

NO. 62552-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON BELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES MERTEL

**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Was Bell denied the right to effective assistance of counsel?
  - a. Was decision not to renew severance motion ineffective?
  - b. Was decision not to sever aggravator ineffective?
  - c. Was decision not to object to triage note ineffective?
2. Did court err in allowing alleged hearsay testimony by Ofc. Norton?
3. In light of State v. Hall, should the State's concession that the five counts of witness tampering constitute two units of prosecution be accepted?
4. Was Bell denied a unanimous verdict on the five counts of witness tampering?
5. Is the pattern of abuse aggravator unconstitutionally vague?
6. Is the pattern of abuse aggravator unconstitutionally overbroad?
7. Was Bell denied the right to a unanimous verdict on the pattern of abuse aggravating circumstance?
8. Was a difference between the statutory definition of "pattern of abuse" and the special verdict form harmless error?
9. Did Jury Instruction 43 impermissibly comment on the evidence?
10. Did Jury Instruction 6 impermissibly comment on the evidence?
11. Was defense counsel ineffective for electing not to argue that Counts 1, 2, and 3 were the same criminal conduct for sentencing?
  - a. Do Counts 1, 2, and 3 have the same level of intent?
  - b. Were Counts 1, 2, and 3 committed at the same time?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL BACKGROUND.**

Clifton Bell was charged with the following fourteen counts; the victim in each count was his girlfriend, Jaimi Freitas:

<b>1</b>	9-23-07	Assault in the Second Degree (DV) (Strangulation) Aggravator: Domestic Violence Ongoing Pattern of Abuse
<b>2</b>	9-23-07	Unlawful Imprisonment (DV)
<b>3</b>	9-23-07	Assault in the Third Degree (DV)
<b>4</b>	9-23 to 10-3-07	Witness Tampering (DV)
<b>5</b>	10-04-07	Witness Tampering (DV)
<b>6</b>	10-12-07	Witness Tampering (DV)
<b>7</b>	11-11-07	Witness Tampering (DV)
<b>8</b>	11-20 to 12-3-07	Witness Tampering (DV)
<b>9</b>	10-12-07	Domestic Violence Violation of No Contact Order
<b>10</b>	10-14-07	Domestic Violence Violation of No Contact Order
<b>11</b>	11-11-07	Domestic Violence Violation of No Contact Order
<b>12</b>	2-17-06	Assault in the Second Degree (DV) (Shoulder)
<b>13</b>	Feb. - Sept. 2006	Assault in the Third Degree (DV) (Dinner plate)
<b>14</b>	Feb. - Sept. 2006	Rape in the Third Degree (DV)

CP 123-29 (2<sup>nd</sup> Amended Information). A jury found Bell guilty as charged on all fourteen counts. CP 211-25; 10RP 6-11. By special verdict the jury agreed that Count 1 involved domestic violence and that the State had also proven the existence of the “pattern of abuse” aggravating circumstance. CP 212.

Bell received a standard sentence on each of the charged crimes. CP 279-93 (felony judgment and sentence); CP 277-78 (misdemeanor judgment and sentence). Bell has filed a timely appeal. CP 294-315.

**B. FACTUAL BACKGROUND.**

Jaimi Freitas – who was 21 years old at the time of trial – grew up in Port Townsend, Washington. 7RP 6. Freitas moved to Seattle to attend Ashmead College when she was 17 years old. 7RP 7-8.

In April of 2005, shortly after Freitas arrived in Seattle, she met Clifton Bell and they began dating. 7RP 8-9. Bell soon moved into Freitas’s one-room apartment. 5RP 10. Freitas admitted that when Bell and she were first together they smoked marijuana and used cocaine. 7RP 12. Freitas stopped using cocaine because it affected her work as a physical trainer. 7RP 82-83.

Bell and Freitas’s relationship started out well. 7RP 11-12. But Freitas soon realized that Bell’s personality could shift radically. One moment he was “sweet” and “fun to be around.” 7RP 86-87. The next, if he didn’t get his way, he would become violent. 7RP 86-87, 100. Freitas testified to an extensive pattern of abuse by Bell over almost three years. The following summary of the charges is presented in the order of the charged counts.

1. **Count 1: Assault 2 (Sept. 23, 2007)**  
**Count 2: Unlawful Imprisonment (Sept. 23, 2007)**  
**Count 3: Assault 3 (Sept. 23, 2007)**

- a. **Jaimi Freitas's trial testimony.**

On September 23, 2007, Freitas was living in an apartment in Lake City, Seattle. 7RP 85. Bell was occasionally staying with her, although because of his prior physical violence and the tensions in their relationship, they were not living together. 7RP 85.

Around 3:00 a.m., Bell showed up at the apartment after work. 7RP 86-87. Freitas let Bell inside the apartment. Bell then began to manhandle Freitas's ten-week-old puppy in a way that upset her. 7RP 89. Freitas told Bell to stop. When he didn't, Freitas opened the door and tried to call the puppy outside. 7RP 88-89. When Bell demanded that Freitas come inside, she initially refused, afraid and concerned that Bell would become violent. 7RP 88-90. Bell coaxed Freitas back inside by telling her it would be "fine" and that he loved her. 7RP 90.

When Freitas came inside, Bell shut the door and locked it, keeping the key to the deadbolt. 7RP 91, 104-05. Bell then hit Freitas in the face, over her eye. 7RP 91. Freitas fell to the ground and Bell pinned her to the floor. 7RP 91. Freitas was on her back and Bell sat on her chest, with his knees on her arms. 7RP 92, 94. Bell said, "Do you want to see stars?" over and over. 7RP 92. Bell then put both of his hands on her

throat and squeezed. 9RP 92-93. Freitas's breathing was restricted and she was scared. 7RP 94. She tried to grab Bell's hands but couldn't because he was kneeling on her arms. 7RP 94. Freitas estimated the strangulation lasted between two seconds and thirty seconds. 7RP 95.

Bell let go and Freitas stood up. 7RP 95. She was crying. 7RP 95. Bell put his arm around Freitas and said, "Why do you have to act like that?" 7RP 95. At some point, Bell threw Freitas's cell phone to the floor, breaking it. 7RP 113-15. Bell then grabbed Freitas's hair in a fist and pulled her toward the floor. 7RP 96-97. In doing so, Bell ripped out hair from her scalp. 7RP 97.

Freitas repeatedly tried to leave the apartment, but Bell would not let her do so. Bell positioned himself between Freitas and the door and told her she was not leaving. 7RP 100-01. Freitas knew she could not force her way past Bell because he was so much bigger.<sup>1</sup> 7RP 101. Bell then forced Freitas to drink a shot of rum, saying he would hit her in the head with the bottle if she refused. 7RP 101-02.

Bell put in a movie and told Freitas to come to bed. 7RP 102-03. Before Freitas could do so, Bell kicked her against a wall, injuring her

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<sup>1</sup> Clifton Bell is 6' 1" tall and weighs 270 pounds. 7RP 91-92. Jaimi Freitas is 5' 2" tall and weighs 125 pounds. 7RP 50, 91-92.

lower back. 7RP 103, 107. Freitas was particularly upset about this action because Bell had previously hurt her hip. 7RP 107-08.

Bell insisted that Freitas lay down. 7RP 109. Freitas lay awake until Bell fell asleep. Then, using her own key to open the door, she snuck out of the apartment. 7RP 109-13. Freitas went across the street and called 911 from a pay phone. 7RP 119. The 911 call was played for the jury and on it Freitas summarized what Bell had done; including being hit in the face, being strangled, and being held against her will in the apartment. 7RP 120-30. Freitas estimated that the time between the initial assault and when she was able to escape was about two hours. 7RP 111.

**b. Police and medical response.**

On September 23, 2007, at 4:51 a.m., Seattle Police Department Officer Norton responded to Freitas's 911 call. 4RP 18-21, 47. The officer contacted Freitas, who was barefoot and wearing a sports bra and sweats, in a Safeway parking lot. 4RP 21. The left side of Freitas's face was puffed and purpled, and her left eye was swollen shut. 4RP 22-23. Freitas appeared shaky and was crying. 4RP 23. Freitas did not appear to be under the influence of alcohol or drugs. 4RP 37.

The Seattle Fire Department responded to the scene. 4RP 92. Fire Department Lt. Hammer observed that Freitas had a swollen eye and marks on her neck. 4RP 92. Freitas was crying and upset. 4RP 92. She

told Lt. Hammer that her boyfriend had assaulted her physically, hit her with his fists, choked her, and pulled out her hair. 4RP 92-93. Freitas said that she waited until her boyfriend fell asleep and then left the apartment and went to the Safeway, where she called 911. 4RP 92. Freitas did not appear to Lt. Hammer to be under the influence of drugs or alcohol. 4RP 96. Because Freitas might have broken bones, she was transported by ambulance to a nearby emergency room. 4RP 24, 26-27, 94-95.

Freitas was examined by emergency room doctor Abel Tewodros.<sup>2</sup> 4RP 61-68. Dr. Tewodros observed an orbital hematoma (bruising around her left eye), a facial contusion (a blow to the face), and petechia on the upper chest near the neck (bleeding from smaller capillaries consistent with strangulation). 4RP 68-73. These injuries, including the signs of petechia, are visible in the photographs taken by Officer Norton in the ER. Exhibit 7. They are even more visible in photos that Freitas took of herself several days later. 7RP 145; Exhibits 39-43. Dr. Tewodros opined that the injuries were consistent with Freitas being punched in the eye and having her throat squeezed. 4RP 80. Dr. Tewodros did not observe any signs of drug use by Freitas.<sup>3</sup> 4RP 83-85.

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<sup>2</sup> In examining Freitas, Dr. Tewodros relied on intake notes prepared by a triage nurse. The content of those notes, and the reason they were admitted at trial, is discussed in the argument section of this brief.

<sup>3</sup> Freitas gave a statement to Ofc. Norton at the hospital. The content of her statement, and the reason it was admitted at trial, are discussed in the argument section.

Freitas gave the officers the address of her apartment and told them that Bell was still there, in bed. 4RP 28-29. Officers went to the apartment, found Bell in bed, and arrested him. 4RP 29-30, 50-53. The officers did not observe any injuries on Bell when he was taken into custody. 4RP 36-37, 39, 52.

Freitas's eye was swollen shut for days. 7RP 150. Freitas was unable to go to work at her job as a personal trainer. 7RP 150-51. The facial bruising lasted about two weeks. 7RP 151.

**c. Clifton Bell's testimony.**

Bell testified in his own defense. In regard to Counts 1, 2, and 3, Bell denied Freitas's version of events and claimed that he had acted in self-defense. Bell suggested that Freitas had smoked "hash." 8RP 14-17. Bell asserted that Freitas became upset when he wouldn't let her check who he had been calling on his cell phone. 8RP 17-22. Bell claimed that when he lay down Freitas grabbed a knife and cut his hand. 8RP 23. He tried to calm Freitas down but she poked him in the wrist with the knife. 8RP 24-25. Bell testified that he got up and moved toward Freitas and she tripped on some shoes. 8RP 26. Bell claimed that he charged Freitas, grabbed the knife, and took it out of her hand. 8RP 24-27. He stated that he picked Freitas up and she kicked him in the groin. 8RP 27. Bell

dropped Freitas and she picked up the knife. 8RP 27. Bell said that Freitas came at him with the knife and he hit her in the face. 8RP 27.

Bell said that he then iced Freitas's eye and gave her a shot of rum. 8RP 28-30. He then claimed that Freitas smoked more hash and that Freitas and he had sex. 8RP 32-36. Bell denied that he ever prevented Freitas from leaving the apartment. 8RP 36, 44. Bell said he tried to leave, but Freitas told him not to, that he went to sleep, and when he woke up there were police in his apartment. 8RP 37-40.

**2. Counts 4 to 8: Witness tampering.**

Beginning the same day of his arrest, September 23, 2007, Bell commenced an onslaught of calls from jail to get Freitas to withdraw her charges, absent herself from the proceedings, or to lie to prosecutors about what had happened. All of the jail house telephone calls were recorded, a fact that Bell admitted he knew when he made the calls. 8RP 82-83. Bell also admitted at trial that the recordings were accurate. 8RP 43.

The chart below shows the charging dates for the five witness tampering counts, the phone calls used to support each count, the location in the record where each phone call was played for the jury, and whether there was a transcript of the call. An indication of who Bell was primarily talking to is also given, although often he spoke to several different people during a single call.

<b>Count</b>	<b>Charging Period</b>	<b>Date of Call</b>	<b>Exhibit &amp; Testimony</b>
	9-23-07	9-23 to Freitas	Exhibit 2; 4RP 101
<b>IV</b>	9-24-07 to 10-3-07	9-24 message to Freitas 10-1 to Delano 10-3 to Delano	Exhibit 3; 5RP 53 Exhibit 3; 5RP 57 Exhibit 3; 5RP 74
	10-3-07	<b>Phone Block</b>	
	10-4-07	<b>No Contact Order</b>	
<b>V</b>	10-04-07	10-4 to mom	Exhibit 4; 8RP 89-90.
<b>VI</b>	10-12-07	10-12 to Delano to Freitas 10-12 to Delano	Exhibit 4; 5RP 103 Exhibit 4; 5RP 118
	10-14-07	10-14 to Freitas 10-14 to Delano	Exhibit 4; 5RP 127 Exhibit 4; 5RP 147
<b>VII</b>	11-11-07	11-11 to Freitas 11-11 to Freitas 11-11 to Delano	Exhibit 5; 6RP 59 Exhibit 5; 6RP 61 Exhibit 5; 6RP 92
<b>VIII</b>	11-20-07 to 12-3-07	11-20 to Delano 11-28 to Delano & Antonio 12-3 message to Delano	Exhibit 6; 6RP 127 Exhibit 6; 6RP 133 Exhibit 6; 6RP 138

The State moved in limine to admit the calls for the purpose of describing the general background and relationship that existed between Bell and Freitas and to establish the aggravating circumstance.

