

65675-9

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COA NO. 65675-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAZARO NICIA,

Appellant.

2011 JUN -1 11:12:05
COURT OF APPEALS
DIVISION ONE
[Signature]

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

The Honorable Ronald Kessler, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. Procedural History	2
2. Trial Facts	2
a. <u>Events of New Year’s Eve</u>	2
b. <u>The January 3rd Event</u>	4
C. <u>ARGUMENT</u>	8
1. THE COURT ERRED IN ADMITTING EVIDENCE OF NICIA’S BAD ACTS TWO DAYS BEFORE THE ALLEGED CRIMINAL EVENT AT ISSUE.....	8
a. <u>The Court Denied Defense Counsel’s Motion To Exclude Testimony About The Events Of New Year’s Eve</u>	8
b. <u>The Court Erred In Admitting The ER 404(b) Evidence Because It Did Not Balance It Probative Value Against Its Prejudicial Effect On The Record</u>	11
c. <u>The Evidence Was Irrelevant and Unfairly Prejudicial</u>	14
d. <u>It Is Reasonably Probable Wrongful Admission Of The New Year’s Eve Evidence Affected The Outcome</u>	18
2. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF FELONY HARASSMENT.	22
3. THE OFFENDER SCORE ERRONEOUSLY INCLUDED A WASHED OUT PRIOR CONVICTION.....	26

TABLE OF CONTENTS (CONT'D)

	Page
4. NICIA WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THE ASSAULT AND HARASSMENT OFFENSES CONSTITUTED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING.....	30
a. <u>The Harassment And Assault Constituted The Same Criminal Conduct Under RCW 9.94A.589(1)(a)</u>	30
b. <u>Defense Counsel Was Ineffective In Failing To Raise A Same Criminal Conduct Argument</u>	33
5. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.....	35
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Dix v. ICT Group, Inc.,
160 Wn.2d 826, 161 P.3d 1016 (2007)..... 15

In re Pers. Restraint of Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002)..... 29

In re Pers. Restraint of Mayer,
128 Wn. App. 694, 117 P.3d 353 (2005)..... 36

State v. Adame,
56 Wn. App. 803, 785 P.2d 1144 (1990)..... 33

State v. Allen,
__ Wn. App. __, __ P.3d __, 2011 WL 1745014 (slip op. filed May 9,
2011)..... 25

State v. Atkins,
156 Wn. App. 799, 236 P.3d 897 (2010)..... 24

State v. Bacotgarcia
59 Wn. App. 815, 801 P.2d 993 (1990)..... 22

State v. Barragan
102 Wn. App. 754, 9 P.3d 942 (2000)..... 16, 17

State v. Binkin,
79 Wn. App. 284, 902 P.2d 673 (1995),
overruled on other grounds,
State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)..... 16

State v. Bowen
48 Wn. App. 187, 738 P.2d 316 (1987)..... 21

State v. Black,
109 Wn.2d 336, 745 P.2d 12 (1987)..... 10

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Burns,</u> 114 Wn.2d 314, 788 P.2d 531 (1990).....	31
<u>State v. Calvert,</u> 79 Wn. App. 569, 903 P.2d 1003 (1995).....	31
<u>State v. Campbell,</u> 125 Wn.2d 797, 888 P.2d 1185 (1995).....	26
<u>State v. Cantabrana,</u> 83 Wn. App. 204, 921 P.2d 572 (1996).....	11
<u>State v. Carleton,</u> 82 Wn. App. 680, 919 P.2d 128 (1996).....	13, 18
<u>State v. Casarez,</u> 64 Wn. App. 910, 826 P.2d 1102 (1992).....	36
<u>State v. Deharo,</u> 136 Wn.2d 856, 966 P.2d 1269 (1998).....	31
<u>State v. DeVincentis,</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	12
<u>State v. Ervin,</u> 169 Wn.2d 815, 239 P.3d 354 (2010).....	27
<u>State v. Feeser,</u> 138 Wn. App. 737, 158 P.3d 616 (2007).....	25
<u>State v. Fisher,</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	25

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Foxhoven</u> 161 Wn.2d 168, 163 P.3d 786 (2007).....	12, 13
<u>State v. Grant,</u> 83 Wn. App. 98, 920 P.2d 609 (1996).....	9, 10, 14, 15
<u>State v. Grantham,</u> 84 Wn. App. 854, 932 P.2d 657 (1997).....	32
<u>State v. Gregory,</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	20
<u>State v. Hall,</u> 45 Wn. App. 766, 728 P.2d 616 (1986).....	27, 28
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	12
<u>State v. Holmes,</u> 43 Wn. App. 397, 717 P.2d 766 (1986).....	22
<u>State v. Johnson,</u> 119 Wn.2d 143, 829 P.2d 1078 (1992).....	25
<u>State v. Kilburn,</u> 151 Wn.2d 36, 84 P.3d 1215 (2004).....	23-26
<u>State v. Kjorsvik,</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	23
<u>State v. Kyлло,</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	34
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	12

