE OF WASHINGTON  
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