CP 321-31, 339-48. This motion was granted by the trial court and has not been challenged on appeal. CP 138-40.

The State played approximately four hours of recordings for the jury. Based on the selections from some of the calls, the State charged Bell with five counts of witness tampering. In light of the recent Supreme Court decision in State v. Hall, \_\_\_ Wn.2d \_\_\_, 2010 WL 1610966 (2010), the State concedes that only two of these charges survive. A summary of Bell's telephone calls is reserved for the argument section.

**3. Counts 9 to 11: No contact order violations.**

On October 4, 2007, in response to Bell's continued attempts to contact Freitas from jail, a no contact order was issued by a King County Superior Court judge. The order prohibited Bell from having any contact with Freitas for three years. 6RP 41-43; 7RP 139; Exhibit 36.

Bell admitted at trial that he signed the order and understood its purpose. 8RP 71-72; Exhibit 36. Nevertheless, Bell continued to contact Freitas – by calling her from the jail – after the no-contact order was issued. 7RP 139. Bell admitted that he had done so. 8RP 72. The State charged Bell with three counts of Domestic Violence Violation of a No Contact Order based on phone calls Bell made to Freitas on October 12, October 14, and November 11, 2007. CP 126-27. Bell has not challenged the validity of these convictions on appeal.

**4. Count 12: Assault 2 (February 17, 2006).**

**a. Jaimi Freitas's testimony.**

On February 17, 2006, Bell and Freitas were living in an apartment in Shoreline. 7RP 17-18. Freitas was upset because Bell had forced her to rearrange her evening plans. 7RP 21-23. They began to argue and Bell grabbed Freitas by her left arm and threw her to the ground. 7RP 23-24. Freitas felt a sharp pain in her shoulder and could no longer move her arm. 7RP 24. Freitas lay on the floor crying. She could tell something was wrong and was in severe pain. 7RP 24, 26-27. When Bell tried to pick her up, she yelled at him, “[D]on’t touch me. Just don’t touch me. Something is really wrong.” 7RP 24-25. When she stood up, the weight of her arm actually hurt her shoulder. 7RP 24. A friend of Bell’s arrived and drove Freitas to the hospital. 7RP 25.

**b. Testimony of Dr. DiJulio.**

Dr. Marc DiJulio, an emergency room physician at Northwest Hospital, testified that on February 17, 2006, he treated Freitas for a dislocated shoulder. 5RP 13-16. Dr. DiJulio’s treatment notes indicate that Freitas stated she had fallen but could not remember how she fell. 5RP 20. Like all dislocated shoulders, the injury was extremely painful (“up there on the level with kidney stones and childbirth”). 5RP 20. Freitas was given narcotic and anti-nausea pain medication intravenously

and her shoulder was “popped” back into place. 5RP 22-23. Follow-up treatment included keeping the shoulder immobilized for several days and taking pain medication. 5RP 24-25. Dr. DiJulio testified that it usually takes at least six months for injuries of this type to fully heal. 5RP 24-25. Freitas’s shoulder still occasionally dislocates when she raises her arm over her head. 7RP 28-29.

**c. Clifton Bell’s testimony.**

Bell admitted that Freitas and he had argued about Bell’s friends visiting the apartment. 8RP 46-49. He denied assaulting Freitas. Instead, Bell claimed that Freitas tripped as she ran to answer the phone and injured her shoulder falling against a couch. 8RP 49-50.

**5. Count 13: Assault 3 (February to September, 2006).**

**a. Jaimi Freitas’s trial testimony.**

In 2006, sometime between February and September, Freitas was at a barbecue with Bell. 7RP 30-31. Bell was intoxicated. 7RP 30. Bell asked Freitas to make him a plate of food; she did so and then sat down next to him. 7RP 30-31. When Freitas placed her hand on Bell’s leg, Bell accused her of wiping ketchup on him. 7RP 31. Freitas showed Bell her hands, saying, “There’s nothing on my hands.” 7RP 31. Bell became angry. He stood up and threw a glass dinner plate at Freitas’s head. 7RP 31. The plate slit open a gash in Freitas’ forehead and the wound

would not stop bleeding. 7RP 32-33. Bell and Freitas went to the bathroom where Bell tried to stop the bleeding. 7RP 32-33. Bell took Freitas to his mother's house, where the bleeding eventually stopped. 7RP 33-34. Freitas did not go to the hospital.<sup>4</sup> 7RP 33-34.

**b. Clifton Bell's trial testimony.**

Bell denied that this incident occurred. He claimed instead that Freitas injured her forehead when she broke a window after they got into an argument about a movie. 8RP 52-57.

**6. Count 14: Rape 3 (February to September, 2006).**

**a. Jaimi Freitas's trial testimony.**

The same night Bell cut Freitas's forehead with the dinner plate, he raped her. Freitas and Bell were in bed at his mother's house. 7RP 35. Bell told Freitas he was sorry. Bell then wanted to have sex. 7RP 35-36. Freitas did not want to have sex and told Bell so. 7RP 36-37. Freitas told Bell, "No. I don't want to do this." Bell started to remove Freitas's pants, telling her it would be "fine." 7RP 37. Freitas tried to pull her pants back on. 7RP 37. Because Bell was bigger, he was able to remove Freitas's pants. 7RP 38-39. Bell pinned Freitas's arms down. 7RP 72. Bell then forced himself on Freitas, despite her continuing verbal objections.

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<sup>4</sup> A co-worker of Freitas's testified that sometime between April and July 2006, he saw a cut on Freitas's forehead. 5RP 49-50.

7RP 38-39. Bell placed his penis in Freitas's vagina and eventually ejaculated. 7RP 38-39. Freitas testified that she just wanted "it to be over" and that she felt like she had been taken advantage of by the one person she trusted. 7RP 38-39.

Freitas did not report this incident. 7RP 66-68. She believed that no one would take it seriously because Bell was her boyfriend. 7RP 67-68. She also didn't want Bell to get into trouble. 7RP 164-65.

Subsequently, on September 23, 2007, at Northwest Hospital after Bell had hit and strangled her, Freitas was asked if she had ever "been forced by someone to have sex when you did not want it." 7RP 67, 181. Freitas responded in the affirmative. 7RP 67. When asked about this statement by a prosecuting attorney, Freitas revealed the circumstances of this rape for the first time (as well as the incident of anal rape, discussed below). 7RP 67, 181.

**b. Clifton Bell's trial testimony.**

Bell denied having sex with Freitas against her will. 8RP 57.

**7. ER 404(b) evidence: "Other bad acts."**

Prior to trial, the State sought to admit evidence of other bad acts by Bell against Freitas. CP 337-48. The court granted this motion, which has not been challenged on appeal. CP 138-40. The court allowed the State to introduce testimony about three specific incidents:

**a. Nose ring incident.**

Shortly after they moved to Shoreline, Bell and Freitas had their first physical conflict. Friends were visiting and one of them asked Freitas to hand him something. 7RP 18. Bell interrupted and said, "You don't ask her to hand you something. You ask me to tell her to hand it to you." 7RP 18. When Freitas confronted Bell, he became angry and said he can do whatever he wants. Bell then grabbed Freitas' nose ring and ripped it partially out so that her nose bled. 7RP 19. Bell then put his hands around Freitas's neck and squeezed, but Freitas did not pass out. 7RP 20-21.

**b. Anal sex incident.**

After Freitas's lease expired on her Shoreline apartment, she moved to Lynnwood. 7RP 39-40. One night, while in this apartment, Freitas and Bell were having sex. 7RP 41. Bell wanted to have anal sex. 7RP 41. Freitas told him she did not want to do that. 7RP 41. Freitas was crying and continuing to tell Bell she didn't want to have anal sex. 7RP 41-42. Bell flipped Freitas on her stomach and Bell placed his penis in her anus. 7RP 41-42, 74. The action hurt and Freitas was crying. 7RP 74. Freitas did not recall how long this incident lasted. 7RP 42.

**c. Balcony incident.**

On July 26, 2006, Freitas was still living in Lynnwood. 7RP 43. Her apartment was on the second floor. 7RP 43. Bell and Freitas were

still seeing each other, but Bell was not living with her. 7RP 43-44.

Freitas was getting ready to leave for her afternoon shift at work. 7RP 45.

Because she did not want Bell to be able to get into the apartment while she was gone, and tired that Bell refused to pay for food or rent, she asked that Bell give her back the key to the apartment. 7RP 46-47. Bell refused. 7RP 47-48. Bell then told Freitas to come and get the key. 7RP 48.

Freitas recognized that Bell was angry enough to hurt her and did not want to get within reaching distance of him. 7RP 48.

When Freitas went to get her spare key, Bell pulled her inside the apartment. 7RP 48. Bell locked the door and threw Freitas to the floor. 7RP 49. He began to swear at Freitas and hit her. 7RP 49. Freitas managed to run to the sliding glass door that opened onto the second floor balcony. 7RP 49. She hoped that someone outside would see her. 7RP 49. Bell tried to drag Freitas back inside the apartment. 7RP 51. Freitas, afraid to be inside with Bell, held onto the balcony railing. 7RP 51. When Bell let go of Freitas, she flipped over the edge of the balcony, fell two stories (at least 15 feet), and landed on her back. 7RP 52-53.

Freitas was afraid that Bell would come down to her, so she forced herself to her feet and began to walk around to the front side of the house. 7RP 53. She was in pain and unable to put weight on her right leg.

7RP 53, 61. She got out her cell phone and called 911. 7RP 53-54.

Freitas then tried to call off the police by calling 911 back and saying she just needed an ambulance. 7RP 55.

Snohomish County Deputy John Kuska responded to Freitas's 911 call. 5RP 89. He spoke with Freitas who was upset and emotional. 5RP 90-91. Freitas, although clearly injured, was uncooperative. 5RP 90-91. As an ambulance crew tended to Freitas, Bell came out of the apartment. 5RP 92-93. Freitas told Deputy Kuska "that was the individual." 5RP 92-93. Bell gave a false name ("Cameron Bell"). 5RP 93. Deputies eventually identified him as Clifton Bell. 5RP 94-95. Freitas told the deputies that she had fallen from a balcony and needed medical attention. 5RP 95. The deputy saw no indication that Freitas or Bell were under the influence of alcohol or drugs. 5RP 99-100.

Dr. Cuschieri, an emergency room surgeon at Harborview Medical Center, testified that on September 26, 2006, he treated Freitas after she was transferred by helicopter from Stevens Hospital. 6RP 9-10, 30. Freitas was diagnosed with a pelvic injury and liver injury. 6RP 10-13. There were three fractures (breaks) to her pelvis. 6RP 15. There was a laceration to the liver that was bleeding internally. 6RP 14-19. The injury to the pelvis and liver were consistent with a fall from at least 14 feet.

6RP 16. Freitas was admitted to the intensive care unit for observation.

6RP 18.

Freitas stayed at Harborview for three days. 7RP 63. When discharged, Freitas could not put weight on her right leg for six weeks and had to use crutches. 6RP 20-21; 7RP 63. Because of the risk of internal bleeding, Freitas was instructed to avoid physical activity. 6RP 20. The healing time for both injuries was six to twelve weeks. 6RP 22.

Freitas admitted at trial that she had not told the doctors the truth about what had occurred, but did tell the social worker that it was a domestic violence incident.<sup>5</sup> 7RP 56-57. Sherri Ford, county designated mental health professional, spoke with Freitas at Stevens Hospital. 6RP 103-05. In speaking with Ford, Freitas was fearful and concerned that what she said would not be confidential. 6RP 110. Based on her conversation with Freitas, Ford took steps to make sure Freitas “had a safe place to go, and appropriate service referrals.” 6RP 117.

Bell asserted that he did not assault Freitas. Bell claimed that after an argument over a key, Freitas grabbed a key out of his hand, sprinted straight toward the sliding glass door, ran through the screen door, and fell over the balcony. 8RP 57-60.

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<sup>5</sup> At this point in Freitas’s testimony, Bell interrupted the proceedings, calling Freitas a “liar” and a “psycho-bitch.” 7RP 57-59.

**8. Bell's September 23 call from jail to Freitas.**

Shortly after he was arrested, Bell called Freitas from jail. 5RP 37-38. Like all of the jail calls, this one was recorded. In this call, Freitas confronted Bell with many of the charged and uncharged incidents and, significantly, Bell did not deny that any of them occurred. The State moved in limine to admit this phone call to support Counts 1, 2, and 3, as well as the Count 1 aggravating factor that Bell had engaged in an ongoing pattern of abuse. CP 349-48. The motion was granted and has not been challenged on appeal. CP 138-40. Here is a summary of relevant portions of this call.