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Magers,</u> 164 Wn.2d 174, 189 P.3d 126 (2008).....	9, 10, 14-16
<u>State v. McCarty,</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	23, 26
<u>State v. Moen,</u> 129 Wn.2d 535, 919 P.2d 69 (1996).....	10
<u>State v. Moeurn,</u> 170 Wn.2d 169, 240 P.3d 1158 (2010).....	28
<u>State v. Neal,</u> 144 Wn.2d 600, 30 P.3d 1255 (2001).....	18
<u>State v. Nitsch,</u> 100 Wn. App. 512, 997 P.2d 1000 (2000).....	33
<u>State v. Oswald,</u> 62 Wn.2d 118, 381 P.2d 617 (1963).....	19
<u>State v. Peterson,</u> 168 Wn.2d 763, 230 P.3d 588 (2010).....	25
<u>State v. Quismundo,</u> 164 Wn.2d 499, 192 P.3d 342 (2008)	11
<u>State v. Rafay,</u> 167 Wn.2d 644, 222 P.3d 86 (2009)	15
<u>State v. Ragin,</u> 94 Wn. App. 407, 972 P.2d 519 (1999).....	16, 17
<u>State v. Roche,</u> 75 Wn. App. 500, 878 P.2d 497 (1994).....	29

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	10, 16, 18
<u>State v. Schaler,</u> 169 Wn.2d 274, 236 P.3d 858 (2010).....	23-26
<u>State v. Tellez,</u> 141 Wn. App. 479, 170 P.3d 75 (2007).....	24, 25
<u>State v. Thach,</u> 126 Wn. App. 297, 106 P.3d 782 (2005).....	13
<u>State v. Tharp,</u> 96 Wn.2d 591, 637 P.2d 961 (1981).....	13
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	34, 35
<u>State v. Tili,</u> 148 Wn.2d 350, 60 P.3d 1192 (2003).....	26
<u>State v. Tinkham,</u> 74 Wn. App. 102, 871 P.2d 1127 (1994).....	35
<u>State v. Vangerpen,</u> 125 Wn.2d 782, 888 P.2d 1177 (1995).....	22, 23
<u>State v. Venegas,</u> 155 Wn. App. 507, 228 P.3d 813, <u>review denied</u> , 170 Wn.2d 1003, 245 P.3d 226 (2010)	13
<u>State v. Wade</u> 98 Wn. App. 328, 989 P.2d 576 (1999).....	12
<u>State v. Wilson,</u> 136 Wn. App. 596, 150 P.3d 144 (2007).....	32, 33

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Gardner v. Florida,
430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)..... 34

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)..... 34

RULES, STATUTES AND OTHER AUTHORITIES

ER 401 1, 18

ER 402 18

ER 403 10

ER 404(b)..... 1, 10-13, 15, 17-19

ER 608(b)..... 21

ER 609 21

Former RCW 9A.46.020 (Laws of 1999, ch. 27 § 2) 28

Former RCW 46.52.020 (Laws of 2001, ch. 145 § 1) 28

Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice §
607.12 (5th Ed.) 20

Laws of 2008, ch. 231 § 3 27

RCW 9A.46.020 23

RCW 9.94A.030(32)..... 29

RCW 9.61.230(2)(b) 25

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

RCW 9.94A.510	29, 35
RCW 9.94A.515	29, 35
RCW 9.94A.525(2)(c)	26-28, 30
RCW 9.94A.525(7).....	29
RCW 9.94A.525(8).....	29
RCW 9.94A.589(1)(a)	30, 31, 35
U.S. Const. Amend. I.....	23
U.S. Const. Amend. VI.....	22, 34
Wash. Const. Art. I, § 22	22, 34

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence under ER 401 and ER 404(b).

2. The information charging felony harassment is defective because it omits an element of the offense.

3. The court erred in failing to omit a washed out prior conviction from the offender score.

4. Appellant received ineffective assistance of counsel at sentencing in relation to a "same criminal conduct" determination.

5. The judgment and sentence contains a clerical error regarding the date of offense.

Issues Pertaining to Assignments of Error

1. Must the convictions be reversed due to the erroneous admission of prior misconduct evidence, which made appellant look like a bad person with a propensity to offend?

2. Is reversal required where the State failed to allege the "true threat" element of the crime of felony harassment in the information?

3. Appellant spent more than five continuous years in the community without committing a crime after previously being convicted of harassment, a class C felony. Did the court err by including this washed out conviction in appellant's offender score?

4. Appellant was convicted of two crimes that involve the same victim, same time and place, and the same objective intent. Because these crimes involve the "same criminal conduct" for sentencing purposes, was defense counsel ineffective in failing to make this argument?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Lazaro Nicia with committing second degree assault by strangulation and felony harassment against Karina Wood on January 3, 2010. CP 1-2. A jury returned guilty verdicts. CP 6-7. The court imposed a total of 18 months confinement. CP 35. This appeal follows. CP 26-27.