Freitas begins by telling Bell she hates him. 4RP 101. She recounts how she had to go to the hospital, how her eye is injured, and how she will be forced to miss another week of work. 4RP 101-02. In response, Bell says, "I'm sorry." 4RP 102. Freitas responds that she knows Bell is not sorry and that he should have been prosecuted "the first time." 4RP 102. Bell tells Freitas he "loves her" – a suggestion which Freitas, angry and emotional, denies. 4RP 104-05.

Freitas asks why Bell said "you're going to drink this before I throw it upside your head." 4RP 106. Bell does not deny this reference to forcing Freitas to drink rum. Freitas then states: "[A]fter you punched me in the eye. . . why did you kick me? When you know that my hip has been

bothering me all for, like, the past two weeks, and you kicked me into the wall.” 4RP 107. Again, Bell does not deny Freitas’s allegation. A similar exchange about Bell hitting and kicking Freitas, with no denial from Bell, occurs a short while later. 4RP 110.

Later, Freitas says: “I’m fucking, blacking [sic] both 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.” 4RP 117. Bell does not deny the references to the fact that he had dislocated Freitas’s shoulder, threw her off a balcony, and threw a plate into her forehead. Instead, Bell just says, “I’m sorry.” 4RP 117.

Freitas refers to the nose ring incident (and the fact that Bell strangled her when that incident occurred). 4RP 121. Bell offers no denial. 4RP 121. Freitas says, “I can’t be around you, you’re not safe. No. . . . I can’t be around you ever again. You will always hurt me. . . .” 4RP 136-37. To which Bell responds, “You don’t love me?” 4RP 137. And Freitas responds, “I can’t anymore.” 4RP 137.

### III. ARGUMENT

#### A. **BELL WAS NOT DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

Bell asserts that he was denied the right to effective assistance of trial counsel for three reasons. These arguments are without merit.

##### 1. **Legal standard: ineffective assistance of counsel.**

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate both that counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether defense counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d at 225. The prejudice prong of the test requires the defendant show a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, a defendant must show that counsel had no legitimate

strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336.

**2. Decision not to renew motion to sever.**

Bell asserts that his trial counsel was ineffective for failing to renew his motion to sever charges at the close of evidence. Prior to selecting a jury, Bell moved to sever the charges. 2RP 16-17. The motion was denied. 2RP 19. At the close of evidence there was even less reason to sever the charges, particularly in light of the trial court's rulings that much of the testimony in the case was cross-admissible.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses joined under CrR 4.3(a) may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Separate trials are not favored in Washington. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (citing State v. Dent, 123 Wn.2d 467, 484, 869 P.3d 392 (1994)). The rule of joinder is construed expansively to promote the public policy of conserving judicial and prosecution resources. See, e.g., State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). A court's refusal to sever is reversible only upon a showing that there was a manifest abuse of discretion, which occurs only when the court bases its decision on untenable or

unreasonable grounds. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154, 156 (1990).

Defendants seeking severance have the burden of demonstrating that a trial on both counts would be so manifestly prejudicial as to outweigh concerns for judicial economy. Bythrow, 114 Wn.2d at 713; State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Factors offsetting potential prejudice include: (1) the jury's ability to compartmentalize evidence; (2) the strength of the State's evidence on each count; (3) the clarity of the defenses on each count; (4) the cross-admissibility of evidence between counts; (5) the admissibility of evidence of other charges not joined for trial; (6) whether the trial court instructed the jury to decide each count separately; and (5) whether concerns of judicial economy weigh in favor of joinder. Kalakosky, 121 Wn.2d at 537; State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

**a. The ability to compartmentalize evidence.<sup>6</sup>**

This factor weighs strongly in favor of joinder in this case. Each count with which Bell was charged had a distinct charging period. Each count clearly related to a separate and distinct act (or, in the case of the witness tampering charges, a series of acts within a specified time). In

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<sup>6</sup> This factor was not discussed by Bell in his brief on appeal.

particular, there was no doubt that the jury could compartmentalize the rape charge from the assault charges. Unlike say, multiple and identical counts involving a complicated financial scheme, the jury in this case would have little difficulty in compartmentalizing the charges based on their distinct nature and differing time periods.

**b. The strength of the evidence on each count.**

This factor is at best neutral when it comes to severance. On appeal Bell tries to argue that the rape charge (Count 13) is weaker than the assault charges. But, after all the testimony is considered, these charges ultimately pitted Freitas's testimony against that of Bell.

On Count I (Assault 2, strangulation) Freitas testified that Bell's assault on her was unprovoked; that he placed his hands around her neck and squeezed until she could not breathe. Bell testified that he was acting in self-defense and that he punched, but never strangled, Freitas. Bell denied Freitas's version of events on Count 2 (Unlawful Imprisonment) and Count 3 (Assault 3). On Count 12 (Assault 2, dislocated shoulder), Freitas testified that Bell threw her to the ground dislocating her shoulder; Bell claimed she injured her arm tripping and falling. On Count 13 (Assault 3, dinner plate) Freitas claimed Bell threw a plate at her head; Bell asserted that Freitas broke a window and cut herself. On Count 14 (Rape 3), Freitas asserted that Bell raped her; Bell denied he had done so.

There were no independent eyewitnesses to any of these claims. On all of these counts the presence or absence of physical evidence was not dispositive. Bell presented a version of events that arguably accounted for the physical injuries Freitas had suffered. The charges – including the rape charge – came down to Freitas’s word against Bell’s. In phone calls, Bell appears to apologize for these crimes. Bell, however, testified that his apologetic responses were not admissions of guilt, but examples of him saying what he knew Freitas wanted to hear in order to appease her. Again, Bell’s testimony made even the telephone evidence a question of credibility. If the jury chose to believe Bell, the evidentiary value of the phone calls is eradicated.

**c. The clarity of the defenses on each count.**

This factor also weighs in favor of joinder. The defense on all of the counts was clear: general denial. 1RP 75. On Count 1, Bell asserted self-defense. 1RP 75. The jury was not required to parse through confusing, overlapping, or mutually inconsistent defenses.

**d. The cross-admissibility of evidence.**

This factor supports joinder of the charges. Prior to trial, the State moved to admit other bad acts by Bell. This motion was granted by the trial court and has not been challenged on appeal. In addition to certain specific uncharged crimes (discussed above), the court admitted evidence

relating to the “general nature and background” of the relationship based on phone calls between Bell (from jail) to Freitas. CP 138-40. In the calls, Freitas discusses the injuries she suffered during the September 23 assaults (Counts 1 and 3), the assault in which Bell dislocated her shoulder (Count 12), and the dinner plate assault (Count 13).

The trial court admitted this evidence to explain “the context of the relationship, the state of mind and credibility of the victim, the defendant’s motive, opportunity, intent, lack of accident, [and] lack of self-defense. The acts were also admitted to explain the aggravating circumstance. CP 138-40. Thus, evidence relating to the underlying assaults was cross-admissible on the rape charge (Count 13), and cross-admissible vis-à-vis each other. Of course, the phone calls by Bell from jail were admissible as direct evidence of Counts 5 to 8 (Witness Tampering) and Counts 9 to 11 (Violation No-Contact Order).

**e. Admissibility of evidence uncharged counts.<sup>7</sup>**

This factor strongly supports joinder in light of the trial court’s ruling – unchallenged on appeal – that at least three specific uncharged crimes were admissible as “other bad acts.” These include: the nose ring assault, the broken pelvis assault, and the Snohomish County rape. CP 138-40. As with the charged bad acts, these uncharged bad acts were

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<sup>7</sup> This factor was not discussed by Bell in his brief on appeal.

admissible to explain “the context of the relationship, the state of mind and credibility of the victim, the defendant’s motive, opportunity, intent, lack of accident, [and] lack of self-defense. These acts were also admitted to explain the aggravator charged to Count 1. CP 138-40.

**f. Instruction to decide each count separately.**

This factor weighs in favor of joinder because the court instructed the jury to consider each count separately. CP 219 (Jury Instruction 45).

**g. Judicial economy weighs in favor of joinder.<sup>8</sup>**

Finally, the concerns for judicial economy weigh particularly strongly in favor of joinder. As discussed above, much of the evidence on Counts 2 through 14 was admissible to demonstrate Freitas’s state of mind in choosing to stay with Bell, to evaluate Bell’s claim of self-defense, and to support the ongoing pattern of abuse aggravator. It would be an extreme waste of judicial resources to have that testimony introduced in one trial and then to commence a second trial just on the rape charge in which precisely the same evidence would be admissible again.

The factors for evaluating whether joinder is proper establish that the court did not err in refusing to sever the charges and that there was no likelihood that a renewed motion to sever would have reached a different

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<sup>8</sup> This factor was not discussed by Bell in his brief on appeal.

result. Defense counsel was not ineffective for electing not to renew the motion to sever.

On appeal, Bell relies heavily on State v. Sutherby, 165 Wn.2d 870, 874, 204 P.3d 916 (2009), to support his claim that the trial court would have granted a renewed motion to sever. Sutherby, however, is not on point. Sutherby was charged with first degree child rape, first degree child molestation, and ten counts of possession of child pornography. Id. at 874. Significantly, however, in Sutherby defense counsel *never moved to sever any of the charges*. Id. at 883. Thus, Sutherby is distinguishable from the present case in which defense counsel did in fact move to sever the charges and the court denied that motion.

Finally, Bell is raising the severance issue in the context of an ineffective assistance of counsel claim. This has two significance implications: First, Bell must show his attorney had no tactical reason for deciding not to renew the motion to sever. And yet a review of counsel's closing argument demonstrates a clear tactical basis for wanting the charges joined. Bell's attorney believed – indeed, it was the primary theme of his closing argument – that he could establish that Freitas had lied about the incidents surrounding the September 23 charges (Counts 1, 2, and 3). Counsel used this “lie” to pursue his theme – in both opening and closing – that “*falsum in unum, falsum in omnibus.*” 9RP 122.

Counsel argued, “basically, it means if you can’t believe some of it, you can’t believe any of it.” 9RP 122. Clearly, counsel concluded that the best way to defend his client was to attack Freitas’s credibility and saw an opening to do so in the context of Counts 1, 2, and 3. Counsel sought to expand this perceived inconsistency to attack Freitas’s testimony on all of the remaining counts.

Second, in making an ineffective assistance of counsel claim, Bell must demonstrate a “reasonable probability” that, but for counsel’s error, the result of the trial would have been different. Bell is unable to point to any testimony in the record that – within even a remote probability – might have persuaded the trial court to change its original decision not to sever the charges. Indeed, the complete testimony establishes that Freitas’s testimony on all of the counts was cross-admissible. At a minimum, everything that happened prior to September 23, 2010, was admissible to show both the context of a relationship and to establish the aggravator circumstance of an ongoing pattern of abuse.

In sum, Bell’s ineffective assistance of counsel claim is without merit because the motion to sever was properly denied by the trial court, because there was a tactical reason for defense counsel to want to try the charges together, and because Bell has failed to show that a renewed motion to sever would have been granted.

**3. Separate proceeding on Count 1 aggravator.**

Bell argues that trial counsel was ineffective for failing to move for a separate proceeding on the aggravating circumstance alleged with Count 1. Severing an aggravating circumstance is discretionary with the trial court. Bell's assertion that the court would have severed the aggravating circumstance if his attorney had moved to do so is without merit.

Bell was charged with an aggravating circumstance pursuant to RCW 9.94A.535, which states:

**(3) Aggravating Circumstances - Considered by a Jury Imposed by the Court**

...

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) 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). The procedure for finding an aggravating circumstance is set forth in the following statutory provision:

Evidence regarding any facts supporting aggravating circumstances. . . *shall be presented to the jury during the trial of the alleged crime* . . . unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3). . . (h). . . . If one of these aggravating circumstances 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.

RCW 9.94A.537(4) (emphasis added). A separate proceeding on an aggravator is to be held before the same jury which heard the underlying case. RCW 9.94A.537(5).

Bell's argument that the trial court would have severed the aggravating circumstance if his defense attorney had so requested fails the test set forth in RCW 9.94A.537(4). This is because the trial court may only conduct a separate proceeding on the aggravator 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*. . ." But the evidence supporting the aggravator was admissible at trial of the charged crime and part of the *res gestae* of the charged crime.

Most of the evidence that was admissible on the aggravator (the uncharged bad acts, and the background information concerning the charged assaults) was also admissible at the trial. As discussed above, the trial court allowed the State to introduce testimony concerning uncharged assaults and an uncharged rape to establish the aggravator. The court also allowed the State to introduce evidence concerning the background of the relationship between Freitas and Bell that involved evidence of the prior

assaults. In particular, the numerous references to Bell's prior bad acts in the jail phone calls was both evidence of the charged crimes and supported the aggravating circumstance.