2. Trial

a. Events of New Year's Eve.

Wood and Nicia began dating in December 2009. 2RP¹ 93-94. On New Year's Eve, Wood went to Muckleshoot Casino with Nicia, Nicia's friend Ricardo Aguirre, and her friends Jasmine Quiroz, Olivia Castro, Felicia Harris and Harris's boyfriend. 2RP 42-44, 95. Everyone but Aguirre, the designated driver, drank alcohol. 2RP 44, 64, 96, 4RP 4, 95.

¹ The verbatim report is referenced as follows: 1RP - 6/15/10; 2RP - 6/16/10; 3RP - 6/17/10; 4RP - 6/21/10; 5RP - 6/22/10; 6RP - 7/9/10.

Nicia became very upset when some performers at the casino invited the women backstage. 4RP 4, 6-7. As they were leaving the casino, Nicia became belligerent, jealous and angry after Wood pointed to another man and commented on a shirt he was wearing, which was like the one she had earlier planned to buy for Nicia. 2RP 45, 48, 64-65, 97-99; 3RP 9-10. Nicia taunted Wood, saying "Oh, you want him? You want him, go get him." 2RP 45, 48, 64-65. Nicia berated and cursed at Wood, accusing her of "acting like a ho." 2RP 98; 3RP 30, 33-34; 4RP 4-6. Nicia also yelled at Aguirre in derogatory terms for not properly blowing into the interlock ignition device, calling him "stupid" and a "dumbass." 2RP 46, 100; 4RP 6.

On the drive back to Seattle, Nicia continued to berate and verbally abuse Wood about the man she pointed out. 2RP 48-49, 100-03; 3RP 36. They were sitting close to one another in the backseat due to lack of space. 2RP 50, 102; 3RP 37. According to Wood, Nicia yelled at her and pointed a finger in her face, "kind of backing me into the corner." 2RP 101-02. Wood said Nicia leaned in on her and had his arm against her chest. 2RP 102. Castro said Nicia pinned Wood with his arm in the corner of the car and Wood said "you're hurting me." 4RP 7. Nicia did not hit or threaten Wood. 2RP 66.

b. The January 3rd Event

On the night of January 2nd leading into the 3rd, Wood, Quiroz, Nicia and some friends went to Acme Bowl in Tukwila. 2RP 51-52, 73, 105. Everyone was happy — there was nothing residual left over from Nicia's New Year's Eve behavior. 2RP 67. They were all drinking except for the designated driver. 2RP 54, 67, 73, 136; 3RP 38.

At one point, Nicia became angry when Wood saw her stepbrother's brother, asking "You know him? Do you want him?" 2RP 54-55, 68-69, 107. At another point, Nicia referred to Quiroz as a "bitch" in a manner that caused Quiroz no offense but which caused Wood to lash out at Nicia. 2RP 55, 74, 107. Wood and Nicia argued in the backseat on the way home about the name-calling. 2RP 56, 59, 72.

While driving around, Nicia got mad at something. 2RP 110. He later "started back on Jasmine again." 2RP 112. Nicia started beating on the ceiling of the car at some point. 2RP 56, 71. He eventually calmed down. 2RP 58, 69.

Quiroz did not see Nicia make any physical contact with Wood while in the car. 2RP 58. Wood and Nicia did not argue at a party they later attended. 2RP 59. Quiroz was dropped off at home after the party. 2RP 59-60. On the way home, Quiroz did not remember any fighting. 2RP 70. She did not hear Nicia threaten or see him hit Wood that night.

2RP 70-71. Nicia and Wood eventually returned to Wood's house at around 2 in the morning. 2RP 114, 137.

According to Wood, Nicia tried to start an argument, ranting and raving. 2RP 114-16. Wood called Castro while she began to cook some food on the stove. 2RP 115-16. Nicia eventually slapped the phone out of Wood's hand. 2RP 116-17. Wood called Castro back. 2RP 117. The situation escalated. 2RP 117. Wood told Nicia she was not going to deal with him anymore, he was not getting a key to her house, she would not have his baby, and she was not going to meet his mom. 2RP 118.

According to Wood, Nicia said many times he would kill her: 2RP 118, 133-34. Wood told him to leave. 2RP 119. Nicia batted a pot with hot water onto her, splashing water onto her right arm.² 2RP 124-25, 142. Wood ran to the bedroom area. 2RP 125. Nicia choked her in the hallway with his hands. 2RP 126-29. She blacked out. 2RP 130. She woke up and saw him on a phone, telling someone to come get him. 2RP 130. Castro was on the phone while all this happened. 2RP 131.

Castro maintained she overheard Nicia verbally abuse Wood with derogatory terms. 4RP 9-11. According to Castro, Nicia flew into a rage and said he would kill Wood 20 to 50 times. 4RP 11. Castro heard the

² Wood told the responding officer at the scene that Nicia picked up a pot of hot water and threw it at her. 2RP 21, 32.

phone clatter to the ground, some tussling and Wood scream "Ow." 4RP 13, 22. Wood told Castro she was burned and yelled at Nicia to leave. 4RP 12-14. Wood also said Nicia was choking her. 4RP 14. Castro heard Wood gasping and called 911. 4RP 12-15, 18.