The State did not seek to have the rape charge (Count 13) admissible to prove the aggravating circumstance. But severing the aggravator would have made it more – not less likely – that the rape charge (Count 13) would have been used to support the aggravator. At the conclusion of the trial, Freitas's testimony had clearly established an ongoing pattern of psychological, physical, and sexual abuse. This abuse clearly included the rapes (charged and uncharged) by Bell, which occurred immediately after his acts of violence toward Freitas. If a separate proceeding on the aggravator had been held, there would have been no reason for the State not to have moved to admit Freitas's testimony concerning the Count 14 rape to support the aggravating pattern of abuse circumstance.

Moreover, it is extremely doubtful whether the court would have found the introduction of Count 14 rape testimony to be unduly prejudicial. The court had already permitted testimony about the Snohomish County rape to be introduced as relevant to the aggravating circumstance. Given this ruling, it is difficult to imagine that the court would exclude the testimony of the charged rape as unduly prejudicial.

Considered closely, Bell's argument hinges on his claim that defense counsel should have renewed the motion to sever the rape charge and that this motion would have been granted. Only if the motion to sever had been granted would there have been any basis to sever the aggravator (because then there would have been no basis for the jury to have heard the rape charge before considering the aggravating circumstance).

Finally, in order to establish prejudice, Bell must demonstrate that even if the jury had not heard about the Count 14 rape, and had then considered the aggravating circumstance in a separate proceeding, it would not have found that Count 1 was part of an ongoing pattern of domestic violence. Given the overwhelming evidence supporting the aggravator – including prior charged assaults, prior uncharged assaults, the prior uncharged rape, Bell's jail calls to Freitas, and Freitas's own trial testimony concerning the abusive nature of the relationship – Bell has utterly failed to make this showing.

**4. Admission of September 23, 2007, "triage" notes.**

Bell argues that the admission of triage notes by an emergency room nurse violated his right of confrontation under the Sixth Amendment and that the failure to object to these notes constituted ineffective assistance of counsel. This argument is without merit.

When Freitas arrived at the Northwest Hospital emergency room on September 23, 2007, she was screened by a triage nurse. 4RP 64-66. The nurse's notes indicate that Freitas reported pain in her left eye, right ear, neck, and tailbone. 4RP 75; Exhibit 12 (p. 4). Freitas told the nurse that she had been assaulted by her boyfriend. 4RP 75; Exhibit 12 (p. 4). Freitas denied using recreational drugs. 4RP 78-79; Exhibit 12 (p. 6).

The screening form contained three questions concerning domestic violence. Freitas answered the three questions on the form as follows:

- Does anyone hurt you or threaten you? **"Yes."**
- Has anyone tried to keep you from seeing your family, going to school or doing other things that are important to you? **"No."**
- Have you ever been forced by someone to have sex when you did not want to? **"Yes."**

4RP 79-80; Exhibit 12 (p. 6). Dr. Tewodros testified that he relied on the notes taken by the triage nurse in order to assist him with preparing his report. 4RP 74. The notes were admitted, without objection. 5RP 80.

During Freitas's direct examination the triage notes were discussed; in particular Freitas's statement that she had been forced in the past to have sex when she didn't want to. 7RP 67. On cross-examination, Bell confronted Freitas with these triage notes and used it to impeach her on the grounds that Freitas had denied telling the triage nurse that she used recreational drugs. 7RP 176-78.

Bell asserts his attorney was ineffective for failing to object to the triage notes on the grounds that they violated the right to confrontation. To demonstrate that counsel was ineffective for failing to object, Bell must show: (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the trial court would have sustained an objection; and (3) that the result of the trial would have been different had the objection been sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Only where the testimony was central to the State's case will failure to object constitute deficient performance. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Bell – relying upon Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004) – argues for the first time on appeal that the introduction of the triage notes violated his Sixth Amendment right to confront witnesses. This argument fails for the simple reason that Freitas testified at trial about her conversation with the triage nurse. Because Bell had a full and complete opportunity to cross-examine Freitas on this issue, there was no violation of his right to confront witnesses.

The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. . . .” U.S. Const. amend VI. Both the United States Supreme Court and the Washington Supreme Court have held that there is no

Confrontation Clause violation when a declarant testifies at trial and the defendant has an opportunity to cross-examine the declarant as to the contents of his or her prior statement:

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970).

Crawford, 541 U.S. 36, 59, n.9. See also State v. Price, 158 Wn.2d 630, 639-40, 146 P.3d 1183 (2006) (“[P]rior statements must be excluded under the Crawford rule only if a witness is unavailable at trial for purposes of the confrontation clause.”).

Simply put, if the declarant is available to testify, does testify, and there is an opportunity for cross-examination concerning the prior statement at issue, there is no violation of the Sixth Amendment. As the Washington State Supreme Court stated in Price: “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” 158 Wn.2d at 647.

Freitas testified at trial. She was examined during her direct testimony about the statements she made to the triage nurse. Even assuming that her prior statements to the triage nurse were “testimonial,” there was a full and complete opportunity for Bell to cross-examine

Freitas about these statements. In these circumstances, there is no Confrontation Clause violation.<sup>9</sup> Accordingly, there was no possible error or prejudice from Bell's (entirely appropriate) decision not to object to the introduction of the triage report.

Lastly, even if the triage report was testimonial hearsay admitted in violation of the Confrontation Clause, any error is harmless beyond a reasonable doubt for the reason just outlined: Freitas testified about the contents of the notes.<sup>10</sup> In addition, this testimony is duplicative of Freitas's statements on the 911 call, to Fire Department personnel, and her excited utterances to Officer Norton.

Finally, Bell cannot show that his attorney's decision not to object to the introduction of the triage notes was not tactical. At trial, Freitas admitted she had previously used drugs, including marijuana and cocaine. 7RP 11. Bell's attorney used the triage report to impeach Freitas with the fact that she did not tell ER staff that she had used recreational drugs.

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<sup>9</sup> Indeed, this is the conclusion of the principle Washington case relied upon by Bell. See State v. Hopkins, 134 Wn. App. 780, 789, 142 P.3d 1104 (2006). In Hopkins, a nurse examined a child rape victim and prepared a report. The nurse was unable to testify and her supervising doctor testified about the contents of the report instead. Hopkins objected on Confrontation Clause grounds. The Court rejected this argument, noting "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 789 (citing Crawford, 541 U.S. at 59, n.9).

<sup>10</sup> Constitutional errors, including the admission of evidence in violation of the Confrontation Clause, can be harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

7RP 177-79. This was one of the few substantive grounds Bell had to impeach Freitas. In light of defense counsel's general trial strategy – to attack Freitas's credibility – the admission of the triage notes was an obvious tactical decision. Impeachment via these notes not only provided counsel an opportunity to attack Freitas's credibility, but gave him the opportunity to render suspect the statements that Freitas gave to the police and firefighters that same night, and played into the defense theme that Freitas was generally not credible.

**B. THE TRIAL COURT PROPERLY ADMITTED FREITAS'S STATEMENT TO OFFICER NORTON.**

Bell argues that the trial court erred in allowing Officer Norton to testify concerning a statement Freitas made to him shortly after she called 911 on October 23, 2007. The trial court did not abuse its discretion in allowing this testimony because the record establishes that the officer was using Freitas's written statement to refresh his recollection as to what Freitas told him upon his arrival at the Safeway (when Freitas was still making excited utterances about the incident).

**1. Freitas's statement to Officer Norton.**

Bell objects to the following testimony from Officer Norton (during which the officer was referring to a written statement Freitas had given to him at the hospital):

**Ofc. Norton:** [W]hen I stood by and was taking – watching her write the statement, she told me she [Freitas] had been dating Mr. Bell for two about two and a half years; that they had an argument, and that during the course of the argument – it was over their dog. She had a puppy at the time. And after – during the argument, Mr. Bell – he started to strike her, and he pushed her down on the ground and started strangling her. And then when she got up and tried to leave, he hit her again and wouldn't let her leave the apartment. And then she tried to leave, and he kicked her into a wall.

4RP 26. Defense counsel made a timely objection to this testimony.

4RP 26. However, the record establishes that Officer Norton was using Freitas's written statement to refresh his recollection as to what Freitas had told him upon his initial response to the scene. Here is the relevant testimony immediately preceding the court's ruling:

**Ofc. Norton:** I was talking to her -- as soon as I got there, I talked to her. I was -- while Fire was checking her for injuries, I started talking to her to find out what happened. Usually the report, you know, the 911 dispatch call and what actually happened are sometimes close and accurate, but we get there and try to get as many facts as we can while Fire is treating them, so we can continue the investigation.

....

**Mr. Gahan:** How would you describe Jaimi's demeanor as she was speaking?

**A.** She was shaken up.

**Q.** How could you tell?

**A.** Her voice was shaky. She started crying a couple times spontaneously while she recounted the events. She was hesitant. I think that's about all I remember though.

**Q.** Did you take a statement from her?

A. I did.

Q. What did she tell you?

A. Without -- I have the statement. Without the statement in front of me, I couldn't tell you offhand what she said.

**MR. SCANNELL:** Objection, Your Honor. He hasn't laid a foundation for hearsay yet.

**THE COURT:** Well, nothing has been offered at this point, so the last answer will stand. And we'll see what the next question is.

... [Discussion about Freitas's injuries and transport to hospital omitted.]

Q. I'm handing you what has been marked as State's Exhibit 10; would you take a look at that, please?

A. Oh, it looks like she wrote it because that's definitely not my handwriting.

...

Q. And if you had an opportunity to review that statement, would it serve to refresh your recollection as to what Jaimi said?

A. Yes, it would.

Q. Okay. Please take a moment, look down, read it to yourself. When it has sufficiently refreshed your recollection, please look up, and I'll ask you some more questions.

...

Q. (By Mr. Gahan) Did that serve to remind you what Jaimi said?

A. Yes, it does.

Q. Please tell us?

A. Well, what she told us --

**MR. SCANNELL:** Objection, Your Honor --

...

**MR. SCANNELL:** -- hearsay.

**THE COURT:** Hearsay, overruled. He may answer the question.

**Q.** (By Mr. Gahan) Go on?

4RP 22-26.

**2. The trial court did not abuse its discretion in allowing Ofc. Norton to testify about Freitas's excited utterances.**

ER 803(a)(2) allows statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Such statements are not excluded by the hearsay rule. The inquiry for admission of an excited utterance is highly factual. See State v. Dixon, 37 Wn. App. 867, 871-73, 684 P.2d 725 (1984). The question is whether, when Freitas made the statement, she was still under the influence of the stressful event to the extent that her statement “could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

A trial court’s decision to admit evidence is reviewed under an abuse of discretion standard. State v. Redmond, 150 Wn.2d 489, 495-96, 78 P.3d 1001 (2003). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court’s evidentiary ruling may be upheld on

any proper grounds that the record supports. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

Here, the State sought to introduce the statement made by Freitas to Ofc. Norton in the Safeway parking lot while Freitas was still shaky, spontaneously crying, and hesitant. When the officer indicated he was uncertain of exactly what Freitas said, he was allowed to refresh his recollection by reviewing the written statement she had made an hour later. The officer indicated that the written statement refreshed his recollection as to what Freitas had told him. The trial court then appropriately allowed the officer to testify as to what Freitas had said while under the influence of the stressful event. This ruling was not an abuse of discretion.

**3. Any error in admitting the testimony was harmless.**

Nonconstitutional error in admitting hearsay evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Assuming *arguendo* that the trial court erred in admitting the alleged hearsay testimony offered by Ofc. Norton, the error was harmless.

The alleged hearsay statement simply reiterates Freitas's own testimony as to what she told Ofc. Norton. The statement also duplicates other testimony, the admission of which has not been challenged on

appeal, including: the 911 tape, Freitas's statement to Fire Department personnel, and Freitas's statement to Dr. Tewodros. Of course, Freitas testified and was subject to cross-examination about the statements she made to the officer.

Moreover, had the court initially declined to admit the statement, it would almost certainly have been admissible after cross-examination of Freitas and the presentation of the defense case. The entire thrust of Bell's defense was that Freitas was lying about this (and all the other) incidents of assaultive behavior by Bell. As soon as Freitas's credibility was attacked, her statement (written or otherwise) to Officer Norton would be admissible pursuant to ER 801(d)(1) to rebut the assertion of recent fabrication, influence, or motive.

Bell's claim that the trial court erred in allowing Officer Norton to testify about what Freitas had said had occurred, while at the Safeway parking lot, and under stress of the recent incident, is without merit.

**C. AFTER *STATE v. HALL*, TWO UNITS OF PROSECUTION FOR WITNESS TAMPERING REMAIN.**

On appeal, Bell argues that his five convictions for witness tampering violated double jeopardy protections. Bell asserts that the five counts should constitute a single unit of prosecution. This issue has recently been addressed by the Washington Supreme Court in State v.

Hall, \_\_\_ Wn.2d \_\_\_, 2010 WL 1610966 (2010). The Court in Hall held generally that there is only a single unit of prosecution – per witness per proceeding – for witness tampering. The Supreme Court recognized, however, that under different facts, there may be more than one course of conduct that constitutes witness tampering.

In the present case, Bell engaged in two distinct courses of conduct that constitute witness tampering. The division between these two courses of conduct was the issuance of the no contact order and the placement of a phone block that prohibited Bell from contacting Freitas directly. Accordingly, the State concedes that this matter should be remanded so that Bell can be resentenced on two counts of witness tampering, with his offender score accordingly modified.

**1. Witness tampering: unit of prosecution.**

The witness tampering statute says in relevant part:

(1) 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. . . 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).

The law on the unit of prosecution for witness tampering has been clarified by the Washington Supreme court in State v. Hall. It is helpful to begin the analysis of this issue with the Court's ultimate conclusion:

*In this case, we hold the plain language of the statute reveals that the legislature intended to criminalize inducing "a" witness not to testify or to testify falsely. We hold, under the facts of this case, Hall committed one crime of witness tampering, not three. However, we recognize that the facts of a different case may reveal more than one unit of prosecution. We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.*

State v. Hall, \_\_\_ Wn.2d \_\_\_, 2010 WL 1610966 at 6 (2010) (emphasis added).

Hall provided an overview of the unit of prosecution analysis. The Court emphasized that after conducting a review of the statutory language and legislative history, determining the unit of prosecution in each case requires an evaluation of the facts: "[E]ven where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." Hall, 2010 WL 1610966 at 2 (citing State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007) (citing State v. Bobic, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000))). The Court emphasized that: "A unit of prosecution can be either

an act or a course of conduct.” Hall, 2010 WL 1610966 at 2 (citing State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005)).

After reviewing the facts in Hall, the Supreme Court concluded that Hall had engaged in only a single unit of prosecution because his course of conduct was “continuous and ongoing, aimed at the same person, in an attempt to tamper with her testimony at a single proceeding.”

Hall, 2010 WL 1610966 at 5. Significantly, however, the Court stated:

*Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.*

Hall, \_\_\_ Wn.2d \_\_\_, 2010 WL 1610966 at 6 (emphasis added)

## **2. Two counts of witness tampering survive.**

Based on the analysis in State v. Hall, two of the five counts of witness tampering survive in the present case. A clear break between Count 5 (October 24 to October 3, 2007) and Counts 6 to 8 (October 4 to December 12, 2007) occurred on October 3 and 4, 2007, when a phone block and no contact order were put in place in an effort to prevent Bell from contacting Freitas.<sup>11</sup>

On October 3, a jail phone block was established, preventing Bell from calling Freitas directly. 5RP 38. Despite this phone block, Bell tried

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<sup>11</sup> See chart summarizing jail calls, p. 10, supra.

to call Freitas 61 more times, all of which were blocked. 5RP 38-39.

After October 3, Bell was forced to use three-way calling to continue to leave messages for Freitas or to speak with her directly. The jail phone system is supposed to prevent such three-way calls, but inmates have learned to circumvent this feature by “blowing” into the receiver. 5RP 36. When Bell contacts Freitas through a third party, he can often be heard blowing into the phone. See, e.g., 5RP 107-08.

Moreover, on October 4, a no contact order was approved which prohibited Bell from having any contact with Freitas. This order was signed by Bell, who admitted he knew of its existence. 8RP 71; Exhibit 36. Nevertheless, after the phone block and no-contact order were issued, Bell contacted Freitas numerous times. 5RP 38-39; 8RP 71-72.

The State submits that Bell’s actions, after the issuance of the no-contact order and the phone block, constitute a new course of conduct that supports a second unit of prosecution for witness tampering.<sup>12</sup> Unlike Hall, in this case the State interrupted the defendant’s efforts to tamper with the witness. Nevertheless, Bell chose to renew his efforts; finding a

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<sup>12</sup> State v. Hall also contemplates that a new course of conduct may be present when a defendant seeks to tamper with a witness through a third party. Had the State known of this distinction when this case was brought to trial, it would have been a fairly simple matter to charge Bell separately for his efforts to contact Freitas indirectly. However, because the charged counts mix direct contact with Freitas and contact through third parties, the State elects not to pursue this argument on appeal.

way to circumvent the phone block to contact Freitas and knowing that he was prohibited from contacting her. By continuing (directly and indirectly) in his efforts to persuade Freitas not to attend the trial, to drop the charges, and to tell the prosecutor that nothing happened, Bell engaged in a second and distinct course of conduct. This course of conduct represents a second unit of prosecution for witness tampering.

**D. SUFFICIENT EVIDENCE SUPPORTS EACH OF THE ALTERNATIVE MEANS OF WITNESS TAMPERING.**

Bell argues the five counts of witness tampering are not supported by sufficient evidence on each of the two possible alternative means.<sup>13</sup>

**1. Legal standard: alternative means & witness tampering.**

Tampering with a witness is an alternative means crime. A person is guilty of tampering if he attempts to induce a witness to: “(a) [t]estify falsely or, without right or privilege to do so, to withhold any testimony; or (b) [a]bsent himself or herself from such proceedings; or (c) [w]ithhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.” RCW 9A.72.120. Only the first two alternatives are at issue in this case. CP 187-92.

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<sup>13</sup> Despite the State’s concession that there are only two units of prosecution for witness tampering, it is necessary to address the alternative means argument for each count in order to ensure that there is a basis for both units of prosecution.

When an offense may be committed by more than one means, the jury need not be unanimous as to which means was proved so long as substantial evidence supports a finding under each means. State v. Orteaa-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). To prove an attempt to testify falsely, the State is not limited to the literal meaning of the words used by the defendant, but is entitled to rely on their inferential meaning as well as the context in which they were used. State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

**2. Count 4: substantial evidence to convict.**

The evidence supporting Count 4 – which occurred prior to the issuance of the no contact order and phone block – consisted of three phone calls. On appeal, Bell asserts that there was not sufficient evidence to support the “absent herself from the proceedings” means of committing this crime. See App. Brief, p. 52. Bell’s claim is without merit.

**a. Sept. 24, 2007 jail call.**

On September 24, 2007, Bell called his family’s nightclub, Ximaica. Bell spoke to an unknown individual (subsequently identified as his brother, Winston).<sup>14</sup> 5RP 56-57. There is a reference to the fact that Bell’s mother has spoken with Freitas. 5RP 56. Bell has his brother call

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<sup>14</sup> In the record, Winston is referred to as an “unknown female.”

Freitas on a three-way line. 5RP 56-57. Freitas does not answer, and Bell leaves a message telling Freitas he “loves her” and instructing her to “give the prosecutor a call.” 5RP 57. Bell tells Freitas the number for the prosecuting attorney’s office. 5RP 57.

**b. Oct. 1, 2007 jail call.**

Bell calls his family’s nightclub and again speaks to his brother, Winston. 5RP 57-58. Bell asks, “Did anybody hear from the bitch?” and then explicitly says he means “Jaimi.” 5RP 59-60. Bell has his brother call Freitas on a three-way line, but can’t get through. 5RP 60, 62. Bell then has his brother call his friend Delano (“Dog”). 5RP 62-63. “Dog” says that he has already spoken with “her” and told her not to go to court and if she doesn’t go to court, then they “can’t press charges.” 5RP 64-65. Bell gives Delano the phone number for the prosecutor’s office and tells him to give it to Freitas. 5RP 66.

After Delano relates his conversations with Freitas, Bell says: “Like what are her – I don’t give a fuck what you have to do, dog. Fucking, if she has a price, fucking ask it, brother. Seriously. Okay?” 5RP 68. Bell repeats that he doesn’t care what the price is. 5RP 68. He then tells Delano to “make it happen.” 5RP 68-69. Bell ends the call by telling Delano to tell Freitas to call the prosecutor. 5RP 71.

**c. Oct. 3, 2007 jail call.**

Bell again calls Ximaica and eventually speaks to Delano. 5RP 71-74. Once Delano is on the phone, Bell complains that Freitas is feeling “all powerful” and that he needs “leverage.” 5RP 76-77. Bell says he needs to “get the fuck out” and asks Delano to get in touch with Freitas, telling him to “move on it.” 5RP 77-78. Bell tells Delano, “I don’t care what you have to do. If you have to fuck her in the ass, dog, fucking do it. Do you hear me? Dog, fucking put it in her, dog.” 5RP 78.<sup>15</sup>

These three phone calls clearly provide sufficient evidence to convict on the alternative means that Bell sought to have Freitas “absent herself from the proceedings.” Delano specifically stated that he had spoken with Freitas and told her not to go to court and if she doesn’t go to court, then they “can’t press charges.” 5RP 64-65. Further, Bell’s statements to Delano stating “I don’t care what you have to do” and to “fuck her in the ass” can only be construed as a threat to get Freitas not to testify by scaring her into failing to appear for court.

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<sup>15</sup> In an inaudible portion of the record, but on the CD, Bell tells Delano to drive to Freitas’s work and hand her the phone so he can talk to her, adding, “She either needs to not show up or she needs to like show up tomorrow and say she was lying so I can get, if she shows up tomorrow and says she was lying, I get out... if you could just go to her and tell her ...” He concludes by telling Delano, “Dog I want you to show up to her fuckin’ work man. And beat that bitch in her fuckin’ face... Jesus Christ dog give her that fuckin’ number dog...” Exhibit xx.

**3. Count 5: substantial evidence to convict.**

This count of witness tampering was based on a telephone call Bell made from jail October 4, 2007. In this phone call, Bell asks his mother to offer money to Freitas to get her to “drop it.” Bell’s mother tells him, “You know that’s witness tampering.” Exhibit 3; XRP xx-xx.

Contrary to Bell’s claim on appeal, offering to pay money to a witness to get her to “drop it” presents substantial evidence that Bell wanted Freitas to absent herself from the proceedings. The fact that it might also be a suggestion that she should “testify falsely” does not mean that both alternative means of committing witness tampering were not established by this offer to bribe Freitas.<sup>16</sup>

**4. Count 6: substantial evidence to convict.**

Count 6 was based on phone calls Bell made to Delano on October 12, 2007. Bell asserts on appeal that there was insufficient evidence to support the “absent herself” means of witness tampering.

On October 12, Bell called the nightclub and spoke with Delano. Delano told him that he saw Freitas with another man, but did not speak with her. 5RP 103-05. Delano then puts Bell through to Freitas on a three-way call (Bell has to blow into the phone system to make this

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<sup>16</sup> In subsequent phone conversations, Freitas told Bell that she had in fact been contacted by Bell’s mother, who blamed her for Bell’s incarceration and told her she had to drop the charges. 6RP 81.

happen), but she hangs up. 5RP 107-08. Bell then speaks to a female friend named Kelly, and asks her to be prepared to testify that Freitas is a “bitch.” 5RP 110-17.

Bell called Delano a second time. 5RP 118. He tells Delano that when he speaks with Freitas he should just say that Bell is “so sad” and that Bell was only concerned whether she (Freitas) is happy. 5RP 119-20. Bell then says that Delano should offer her “five.” 5RP 120. Delano says, “For what?” Bell responds: “To take all this shit and fuck off.” 5RP 120-21. Later, Bell confirms that the money would cover Freitas’s rent. 5RP 122. He says that Freitas could call the prosecutor and say, “I want to take it all back.” 5RP 121. After unsuccessful three-way calls to Freitas, Bell tells Delano to “go talk to her in person,” but “don’t leave that, fucking, letter with her, whatever you do boy. That’s fucking evidential.” 5RP 126.

Bell’s statement that Delano should offer Freitas five-hundred dollars to “take all this shit and fuck off” is substantial evidence to convict Bell on the “absent herself” prong.

**5. Count 7: substantial evidence to convict.**

This count of witness tampering was based on telephone calls Bell made to both Freitas and Delano on November 11, 2007. On appeal, Bell admits that these conversations establish sufficient evidence of the “absent

herself” means, but asserts there is not evidence to support the “testify falsely or withhold evidence” means. Bell’s argument is without merit.

**a. First November 11, 2007 jail call.**

Bell manages (through third parties) to be connected to Freitas and have several conversations with her. 6RP 59. Bell tells Freitas he has dreamed about her and asks Freitas if she misses him. Freitas replies: “What would I miss [inaudible] my ass kicked, being bruised every day, having to make up a different fucking lie for the bruises on my arms and the bruises on my face? Or did I miss you sitting on me or do I miss you kicking at me or did I miss my shoulder dislocating every time I fucking try to wash my hair [inaudible] by my arm. Is that what I miss?” 6RP 72. Bell responds by saying, “I’ve changed.” 6RP 72.

Freitas tells Bell that his mom has been calling her, telling her she had to drop the charges. Bell asks Freitas to “make this right.” After sweet-talking Freitas and telling her he needs help, Bell begins to wear Freitas down. Bell asks if he can write Freitas. He tells her they were “meant to be together.” Exhibit 5. The call ends with Freitas telling Bell that she loves him but that she can’t take any more. 6RP 92.

**b. Second November 11, 2007 jail call.**

Immediately after speaking with Freitas, the defendant again calls Ximaica and is transferred to Delano's phone after an unsuccessful attempt to call Freitas. During his conversation with Delano, Bell admits to trying to trick Freitas into not testifying by being sweet to her; he brags to Delano that she told him "she loves him." Bell tells Delano that he still might need his help, and if "worse comes to worse" he knows what to do. Bell says that it is Delano's job to make sure she doesn't show up and Delano responds by saying, "I'll hold that, I'll hold that accountability down dog." Bell warns Delano not to say too much on the recorded line and they can speak in more detail when Delano comes to visit. Bell confesses that on the telephone he was not explicit in telling Freitas not to testify, that he was purposefully not telling her "the main point" and that he wanted to "make it seem that I still like her." Exhibit 5. Delano responds knowingly, saying, "Yeah, exactly, you want to look cool for those fuckin' idiots." The defendant agrees, saying he was "high-steppin' around the soft spot." It is obvious Bell and Delano are aware they are being monitored and are trying to avoid being understood.