Officers Delacruz and Jenkins responded. 2RP 17; 4RP 26. Delacruz saw a scratch on Nicia's chest and a cut on his pinky finger. 4RP 26-28. Nicia was compliant. 4RP 28.

Wood, crying, told Jenkins a version of events substantially consistent with her trial testimony. 2RP 19-21, 29, 36-37. Jenkins saw her swollen hand, a burn on her arm, and red marks on her neck. 2RP 21-22, 26, 38. Quiroz later went to Wood's residence after being called and saw burns on her arm, some bruising near her collarbone, a cut on her hands, and a swollen wrist. 2RP 60-63.

Emergency medical technicians examined Wood at the scene. 2RP 79, 81-82. Wood complained of pain in her throat when swallowing. 2RP 84. She was crying and emotional. 2RP 84. The EMT saw a small burn on her right shoulder. 2RP 84. This burn did not require any further medical care. 2RP 84. The EMT's examination team did not see any physical marks on Wood's face, head or neck. 2RP 82, 86, 88-90. Transport to a medical facility was unnecessary. 2RP 87.

Nicia, who testified in his own defense, said there was drinking throughout the night. 4RP 47-52. Back at the house, Wood talked with Castro on the phone, telling her about how Nicia defended some women at the bowling center after Wood made a derogatory comment about them. 4RP 56-57. According to Nicia, Wood "went off" and started hitting him when he tried to hug her and say he was sorry. 4RP 57-58. She scratched his neck. 4RP 58.

Nicia called Aguirre to pick him up, saying Wood had a knife. 4RP 58. Aguirre testified Nicia left a voice message in which Nicia could be heard saying "Put the knife down" and Wood saying she would. 4RP 98. Nicia testified Wood told him "no, you have a knife, you have a knife. Who they gonna believe, you or me? They're gonna believe me. I take your freedom, motherfucker." 4RP 58. She grabbed a hammer at some point. 4RP 61.

As Nicia was preparing to leave, Wood said Castro was going to call 911, telling Nicia in derogatory terms "I know they're gonna believe me" and "I take your freedom." 4RP 61. Wood started throwing Nicia's things outside. 4RP 61-62. Nicia called Aguirre for a ride. 4RP 99-100. When Aguirre arrived, he noticed scratches on Nicia's neck and saw Nicia picking up his clothes, which were strewn about the yard. 4RP 99-101.

Nicia denied strangling Wood or throwing hot water on her. 4RP 63-64. Nicia said he only pushed Wood when she was beating on him. 4RP 64.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING EVIDENCE OF NICIA'S BAD ACTS TWO DAYS BEFORE THE ALLEGED CRIMINAL EVENT AT ISSUE.

The State needed to prove Nicia committed crimes on January 3. Jurors heard testimony that Nicia acted in a disgraceful manner on New Year's Eve, demeaning and berating Wood as well as his friend. Nicia did not, however, threaten Wood on New Year's Eve and the only physical contact between them consisted of Nicia putting his arm against Wood's chest during an argument. Under these circumstances, the trial court erred in admitting testimony about Nicia's actions that night without conducting the requisite balancing analysis on the record under ER 404(b). In addition, the New Year's Eve evidence was irrelevant and unfairly prejudicial under ER 401 and ER 404(b).

- a. The Court Denied Defense Counsel's Motion To Exclude Testimony About The Events Of New Year's Eve.

Defense counsel moved in limine to prohibit Quiroz from testifying about what happened on New Year's Eve because there was no testimony Nicia threatened or physically abused Wood on that occasion.

2RP 3-4, 7-8. Counsel argued the New Year's Eve argument ended before the January 3 incident and therefore did not comprise a continuous course of conduct. 2RP 4, 7-8. The two incidents were not "connected." 2RP 8. According to counsel, "all it is is confusing and adding to it, it does not go to prove more or less likely the incident that happened in the house." 2RP 4-5.

The prosecutor acknowledged Nicia did not threaten Wood on New Year's Eve, but said Quiroz's testimony would show he "berated" Wood, called her names and "pinned her in a corner of the backseat of the car." 2RP 7. The prosecutor claimed the evidence was relevant to show Wood's reasonable fear that Nicia may actually follow through on his threats to kill. 2RP 5.

The trial court denied the defense motion to exclude the testimony, saying "I think it goes both to — at least the way it's being described to me by the State, its going to go to reasonable fear. Also goes to the question of the dynamics of the relationship, pursuant to State v. Grant, State v. Magers." 2RP 8. Under Grant and Magers, ER 404(b) evidence may be admissible in certain circumstances to support a domestic violence victim's reasonable fear and to support a recanting victim's credibility. State v. Magers, 164 Wn.2d 174, 181-83, 186, 189 P.3d 126 (2008)

(Alexander, C.J., lead opinion); State v. Grant, 83 Wn. App. 98, 107-09, 920 P.2d 609 (1996).