**c. Third November 11, 2007 jail call.**

Bell again calls Ximaica and is transferred to Delano. After some small talk about drugs and a bar brawl, Bell specifically references the

upcoming omnibus hearing in his case. He tells Delano that if Freitas doesn't show, the prosecutor can't proceed because its "all hearsay."

Exhibit 5. Bell tells Delano that Freitas shouldn't tell the prosecutor that she isn't going to testify, because then they will "make her go." Instead, she should say that she is going to go and then not do so. That way, Bell says, "they can't do shit about it." Exhibit 5.

The entire thrust of Bell's conversations with Freitas is to convince her to help him get out of jail. While it is true that Bell does not come out and say "lie for me" he has already established in his conversations with Delano that his *modus operandi* is going to be to try and go softly with Freitas and convince her not to cooperate. Bell's intent is made clear by his subsequent conversations with Delano, in which he is specifically asking him to make sure that Freitas does not testify. Bell will use Delano for the threats; he believes that he can talk Freitas into not cooperating. And Bell almost succeeds, getting Freitas to finally admit that she loves him. This is the ultimate form of witness tampering and the phone calls on this date provide eloquent evidence that Bell was trying to convince and persuade Freitas to withhold testimony that he knew was both true and damning. Of course, Bell's statements to Delano that Freitas should not tell the prosecutor that she will not appear is direct evidence of the "absent

herself” prong. The three calls make it abundantly clear that Bell is trying to convince Freitas to absent herself from the proceedings.

**6. Count 8: substantial evidence to convict.**

Count 8 is based on three phone calls from Bell to Delano from November 11 to December 3, 2007. On appeal, Bell asserts there is not enough evidence to convict him on the “testify falsely or withhold evidence” means. Bell is incorrect.

**a. November 20, 2007 jail call.**

On November 20, Bell calls Delano and tells him he has to “talk to that fucking idiot.” Delano assures him that he will go and speak with her. The conversation eventually returns to the subject of Freitas and how sad and frightened she seems to be; Delano tells the defendant that he is going to “infiltrate.” Bell says he doesn’t care what Delano has to do. Exhibit 6. Bell tells Delano to pretend like he can protect Freitas, “Like, I’ll protect you, you know, you know what I mean? Just fuckin’ role bro I don’t care what you gotta do, dog... the whole time I’m in here dog she really ain’t gotta worry about me dog...” Exhibit 6. Delano responds by saying, “Dog, she better be done with this dumb shit.” The conversation ends with Bell saying, “If she doesn’t show up, it all goes away.” Exhibit 6.

**b. November 28, 2007 jail call.**

Eight days later, Bell calls Delano and the phone is eventually given to his friend Anthony. Bell attempts to disguise his conversation with Anthony, talking about delivering a message to Freitas and, if the message is not successful, then something needs to happen to Freitas. Bell uses an allegory about a “DJ” and a “mixed CD” to deliver the message, but Anthony is concerned that Bell is discussing this on a recorded line, saying, “Nigga, you done said way too much shit on the mother fuckin’ phone already. You know what I mean, nigga. I’m on my mama’s phone nigga you got me fucked up. Nigga, I’m not fixin’ to get caught behind some shit you talkin’ about, nigga... Why are you callin’ me talkin’ to me about this shit over this phone dog? . . . there might be one of them assholes down there at the King County Jail that listens to rap music nigga and they wanna leak our shit, nigga.” Exhibit 6.

**c. December 3, 2007 jail call.**

On December 3, Bell again calls Delano but does not get through. Bell leaves a message for Delano, saying, “Did you talk to the bitch or what?” Exhibit 6.

These three calls appear primarily directed toward convincing Freitas not to appear for court. But the subtext is that Freitas should drop the charges, as epitomized by the statement “she better be done with this

dumb shit.” This would require Freitas to “withhold evidence” from the prosecutor and thus satisfies the first alternative means of committing witness tampering.

**E. THE “PATTERN OF ABUSE” AGGRAVATING FACTOR IS NOT VOID FOR VAGUENESS.**

Bell asserts that the term “psychological abuse” as used in the statutory aggravating factor is unconstitutionally vague. Bell may not raise a due process vagueness challenge to an aggravating circumstance. In any event, the argument is without merit.

**1. Exceptional sentence aggravating circumstances are not subject to a due process challenge.**

Under the Due Process Clause, a statute is void for vagueness if it: (1) fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Significantly, both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Washington Supreme Court has held that aggravating circumstances are not subject to due process vagueness challenges because they “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” Baldwin, 150 Wn.2d at 459. “A

citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.” Id. at 459.

The Court further observed that: “[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.” Id. at 461.

Bell argues that in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), this Court’s decision in Baldwin is incorrect. But the fact that a jury, not a judge, makes the finding of whether an aggravating circumstance accompanied the commission of the crime does not compel this court to overrule its decision. The Baldwin analysis remains valid after Blakely. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. Instead, they list accompanying circumstances that may justify a trial court’s imposition of a higher sentence.

Significantly, a jury’s finding of an aggravating circumstance does not mandate an exceptional sentence. Even when a jury finds an aggravating circumstance, the trial court has discretion in deciding whether the aggravating circumstance is a substantial and compelling

reason to impose an exceptional sentence. RCW 9.94A.535. Because Bell fails to show that the decision in Baldwin was incorrect and harmful,<sup>17</sup> this court should adhere to its holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.

**2. The “pattern of abuse” aggravator is not vague.**

Statutes are presumed to be constitutional. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). A party challenging a statute as unconstitutionally vague has the burden of proving the statute’s unconstitutionality beyond a reasonable doubt. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

A statute is void for vagueness under the due process clause of the Fourteenth Amendment and cannot support a conviction if either: (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.” City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (citing State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993)). However, the constitution does not require “impossible standards of specificity” or “mathematical certainty” as some

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<sup>17</sup> See generally State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the Court does “not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.”).

degree of vagueness is inherent in the use of language. Halstien, 122 Wn.2d at 118. If persons “of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty.” City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988).

Bell argues that “psychological abuse” is unconstitutionally vague because it is not defined by the statute and that reasonable people must guess at its meaning. The fact that some terms in a statute are not defined, however, does not necessarily mean that the enactment is void for vagueness. City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). Impossible standards of specificity are not required, and a statute “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” Eze, 111 Wn.2d at 26-27.

“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). The State agrees with the dictionary definition of these terms offered by Bell on appeal. “Psychological” means: “relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind.”

Webster's Third New Int'l Dictionary (1993). Definitions of "abuse" include: "1 a: 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 (1993).

A person of ordinary intelligence would understand what is proscribed by the phrase "[t]he offense was part of an ongoing pattern of psychological. . . abuse of the victim." It is precisely the equivalent of physical abuse (i.e., injury to the body) – a term that no one doubts is readily cognizable – but directed at the person's mind. Bell's argument seems to be that simply because one cannot see an injury, no injury is possible. That argument is completely contrary to human experience. Everyone understands that the infliction of emotional distress or psychological abuse is possible. While it might not be possible to quantify a precise measure of such abuse – which is perhaps why it does not form the basis of an underlying crime – a person of ordinary intelligence can make an informed judgment of when such abuse is present.

Bell's argument is essentially premised on State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001). In Williams, our Supreme Court found unconstitutionally vague that portion of the criminal harassment statute that prohibits "any other [malicious] act which is intended to

substantially harm the person threatened or another with respect to his or her physical or mental health or safety.’” Williams, 144 Wn.2d at 203 (emphasis omitted, quoting former RCW 9A.46.020(1)(a)(iv) (1992)). The statute did not define “mental health,” nor did it specify whether the prohibition covered threats that caused simple irritation or emotional discomfort or only threats that caused a diagnosable mental condition. Williams, 144 Wn.2d at 204. Accordingly, the Court concluded that the statute did not provide sufficient guidance to the public or to law enforcement. Williams, 144 Wn.2d at 205-06.

Contrary to Bell’s assertion, “threats to mental health” and “psychological abuse” are not identical twins. Indeed, in making this argument Bell is forced to take these terms in isolation, depriving them of the context in which they have been adopted by the legislature.

First, the harassment statute in Williams criminalized words that had not yet – and might never – be acted upon. By contrast, the pattern of abuse aggravating circumstance criminalizes nothing; by definition the aggravating circumstance only has relevance if there has been an underlying crime.

Moreover, and perhaps most basically, the aggravating factor modifies the term “psychological” with the term “abuse.” The aggravator thus imposes a requirement of degree absent from the term “mental

health.” In other words, the aggravator is not present simply because there has been a psychological impact, however small or *de minimus*; the impact must constitute actual abuse. See State v. Dyson, 74 Wn. App. 237, 247, 872 P.2d 1115, review denied, 125 Wn.2d 1005, 886 P.2d 1133 (1994) (phrase “extremely inconvenient hour” in telephone harassment statute not unconstitutionally vague, because “extremely” limits subjectivity of what is inconvenient).

In addition, unlike the harassment statute at issue in Williams, the aggravator uses the term “psychological abuse” in sequence with the terms “physical abuse” and “sexual abuse.” Allegedly vague terms in a statute are interpreted in a manner consistent with the other words in the sequence. State v. Hutsell, 120 Wn.2d 913, 918, 845 P.2d 1325 (1993) (citing Dean v. McFarland, 81 Wn.2d 215, 221, 500 P.2d 1244, 74 A.L.R.3d 378 (1972)). Reading these terms together makes it clear that the level of psychological abuse required to satisfy the aggravating circumstance is on par with that required for physical or sexual abuse. Bell does not challenge the validity of the terms “sexual abuse” or “physical abuse,” which are clearly understood by individuals of ordinary intelligence. Psychological abuse is no different.

Further, unlike the harassment statute at issue in Williams, the aggravator requires a “pattern” of abuse. That pattern must be established by proof of “multiple acts” over a prolonged period of time.

Finally, unlike the harassment statute, the aggravator is predicated on the existence of a domestic violence crime; establishing a connection between the defendant and the victim.

For all of these reasons, the aggravator in his case is unlike the term “mental health” as used in the harassment statute at issue in Williams. Ordinary people can understand what conduct is proscribed by the term “psychological abuse” and the statute provides ascertainable standards of guilt to protect against arbitrary enforcement. The pattern of abuse aggravator is not unconstitutionally vague.

**F. THE “PATTERN OF ABUSE” AGGRAVATING FACTOR IS NOT OVERBROAD.**

Bell also argues that the pattern of abuse aggravating factor is unconstitutionally overbroad under the First Amendment. This argument is without merit

**1. Legal standard: Unconstitutionally overbroad.**

A statute is presumed constitutional and the party challenging a statute carries the burden of proving its unconstitutionality beyond a reasonable doubt. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739,

818 P.2d 1062 (1991). Where possible, courts must interpret a challenged statute in a manner that upholds its constitutionality. City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990). “Therefore, the presumption in favor of a law’s constitutionality should be overcome only in exceptional cases.” City of Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

The First Amendment provides that “[c]ongress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. This protection applies to the states through the Fourteenth Amendment. Kitsap County v. Mattress Outlet/Gould, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005). Under Washington’s Constitution, “[e]very person may freely speak, write and publish on all subjects, being responsible for an abuse of that right.” Wash. Const. art. I, § 5. Overbreadth challenges under both constitutions are viewed similarly. City of Seattle v. Huff, 111 Wn.2d 923, 928, 767 P.2d 572 (1989).

In general, the First Amendment prevents the government from prohibiting speech or expressive conduct. State v. Halstien, 122 Wn.2d 109, 121, 857 P.2d 270 (1993) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305, 317 (1992)). A statute is unconstitutionally overbroad if it prohibits a substantial amount of

protected speech and conduct in addition to legitimately prohibited unprotected speech or conduct. Webster, 115 Wn.2d at 641.

To determine whether a statute is overbroad, courts first consider whether it reaches a substantial amount of constitutionally protected conduct. Tacoma v. Luvene, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). A statute which regulates behavior, and not pure speech, will not be overturned unless the overbreadth is “both real and substantial in relation to the ordinance’s plainly legitimate sweep.” Webster, 115 Wn.2d at 641 (quoting Eze, 111 Wn.2d at 31). Therefore, even if a statute is “substantially overbroad,” it will not be overturned on overbreadth grounds unless the court is unable to place a sufficiently limiting construction upon the statute. Halstien, 122 Wn.2d at 123. The “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)).

**2. The “pattern of abuse” aggravator is not overbroad.**

Bell asserts that RCW 9.94A.535 – which establishes an aggravating circumstance when there is an “ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time” – is overbroad because it reaches a

substantial amount of protected speech. The statute does not regulate a substantial amount of protected speech for two reasons.

First, on its face the statute does not regulate speech at all. At best, the statute regulates “abuse.” Bell’s argument on appeal hinges on the assertion that abuse “involves speech directly.” App. Brief, p. 68. This is obviously not correct. As the language of the statute makes clear, “abuse” is measured by its impact on the victim in psychological, physical, and sexual terms. The statute says nothing about speech as the mode of committing abuse; nor does it in any way attempt to regulate speech because of its content. It is entirely possible for the aggravator to be present whether or not a defendant is engaged in speech at all.