The State may claim an ER 404(b) objection is not preserved for review. Defense counsel sufficiently invoked the ER 404(b) ground for exclusion in referencing juror confusion and lack of relevancy. 2RP 3-8; see State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (if the ground for objection is apparent from the context, the objection is sufficient to preserve the issue); ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]"); State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982) (ER 404(b) incorporates ER 403 analysis).

The trial court was well aware of the nature of the objection. Its reliance on Magers and Grant, which addressed admissibility of prior threats and acts of violence in a domestic violence case on ER 404(b) grounds, shows this to be true. Magers, 164 Wn.2d at 181-86; Grant, 83 Wn. App. at 100-01.

"The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). The record here shows the trial court was aware of the claimed

error at a time when it had an opportunity to correct it. Moreover, "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008).

At trial, Quiroz testified to the negative New Year's Eve events, as did Wood, Harris and Castro. 2RP 43-50, 64-66 (Quiroz); 2RP 95-104 (Wood); 3RP 33-37 (Harris); 4RP 4-8 (Castro). The State may claim defense counsel waived the error in relation to other witnesses because counsel only moved to exclude Quiroz's testimony on the New Year's Eve matter but not anyone else's testimony on the same subject. That argument fails. The denial of counsel's motion to exclude Quiroz's testimony shows any additional motion or objection to the same kind of testimony by other witnesses would have suffered the same fate. The error as to all witnesses is preserved for review. See State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (failure to properly object may be excused where it would have been a useless endeavor).

b. The Court Erred In Admitting The ER 404(b) Evidence Because It Did Not Balance It Probative Value Against Its Prejudicial Effect On The Record.

ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's

propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) prohibits admission of evidence simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Acts that are merely unpopular or disgraceful fall within the scope of ER 404(b). Halstien, 122 Wn.2d at 126.

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. Foxhoven, 161 Wn.2d at 175.

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. DeVincentis, 150 Wn.2d at 17. The trial

court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. Id.

In admitting evidence of the New Year's Eve incident, the trial court failed to balance the probative value of that evidence against its potential for unfair prejudice on the record. 2RP 8. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court in this manner abused its discretion in failing to adhere to the requirements of the evidentiary rule. Foxhoven, 161 Wn.2d at 174.

The trial court focused solely on the probative value of the testimony and its relevance to prove the charged offenses. 2RP 8. The court erred in admitting this evidence because the record does not show the court considered how prejudicial the challenged testimony would be. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). The court should not have permitted testimony about what happened on New Year's Eve without weighing the probative value of this ER 404(b) evidence against its prejudicial effect on the record. State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005).

c. The Evidence Was Irrelevant and Unfairly Prejudicial.

Even if the court had conducted the requisite balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed whatever marginal probative value it retained.

The trial court admitted the evidence on the theory that it "goes to the question of the dynamics of the relationship, pursuant to State v. Grant, State v. Magers." 2RP 8. That rationale is too broad, in effect creating a per se rule that evidence of prior misconduct is admissible in every domestic violence case to show the dynamic of the relationship, even where that dynamic is not helpful in explaining the alleged victim's state of mind.

In the domestic violence context, prior acts of domestic violence involving the defendant and the crime victim are admissible to assist the jury in judging the credibility of a recanting victim. Magers, 164 Wn.2d at 186, 189 P.3d 126 (2008); Grant, 83 Wn. App. at 107-09. Evidence of prior acts of violence toward the victim help the jury assess the credibility of the victim and understand why the recanting victim told conflicting stories. Magers, 164 Wn.2d at 185-86. Evidence of prior domestic violence was properly admitted in Grant and Magers to explain statements

and conduct that might have otherwise appeared inconsistent with the charges. Id.; Grant, 83 Wn. App. at 107-09.

That feature is missing from Nicia's case. Wood did not recant. She did not delay reporting. She did not tell conflicting stories. She acted like someone who had in fact been assaulted and threatened. She did nothing seemingly inconsistent with her alleged victim status. Wood's credibility was at issue, but only in the sense that the defense challenged whether the crimes really occurred. The defense did not attack Wood's credibility by seeking to exploit a dynamic in the domestic relationship. There was nothing to exploit in that regard.

The trial court took an erroneous view of Grant and Magers and what those cases stand for. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

The court also admitted the New Year's Eve testimony on the ground that it went to Wood's reasonable fear. 2RP 8. Under ER 404(b), evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362.

When a defendant is charged with felony harassment, evidence of a prior violent act or threat may be admitted to show the victim's fear was reasonable. See, e.g., State v. Barragan, 102 Wn. App. 754, 758-60, 9 P.3d 942 (2000) (victim's knowledge of previous violent acts); State v. Binkin, 79 Wn. App. 284, 286-87, 902 P.2d 673 (1995), overruled on other grounds, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002) (prior threat to harm victim's unborn child); State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999) (prior violent acts); see also Magers, 164 Wn.2d at 181-83 (lead opinion) (prior violent misconduct admissible where State needed to prove reasonable fear of bodily injury for assault conviction).

The events of New Year's Eve did not involve threats to commit violence. Nicia berated Wood and became upset over real or imagined slights during the course of the evening. 2RP 45, 48, 64-65, 97-99; 3RP 9-10. He also berated his friend in an ugly manner when the latter failed to properly blow into the ignition device as they were preparing to leave the casino. 2RP 46, 100; 4RP 6. Nicia continued to angrily confront Wood on the ride home from the casino. 2RP 48-49, 100-03; 3RP 36. But none of these exchanges involved threats of harm. 2RP 70-71.

Nicia did not hit Wood that night. 2RP 70-71. Wood testified Nicia leaned in on her and "had his arm against my chest." 2RP 102.

Castro said Nicia pinned Wood with his arm in the corner of the car and Wood said "you're hurting me." 4RP 7.

Cases in which prior misconduct was probative of reasonable fear involved actual physical fights or other extreme misconduct. See Barragan, 102 Wn. App. at 758-60 (inmate victim's knowledge of defendant's earlier assaults against fellow inmates); Ragin, 94 Wn. App. at 409 (defendant told harassment target that he was convicted of armed robbery, was involved in a domestic violence incident, was well known to the police department, and suffered from episodic rages).

Such circumstances are a far cry from the physical contact involved in Nicia's case. But even if his conduct that night qualifies as the kind of violent act contemplated by the case law, Wood never testified the verbal abuse and physical contact that happened on New Year's Eve contributed to her fear that Nicia would carry out his later threat to kill. The events of New Year's Eve did not make it any more or less probable that the threats uttered two days later placed Wood in reasonable fear. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

"Prior misconduct evidence is inherently prejudicial." Carleton, 82 Wn. App. at 686. Where ER 404(b) evidence lacks relevance, its prejudicial effect necessarily overcomes its scant probative value.

The New Year's Eve evidence was irrelevant under ER 401 for the reasons set forth above. See Saltarelli, 98 Wn.2d at 361-62 (ER 404(b) incorporates ER 401 analysis). Relevant evidence is defined in ER 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 402 prohibits admission of irrelevant evidence. Evidence that Nicia acted badly on New Year's Eve did not make it more probable that Wood's fear of Nicia's January 3rd threats was reasonable because Nicia did not threaten or attack Wood on New Year's Eve in a manner that contributed to Wood's fear that Nicia would carry out a later threat to kill. The New Year's Eve evidence did not make it more probable that Nicia committed the assault because the two events are unrelated and irrelevant under a relationship dynamic theory of admissibility.

d. It Is Reasonably Probable Wrongful Admission Of The New Year's Eve Evidence Affected The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144

Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

Reversal of the convictions is required because there is a reasonable probability that juror consideration of the New Year's Eve evidence tainted deliberation on whether the State proved Nicia committed the charged crimes beyond a reasonable doubt. The improperly admitted evidence made Nicia look like a hothead, a jerk and a bully. It showed he was the type of person who would lose his temper easily, the very inference ER 404(b) is designed to prohibit. The evidence cannot be considered trivial because it pervaded the trial. Multiple witnesses testified to it.

This case was in large part was a credibility contest between Nicia on one side and Wood and her friend Castro on the other. Nicia's defense was that did not threaten to kill Wood or assault her by strangulation. Wood said he did these things and Castro backed up Wood's account. But Castro's credibility was subject to scrutiny because she had been Wood's friend for over 20 years. 4RP 3. A rational juror could find Castro was biased in her friend's favor.

Wood was drinking that night, which provided a basis to question her credibility. Intoxication may have affected her memory of events. See Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 607.12 (5th Ed.) ("A witness's use of alcohol or other drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately.").

Wood testified Nicia repeatedly strangled her to the point of losing consciousness. 2RP 126-30. She claimed Nicia grabbed her by the throat and slammed her against the wall. 2RP 149. The responding officer said he saw marks on Wood's neck. 2RP 21-22, 26, 38. Yet the EMT team that examined Wood at the scene did not detect any physical marks on Wood's face, head or neck. 2RP 82, 86, 88-90. A reasonable juror could find this piece of evidence cast doubt on Wood's story of strangulation.

The State may point out Nicia was convicted of second degree assault and fourth degree assault against his wife about 10 years ago. 4RP 86-87.³ Those decade old convictions do not ameliorate the prejudicial effect of the New Year's Eve evidence. Those convictions are ancient history. The recent nature of the New Year's Eve evidence sets it apart from the remote convictions. Cf. State v. Gregory, 158 Wn.2d 759, 798-800, 147

³ The State was allowed to inquire into these convictions after Nicia opened the door to their admission on direct examination. 4RP 79-80. Nicia testified he pleaded guilty to avoid deportation. 4RP 86, 91.