Second, the aggravating circumstance never comes into play unless the defendant commits an underlying criminal act. An individual is free to say whatever he or she likes – including, for example, repeated and vitriolic verbal abuse of a domestic partner – with absolutely no criminal consequences whatsoever. Only if a criminal act is committed does the aggravator circumstance become potentially relevant. Thus, Bell’s broad interpretation of the statute – that it necessarily implicates speech – is simply wrong. A narrow, and appropriate interpretation, is that the statute only regulates the action of abusing another person; and then only in the context of a domestic violence relationship and if the abuse is ongoing.

Indeed. As discussed above, even if the jury finds the aggravating circumstance, the court may choose not to impose an exceptional sentence.

In sum, the statute regulates behavior – the behavior of abuse – not speech. Far from regulating a substantial amount of speech, the statute does not regulate speech at all. The aggravating circumstance only becomes applicable if the defendant has committed an underlying crime of domestic violence (here, Assault in the Second Degree). Unlike Williams, relied upon heavily by Bell, the aggravator does not criminalize speech. The harassment statute at issue in Williams criminalized speech that the Court concluded did not constitute “true threats.” The aggravator does not commit the same error. Even if speech is found by the trier-of-fact to justify the aggravator, it can only do so in the presence of some other, non-speech related criminal activity.

Finally, the “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” Bell asserts that it would be possible to find the aggravator based on words alone – and that this is what the State did in the present case. This is wrong for two reasons. First, there must always be some underlying crime. Second, in the present case the State relied primarily on Bell’s prior acts (including the prior rapes and assaults) in establishing the presence of the aggravator. Bell’s

claim that an individual could be punished for simply engaging in speech is certainly incorrect as applied in this case. It is also the sort of far-fetched speculation that does not support an overbreadth challenge. Bell's claim that the aggravator is overbroad must be denied.

**G. NO DENIAL OF RIGHT TO A UNANIMOUS VERDICT ON THE "PATTERN OF ABUSE" AGGRAVATOR.**

Bell claims for the first time on appeal that he was denied the right to a unanimous verdict on the special interrogatory that alleged the pattern of abuse aggravating circumstance. Bell asserts that because there were "multiple acts" that could have supported the aggravating circumstance the jury should have been instructed that it had to be unanimous as to which act supported the aggravating circumstance. This argument fails because the legislature has specified that the aggravating factor is a "pattern" of abuse. Thus, the aggravator specifies a continuing course of conduct that is satisfied by multiple acts over a period of time.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the State presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either it must elect which of such acts it is relying on for a conviction or the court must instruct the jury to

agree on a specific criminal act. Coleman, 159 Wn.2d at 511. These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt. Coleman, 159 Wn.2d at 511-12 (citing State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990)).

There are, however, two important exceptions to the unanimity rule, both of which apply in the present case.

First, a unanimity instruction is not required when the evidence shows the defendant's actions formed a "continuous act." In those situations, "a continuing course of conduct may form the basis of one charge in an information." State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991) (citing Petrich, 101 Wn.2d at 571, 683 P.2d 173). Under the "continuous conduct" exception, a jury must unanimously agree only that the continuous conduct occurred, not that each of the individual acts that might constitute the conduct had occurred. Crane, 116 Wn.2d at 330.

The aggravating circumstance in the present case falls within the continuous course of conduct exception to the unanimity rule because the legislature has specifically created and predicated the aggravating circumstance on the existence of a *pattern* of abuse. The aggravating circumstance reads:

The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) 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). By using the phrase “ongoing pattern” of abuse, the wording of the statute makes it clear that the legislature intended that this aggravating circumstance be evaluated under the “continuous conduct” exception to the multiple acts rule.

Thus, in order to find the aggravating circumstance the jury did not have to agree on a single act, or even a series of specific acts, committed by Bell. What they had to unanimously agree on beyond a reasonable doubt was that Bell engaged in a pattern of acts that constituted psychological, physical, or sexual abuse and that he did so over a prolonged period of time. The language of the aggravator thus makes this a “continuous act” – as opposed to a “multiple act” – case. Bell’s “multiple act” analysis is without merit.

The second exception to the Petrich “multiple acts” rule is the “alternative means” analysis. Under this analysis, a single offense may be committed in more than one way. When this occurs, there must be jury unanimity as to guilt for the single crime charged. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Unanimity is not required, however, as to the means by which the crime was committed so long as

substantial evidence supports each alternative means. Kitchen, 110 Wn.2d at 410.

The pattern of abuse aggravator also satisfies the “alternative means” exception to the Petrich rule because “substantial evidence” supports each of the alternative ways of committing the aggravating circumstance. There was substantial evidence of prior physical abuse, including the charged Assault in the Second Degree (Count 12, dislocated shoulder) and Assault in the Third Degree (Count 13, dinner plate), and the uncharged nose ring and balcony incidents. There was substantial evidence supporting prior sexual abuse, the charged Rape in the Third Degree (Count 14) and uncharged rape (anal sex incident). There was also substantial evidence supporting psychological abuse given Freitas’s testimony concerning Bell’s shifting moods and behavior and the fear she felt when Bell was angry with her and she knew that she might be assaulted. In addition, the jury could find psychological abuse in the fact that Bell would demand, and then force, sex after assaulting Freitas.

In sum, Bell’s claim that he was denied a unanimous verdict because the jury was not instructed that it had to agree on specific acts that constituted the pattern of abuse aggravator is without merit. The aggravating circumstance clearly justifies imposing an exceptional sentence based on Bell’s continuous acts over a period of time. Moreover,

the aggravator also satisfies the “alternative means” exception to the multiple acts rule because substantial evidence supported each means of committing the pattern of abuse aggravator.

**H. ANY ERROR IN THE LANGUAGE OF THE SPECIAL VERDICT FORM WAS HARMLESS.**

Bell asserts that a difference between the language of the pattern of abuse aggravator and the special verdict form requires reversal of the special verdict finding. Bell may not raise this claim for the first time on appeal because he has not established that it was a manifest constitutional error. Assuming that the argument is considered, the difference in language was harmless beyond a reasonable doubt.

**1. Factual background: special verdict language.**

The statutory aggravating circumstance language is as follows:

(i) 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 special verdict form used in this case read:

QUESTION: 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 (emphasis added). The State concedes that the language of the special verdict should have mirrored that of the statutory provision.

**2. Bell may not challenge the language of the special verdict form for the first time on appeal.**

In general, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). “Generally, the failure to object at trial will operate as a waiver of the right to assert that error on appeal.” State v. Brush, 32 Wn. App. 445, 456, 648 P.2d 897 (1982). An alleged error not raised at trial is not reviewed on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show a likelihood of actual prejudice in order to establish that the error is “manifest.” State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

The purposes underlying RAP 2.5(a) were addressed in State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995): [C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn.2d at 686-87. On the other hand, “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials

and is wasteful of the limited resources of prosecutors, public defenders and courts.” Lynn, 67 Wn. App. at 344, 835 P.2d 251.

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest,” i.e., it must be “truly of constitutional magnitude.” Scott, 110 Wn.2d at 688. Essential to this determination is a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Lynn, 67 Wn. App. at 345.

In the present case, Bell offered no objection to the special verdict form at trial. 9RP 9-10. He may not raise the alleged error for the first time on appeal because the error is not manifest: Bell cannot make – and indeed has not really tried to make – a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Bell makes only one argument as to prejudice from the special verdict language. Bell asserts that the jury might have found that Count 1 was not part of a “pattern of abuse” because Freitas and Bell had reduced their cocaine consumption in the year prior to the September 23, 2007. He asserts that it demonstrates a “gap” between the prior incidents and the September 23, 2007 incident. This is not a “plausible showing” of

manifest error, it is simply speculation; and it is unsupported speculation given the testimony establishing that Bell's abuse was ongoing.

Freitas specifically testified that on September 23, when Bell coaxed her back into the apartment, telling her she had nothing to fear, that she was afraid and that she knew, based on her prior experience with Bell's violence, that he was in a dangerous and assaultive mood. XRP xx-xx. This testimony establishes the connection between the September 23 assaults and Bell's prior acts of violence against her. Moreover, Bell's jail phone calls make clear that the violence was ongoing over the period of time leading up to September 23. See, e.g., 6RP 74 (“[F]or every bad month we had we had like two good days. We’d be cool for, like, three weeks at a time before you, fucking, went nuts again.”); 6RP 75-76 (“I tried to help you for, fucking, two and a half years, Clifton.”); 6RP 76 (“This is the first time in, like, the whole time I ever moved out here that I’m actually happy. And I don’t need to be, fucking, sacred of shit, and I don’t need to worry about if my door is locked or not.”). The record abounds with similar examples of the ongoing pattern of abuse that preceded, and included, the September 23 incident.

**3. Any error in the special verdict form was harmless beyond a reasonable doubt.**

The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Washington State Supreme Court adopted the Neder analysis in State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Neder, 527 U.S. at 18. That is, in order to hold the error harmless, an appellate court must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Id. at 19; Brown, 147 Wn.2d at 340.

The error in the language of the special verdict is harmless beyond a reasonable doubt because the modified language *made it harder, not easier, for the State to prove the aggravating factor*. The modified language instructed the jury that it should not consider the events of September 23, 2007 – which included the Assault in the Second Degree (Count 1, strangulation), Unlawful Imprisonment (Count 2), and Assault in the Third Degree (Count 3, blow to the face) – when determining whether Bell had engaged in a “pattern of abuse.” Significantly, Bell

repeatedly asserts on appeal that these were the State's strongest charges. It is little wonder that defense counsel had no objection to the instruction as given to the jury. Had the instruction been worded as Bell now suggests, it would have greatly *enhanced* the likelihood that the jury would have found that the aggravating circumstance was present. From the defense perspective, it was better that the jury *not* be allowed to consider the September 23 incident as a basis for the aggravator. In short, if the language of the special verdict had been identical to the statutory language, there would have been even more reason to impose an exceptional sentence.

**I. INSTRUCTION 43 WAS NOT AN IMPROPER COMMENT ON THE EVIDENCE.**

Bell asserts that Instruction 43 – which instructed the jury that prior bad acts by Bell could only be considered by the jury for certain limited purposes – was an improper judicial comment on the evidence. This argument is without merit.

**1. Legal standard: comment on the evidence.**

Jury instructions are reviewed *de novo*, within the context of the jury instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Wash. Const. art. IV, § 16 prohibits judges from conveying to the jury their personal attitudes regarding the merits of the case or instructing

a jury that matters of fact have been established as a matter of law. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (citing State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); State v. Primrose, 32 Wn. App. 1, 3, 645 P.2d 714 (1982)). “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The fundamental question underlying our analysis of judicial comments is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true. Levy, 156 Wn.2d at 726-27.

“[A] judicial comment in a jury instruction is presumed to be prejudicial and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” Levy, 156 Wn.2d at 725, 132 P.3d 1076; State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995).

## **2. Factual background: Instruction 43.**

Instruction 43 read as follows:

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). Bell did not object to this instruction.<sup>18</sup>

**3. Jury instruction 43 was not an improper comment on the evidence.**

Bell asserts that the use of the phrase “evidence has been introduced on the subject of prior assaults against Jaimi Freitas” in Instruction 43 was improper because it informed the jury that the uncharged bad acts were assaults. This claim is without merit.

Most basically, the instruction states only that “evidence has been introduced on the subject” of assaults. It does not say that the evidence concerning the assaults was “proven,” “established,” “admitted,” or that the jury was in any way to consider the evidence as true. Bell’s argument fails for the simple reason that Instruction 43 is completely opaque as to the trial court’s opinion as to whether the assaults occurred. Perhaps an instruction that stated: “Prior assaults against Jaimi Freitas are to be considered for. . .” might rise to the level of a comment on the evidence; but that is exactly what Jury Instruction 43 did not state.

Moreover, Jury Instruction 1 had already defined “evidence” as “testimony that you have heard from witnesses, stipulations and the

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<sup>18</sup> Because a judicial comment is considered constitutional error, it may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

exhibits” admitted at trial. CP 161. Together, Jury Instruction 1 and 43 informed the jury that: “Testimony from witnesses, stipulations and the exhibits have been introduced in this case on the subject of prior assaults against Jaimi Freitas. . .” This is a completely neutral statement of the law and does not reflect the trial court’s opinion about the merits of any of the “evidence” that was introduced.

Further, the phrase “evidence has been introduced” is not limited to evidence introduced by the State. Bell also introduced evidence on this issue. Indeed, the entire thrust of the defense case was that these “prior assaults” were disputed. Nothing could be clearer from the testimony that it was the function of the jury to resolve the evidentiary disputes concerning Freitas’s claim that Bell had previously assaulted her.

Significantly, the fact that resolving evidentiary disputes was the jury’s responsibility is confirmed by the jury instructions as a whole. Instruction 1 begins by stating that it was the jury’s “duty to decide the facts in this case based on the evidence presented at trial.” CP 161. As previously mentioned, “evidence” was defined as the testimony of witnesses, stipulations, and the exhibits. CP 161. Instruction 1 also informed the jury that it was the sole judge of the credibility of the

testimony of each witness.<sup>19</sup> CP 162. In sum, the instructions made it clear that it was the jury's role and purpose to resolve evidentiary inconsistencies. Nothing in Instruction 43 undermines that basic function or suggests that the court has resolved an issue in favor of the State.