P.3d 1201 (2006) (although defense counsel impeached state's witness with admission of other crimes of dishonesty under ER 609, trial court's error in precluding defense counsel from impeaching witness with evidence of a lie under ER 608(b) was not harmless because the lie was recent and made in connection with the case).

Nicia's words and conduct on the night of January 2nd leading up to the events at Wood's house were similar to his words and conduct on New Year's Eve. 2RP 107-08, 112. But had jurors not heard about the New Year's Eve evidence, they would have been without a basis to infer a *pattern* of behavior that Nicia acted in conformity with two days later.

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of other bad acts "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. No limiting instruction foreclosed or mitigated the prejudice associated with this kind of evidence. The jury's consideration of the evidence without limiting instruction cannot be considered academic because such evidence stripped

the presumption of innocence from Nicia by allowing the jury to use the forbidden inference that he had a propensity to commit crime.

A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). To jurors, propensity evidence is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). Propensity evidence, however, is not legally relevant. Holmes, 43 Wn. App. at 400. The admission of the New Year's Eve evidence prejudiced Nicia because it allowed the jury to follow its natural inclination and infer he acted in conformity with his character and therefore likely committed the criminal acts charged by the State. Reversal of both counts is required.

2. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF FELONY HARASSMENT.

Nicia's conviction for felony harassment must be reversed because the charging document does not set forth the "true threat" element of the crime. CP 2; U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements"

of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Nicia of committing the crime of felony harassment, as follows: "That the defendant . . . on or about January 3, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Karina Wood, by threatening to kill Karina Wood, and the words or conduct did place said person in reasonable fear that the threat would be carried out[.]" CP 2.

The information fails to allege Nicia made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under

RCW 9A.46.020); State v. Allen, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1745014 at * 11-14 (slip op. filed May 9, 2011) (same).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in complete accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143,

147, 829 P.2d 1078 (1992)). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

3. THE OFFENDER SCORE ERRONEOUSLY INCLUDED
A WASHED OUT PRIOR CONVICTION.

Because Nicia committed no crimes for a five year period while in the community, his prior class C felony conviction for felony harassment washed out and must not be included in his offender score. His case should be remanded for sentencing with a reduced offender score.

Offender scores are reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). RCW 9.94A.525(2)(c) governs when

class C felony convictions may be included in the offender score. That statute provides, in relevant part:

[C]lass C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).⁴

The statute contains a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements an offender must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date resets the five-year clock. Ervin, 169 Wn.2d at 821 (citing State v. Hall, 45 Wn. App. 766, 769, 728 P.2d 616 (1986)).

The record is sufficient to address the wash out issue on its merits. The prosecutor's pre-sentence report includes a statement of Nicia's criminal history. CP 49. The offense dates and associated dispositions are set out in detail. CP 49.

⁴ The current version of the statute is identical in relevant respect to the prior version of the statute in effect when the current offenses were committed. (Laws of 2008, ch. 231 § 3). This brief therefore simply cites to RCW 9.94A.525(2)(c).

The prosecutor's report shows Nicia committed the offense of felony harassment, a class C felony, on January 29, 2002. CP 49; Former RCW 9A.46.020 (Laws of 1999, ch. 27 § 2). He was found guilty on April 12, 2002 and sentenced to three months in jail. CP 49.

On April 29, 2002, Nicia committed the misdemeanor offense of hit and run on an attended vehicle. CP 49; see Former RCW 46.52.020 (Laws of 2001, ch. 145 § 1) (defining and classifying the offense). The prosecutor's report does not reflect any sentence of confinement for this offense. CP 49. Nicia next committed a DUI on December 19, 2008. CP 49.

Under RCW 9.94A.525(2)(c), a class C felony conviction washes out if the defendant has five consecutive crime-free years any time following the Class C felony in question. Hall, 45 Wn. App. at 769. The record shows Nicia did not commit any offense resulting in a conviction for over five years following his 2002 hit and run conviction. The 2002 class C felony conviction for harassment therefore washes out under RCW 9.94A.525(2)(c). "[A] conviction that has washed out is not relevant to the calculation of an offender score." State v. Moeurn, 170 Wn.2d 169, 176, 240 P.3d 1158 (2010).

Nicia did not waive the legal error in his offender score calculation by failing to challenge it below. "It is axiomatic that a sentencing court

acts without statutory authority when it imposes a sentence based on a miscalculated offender score." State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A defendant cannot agree to a sentence the court has no authority to impose. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 867, 874, 50 P.3d 618 (2002) (petitioner's challenge to his offender score, specifically whether certain juvenile offenses should have washed out, was a legal issue that could not be waived despite petitioner's agreement in statement on plea of guilty that the prosecutor's statement of criminal history was correct and complete). Challenge to a miscalculated offender score based on the erroneous inclusion of a washed out prior conviction is a *legal* error that may be raised for the first time on appeal. Goodwin, 146 Wn.2d at 867, 874.

The 2002 felony harassment conviction was included in Nicia's offender score, resulting in the addition of one point to both current offenses and increased standard ranges for both. CP 47-48; see RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of IV for second degree assault and III for harassment); RCW 9.94A.030(32) and 53(a)(vii) (second degree assault defined as violent offense and harassment as non-violent offense); RCW 9.94A.525(7) and (8) (prior

non-violent felonies count as one point where present conviction is for violent or non-violent offense).

This case should be remanded for resentencing because the 2002 felony harassment conviction washed out under RCW 9.94A.525(2)(c) and should not have been included in Nicia's offender score.

4. NICIA WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THE ASSAULT AND HARASSMENT OFFENSES CONSTITUTED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING.

Nicia received ineffective assistance of counsel because his attorney failed to argue his harassment and assault offenses should be counted as the same criminal conduct in determining his offender score.

Remand for resentencing is required.

- a. The Harassment And Assault Constituted The Same Criminal Conduct Under RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) provides:

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"Same criminal conduct" is defined as two or more crimes that 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 test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The crimes charged in this case — assault and harassment — involved the same place (Wood's residence), the same time (early morning of January 3rd) and the same victim (Wood).

The question is whether the crimes involved the same criminal intent. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). Part of the objective intent analysis includes whether the time and place of the two crimes remained the same. Burns, 114 Wn.2d at 319. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, the harassment and assault of Wood were part of a continuous sequence of domestic violence conduct over a short period of time. Nicia repeatedly threatened to kill Wood in the early morning. It was in the midst of these threats that he physically assaulted her. 2RP 133-34. Nicia objectively intended to cause fear and harm to Wood when he threatened to kill her and ultimately strangled her. That intent remained constant throughout the entire domestic violence episode. The assault was the physical manifestation of the threats to kill. 2RP 134.

The assault also furthered the harassment by ensuring her reasonable fear. Viewed objectively, the assault furthered Nicia's threat to kill by making it seem as if he were prepared to follow through with that threat.

In some circumstances, the same intent requirement is unmet when a defendant has time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," and makes the decision to proceed. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). In State v. Wilson, for example, Division Two concluded the defendant's assault and harassment did not involve the same intent where the defendant assaulted the victim, left the victim's house, reflected, and then returned and committed harassment by threatening to kill her. State v. Wilson, 136 Wn. App. 596, 614-15, 150 P.3d 144 (2007).

Nicia's case is distinguishable. Nicia never left Wood's residence. e remained agitated and menacing throughout this period. There was no break in time between the two offenses during which Nicia's criminal objective could have substantially changed. Unlike in Wilson, Nicia used the assault to instill fear that his threat was legitimate.

The State may claim the court is precluded from finding that the two crimes shared the same criminal objective because the statutory mens rea element for each charge is different. That claim fails. The inquiry in this context is not whether the crimes share a particular mens rea element but whether the offender's objective criminal purpose in committing both crimes is the same. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

b. Defense Counsel Was Ineffective In Failing To Raise A Same Criminal Conduct Argument.

The determination of whether two crimes constitute the same criminal conduct involves both determinations of fact and the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). Defense counsel waived a direct challenge to the same criminal conduct determination by not raising the argument below. Nitsch, 100 Wn. App. at 519-20.

A claim of ineffective assistance of counsel, however, is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869. Defense counsel's performance fell below an objective standard of reasonableness because, under the circumstances, there was no legitimate reason not to have requested the trial court to find the harassment and assault offenses were the same criminal conduct. Nicia would only have benefited from such a request, and could not have suffered adverse consequences. No legitimate strategy

or tactical decision justified acquiescence to an implicit separate criminal conduct determination that increased his client's term of confinement.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. Nicia's offender score would have been one point lower for each offense, which would have lowered his standard sentencing range. CP 47-48; see RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of current offenses); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score).

In this way, Nicia shows a reasonable probability that but for counsel's unprofessional errors, the result would have been different. The right to effective assistance ensures that the accused does not suffer an adverse judgment or lose the benefit of procedural protections because of the ignorance of the law. State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994). This Court should remand the case for resentencing.

5. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

The judgment and sentence sets forth January 30, 2010 as the date of crime for the felony harassment. CP 32. This is a scrivener's error. The offense took place on January 3, 2010. CP 23. A judgment and

sentence may be amended to correct the offense date. State v. Casarez, 64 Wn. App. 910, 915, 826 P.2d 1102 (1992). The remedy is to remand to the trial court for correction of the scrivener's errors in the judgment and sentence. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

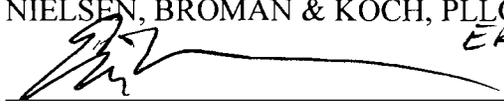
D. CONCLUSION

Nicia requests that this Court reverse his convictions and remand for a new trial. If this Court declines to do so, his case should be remanded for resentencing.

DATED this 27th day of May 2011

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65675-9-1
)	
LAZARO NICIA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 27TH DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LAZARO NICIA
11621 3RD AVENUE S.
SEATTLE, WA 98168

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2011.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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