In a single sentence, Bell also asserts that Instruction 43 established that the charged incidents, described by Freitas and denied by Bell, were "in fact assaults and therefore proved." App. Brief, p. 75. There is no explanation or argument as to why or how Bell reaches this conclusion. In any event, the jury instructions as a whole make it unequivocally clear that the State had the burden of proving beyond a reasonable doubt each of the elements of all of the charged crimes.

Bell also asserts in passing that Instruction 43, in combination with the alleged error in the special verdict language, suggested that the pattern of abuse aggravator had been proven. First, this argument depends on the assertion that the special verdict language was improper. As discussed above, this claim has no merit. Second, the argument hinges on the assumption that Instruction 43 told the jury the uncharged bad acts had in fact occurred. As just discussed, this argument also has no merit. Finally, Instruction 11 made it clear that the jury had to unanimously decide that

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<sup>19</sup> Of course, the instruction also informed the jury that the court had not intentionally commented on evidence during trial or in the instructions. CP 163.

the special verdict was satisfied beyond a reasonable doubt. CP 174. The jury was clearly informed that it was its responsibility to decide whether the special verdict had been satisfied and could only do so if it concluded that the aggravating circumstance alleged had been proven beyond a reasonable doubt.

Bell's claim on appeal fails the basic test for the analysis of judicial comments: whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true. Nothing in the use of the term "assault" in Instruction 43 conveys the idea that the court believed the prior bad acts had in fact occurred. The jury instructions as a whole made it clear that it was the jury's responsibility to resolve all evidentiary issues, and specifically credibility disputes as to whether the prior assaults had occurred. There was no judicial comment on the evidence.

**J. JURY INSTRUCTION 6 WAS NOT A COMMENT ON THE EVIDENCE.**

Instruction 6 stated that evidence that the defendant had previously been convicted of a crime is not evidence of the defendant's guilt. CP 169 (Instruction 6). On appeal, Bell argues that this was an improper judicial comment on the evidence because, he claims, there was no evidence he had a previous conviction. This is incorrect. The very first thing Bell

testified to on direct examination was that, shortly after he met Freitas, he had been “locked up,” that when he got out of “jail” he was on “house arrest” at Freitas’s apartment in Shoreline. 8RP 12-13. Bell’s admission that he had been in custody justified the use of Instruction No. 6.

**K. COUNTS 1, 2 AND 3 DO NOT CONSTITUTE THE “SAME CRIMINAL CONDUCT” FOR SENTENCING.**

Bell contends that his attorney was ineffective for failing to argue that Counts 1, 2 and 3 should be considered the “same criminal conduct” for the purpose of calculating his criminal offender score. Bell’s ineffective assistance claim fails for the simple reason that the three crimes involve different intents, both objectively and subjectively, and thus do not constitute the same criminal conduct for sentencing.<sup>20</sup> Further, Bell had time to pause, reflect, and renew his criminal intent between each criminal act which is an additional reason for concluding that Counts 1, 2, and 3 do not constitute the same criminal conduct.

**1. Legal standard: same criminal conduct.**

Under the Sentencing Reform Act, multiple current offenses generally count separately in determining a defendant’s offender score. RCW 9.94A.589(1)(a). However, if the sentencing court finds that two or more offenses encompass the “same criminal conduct” those offenses

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<sup>20</sup> The standard of review for ineffective assistance of counsel claims was set forth above.

count as a single offense for offender score purposes. RCW 9.94A.589(1)(a).

Crimes constitute the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The absence of any one of these prongs – intent, time or place, or victim – prevents a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Significantly, Washington courts narrowly construe RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

The Washington Supreme Court has held that in construing the “same criminal intent” prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). As a preliminary matter, the underlying statute must be objectively considered to determine whether the required intents are the same or different for each count. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

A sentencing court’s same criminal conduct determination will be reversed only where there is a clear abuse of discretion or misapplication

of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). In this case, Bell did not raise the issue of whether the intimidating and tampering charges constituted the same criminal conduct below. When a defendant has not raised a same criminal conduct claim at sentencing, and the record contains no findings on any of the elements of the same criminal conduct analysis, the trial court's calculation of the offender score is treated as an implicit determination that the offenses did not constitute the same criminal conduct. State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975, 978 (1998). As in cases where the trial court explicitly considers the issue, this implicit determination will not be disturbed absent abuse of discretion or misapplication of the law. Anderson, 92 Wn. App. at 61; State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Abuse of discretion is a deferential standard. State v. Anderson, 92 Wn. App. 54, 61-62, 960 P.2d 975 (1998); State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993); State v. Porter, 133 Wn.2d 177, 184-86, 942 P.2d 974 (1997). A trial court does not abuse its discretion when the facts in the record are sufficient to support a finding either way on the presence of any of the three elements that constitute "same criminal conduct." RCW 9.94A.400(1)(a); Anderson, 92 Wn. App. at 61-62; State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987).

**2. Counts 1, 2 and 3 involve different criminal intent.**

The Supreme Court has held that in construing the “same criminal intent” prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). First, the underlying statute is objectively considered to determine whether the required intents are the same or different for each count. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). If they are the same, the facts usable at sentencing are viewed objectively to determine whether a defendant’s intent was the same or different with respect to each count. Hernandez, 95 Wn. App. at 484.

The defendant’s intent is crucial in a same criminal conduct analysis. State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (1990). The focus is on the offender’s objective criminal purpose in committing the crime. Id. at 811. The relevant inquiry is to what extent did the defendant’s criminal intent, viewed objectively, change from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

Count 1 (Assault in the Second Degree), Count 2 (Unlawful Imprisonment), and Count 3 (Assault in the Third Degree) all involve the same victim, Jaimi Freitas. It is clear, however, that the underlying statutes

involve differing criminal intents and thus do not constitute the same criminal conduct.

Count 1 charged Bell with Assault in the Second Degree by strangulation. CP 116. To establish this crime, the State must prove that the defendant intentionally strangled the victim. There is no requirement of an associated level of injury. RCW 9A.36.021(1)(g). Indeed, despite the fact that strangulation is often associated with physical harm, the legislature chose not to associate any such harm with the classification of the crime as a ranked felony offense, emphasizing that it is *the act of strangulation* which constitutes the gravamen of the offense.<sup>21</sup> To this extent, assault by strangulation is similar to an assault with a deadly weapon which also does not require intent to inflict a specific level of injury or harm. See RCW 9A.36.021(1)(b).

By contrast, Count 3 charged Bell with Assault in the Third Degree for punching Freitas in the face. CP 117. This crime requires the State to prove that the defendant “[w]ith criminal negligence, causes bodily harm

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<sup>21</sup> **Finding -- 2007 c 79:** “The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW.” [2007 c 79 § 1.]

accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f). Criminal negligence is a different, and lower, standard of intent from that required for Assault in the Second Degree. Moreover, Assault in the Third Degree requires that a defendant cause “bodily harm” accompanied by “substantial pain.” This is a different level of intent from Count 1, which only requires that the defendant strangle the victim without any associated showing of bodily harm or injury.

Finally, Count 2 charged Bell with Unlawful Imprisonment. CP 117. This crime requires the State to prove that the defendant knowingly restrains another person. RCW 9A.40.040. Again, the intent required for this crime (“knowledge”) is different than the intent required for Assault in the Second Degree (“intentionally”) and Assault in the Third Degree (“criminal negligence”). Similarly, this crime requires intent to restrain another person, not to strangle or to injure them.

Thus, viewed objectively, the underlying statutes in these three crimes have three different criminal intents. Accordingly, they do not constitute the same criminal conduct for the purpose of sentencing. Moreover, the different intents are reflected in Bell’s actions that night, which were intended to accomplish different results. When Bell hit Freitas in the face, he was intending to physically hurt her. That intent

was lacking when he subsequently chose to strangle her, which was clearly an act of overt control, intended to instill fear in Freitas and to allow Bell to assert his domination over her. Finally, in preventing Freitas from leaving the apartment Bell was not intending to injure or strangle her, but to prevent her from leaving and reporting the incident. Bell's actions were objectively directed toward different purposes and, as such, do not constitute the same criminal conduct.

**3. Counts 1, 2 and 3 occurred at different times.**

The Supreme Court has rejected a requirement that the offenses occur at exactly the same time in order to be the same criminal conduct.<sup>22</sup> State v. Porter, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997) (elements of the same criminal conduct test satisfied because the drug deliveries were part of a continuing, uninterrupted sequence of conduct). Unlike Porter, however, the facts of the present case do not demonstrate a “continuing, uninterrupted sequence of conduct.” This becomes clear when comparing the holdings in State v. Price, 103 Wn. App. 845, 854-59, 14 P.3d 841 (2000), and State v. Grantham, 84 Wn. App. 854, 859,

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<sup>22</sup> Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one category of cases where two crimes will encompass the same criminal conduct: “the repeated commission of the *same crime* against the same victim over a short period of time.” 13A Seth Fine, Washington Practice § 2810 at 112 (Supp.1996). For example, simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct. State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993). Bell was charged with three *different* crimes and this exception to the general rule does not apply.

932 P.2d 657 (1997), with holding in State v. Tili, 139 Wn.2d 107, 119-20, 985 P.2d 365 (1999).

In Price, the court found that the defendant formed two different criminal intents because, in the short time between the two sets of shootings, he had the opportunity to understand that his first attempt to murder the victims was unsuccessful, and then to make the choice to pursue them and attempt to murder them a second time. Price, 103 Wn. App. at 854-59. Similarly, in Grantham, a defendant's two different rapes of the same victim were separate and distinct because, upon completing the first act of intercourse, he had time to either cease his criminal activity or commit a further act, and, thus, form a new intent. Grantham, 84 Wn. App. at 859. See also In re Personal Restraint Petition of Rangel, 99 Wn. App. 596, 600, 996 P.2d 620 (2000) (upholding the consecutive sentences for multiple assaults of the same victim because the defendant had time to form new criminal intent).

By contrast, in Tili, the Washington Supreme Court has held that a defendant's conduct in committing three separate rapes of the same victim was the same criminal conduct. This was because the three penetrations of the victim were continuous, uninterrupted, and committed within a time frame of approximately two minutes. Tili, 139 Wn.2d at 124. The Court distinguished Grantham because in that case the defendant's criminal

conduct ended with the first rape; the defendant stood over the victim and threatened her not to tell before beginning an argument and forcing the victim to perform oral sex. Id. at 123.

The facts of the present case are far more akin to Price and Grantham, than to Tili. The record is clear that Bell had an opportunity to pause and reflect and then chose to renew his criminal activity.

After Freitas refused to go back inside the apartment, Bell lured her back in saying that it would be “fine” and that he loved her. 7RP 88-90. When Freitas came inside, Bell hit Freitas in the face, over her eye, knocking her to the ground. 7RP 91. Bell then pinned Freitas to the floor. 7RP 91-94. Bell repeatedly said, “Do you want to see stars?” over and over. 7RP 92. Bell then put both of his hands on Freitas’s throat and squeezed. 9RP 92-93. Bell’s repeated question – “Do you want to see stars?” – demonstrates that he had time to pause and reflect on what he was doing. By giving Freitas a choice, he created a space in time in which he too could choose to act or to forego acting. Bell’s decision to proceed to strangle Freitas represents a new intentional act.

After Bell let Freitas go, she stood up, crying. 7RP 95. Bell put his arm around Freitas and said, “Why do you have to act like that?” 7RP 95. Bell even assisted Freitas in getting ice for her eye. XRP xx-xx. But when Freitas tried to leave the apartment, Bell refused to let her do so.

7RP 100-01. Bell's action in consoling Freitas and helping her treat her injury constitute another point at which he not only could, but did, pause and change his behavior. Bell clearly recognized what he had done was wrong. Nevertheless, he then chose to unlawfully imprison Freitas by refusing to let her leave the apartment.

This case is not like Tili, in which the defendant engages in the same criminal act (rape) within a very short time (two minutes). Rather, this is a case in which Bell engaged in three different crimes: Assault in the Third Degree, Assault in the Second Degree (by strangulation) and Unlawful Imprisonment. Between these acts were breaks in time in which Bell could reflect on his actions and choose whether to continue with his conduct or break it off. Bell chose to continue, thus creating a separate and distinct criminal intent, and his actions do not constitute the same criminal conduct for sentencing.

#### **IV. CONCLUSION**

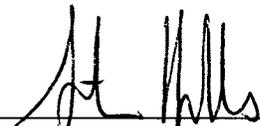
The State of Washington respectfully requests that Bell's convictions on Counts 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, along with the special circumstance aggravating factor on Count 1, be affirmed. Counts 5, 7, 8, and 9 should be considered as a single unit of prosecution

of witness tampering. The case should be remanded so that Bell may be resentenced accordingly.

DATED this 19<sup>th</sup> day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JOHN DORGAN, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE v. CLIFTON BELL, Cause No. 62552-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

5/19/20  
Date

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