70358-7

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No. 70358-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

WARREN EUGENE BELL,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to a unanimous jury verdict requires the jury be instructed only on those alternative means of committing the crime that are supported by substantial evidence. Was Mr. Bell's constitutional right to jury unanimity violated where the jury was instructed on an alternative means of committing the crime of cyberstalking that was not supported by substantial evidence?

2. The Due Process Clause requires that penal statutes provide citizens with fair notice of what conduct is proscribed and provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. The sentencing statute authorizes the court to impose greater punishment based on a jury finding that the current offense was part of an "ongoing pattern of psychological abuse." Is the statutory term unconstitutionally vague in violation of due process?

3. Counsel's failure to argue at sentencing that two offenses constitute the same criminal conduct amounts to ineffective assistance of counsel if there is a reasonable possibility that the sentencing court would have found the offenses were the same criminal conduct had counsel so argued. Did Mr. Bell receive ineffective assistance of counsel when his attorney failed to argue that his assault and harassment convictions constituted the same criminal conduct, where the two offenses occurred at the same time and place against the same victim, and the court could have found the offenses involved the same objective criminal intent?

C. STATEMENT OF THE CASE

Warren and Kimyata Bell have been married since 2001. RP 696. They have two boys, Kalijah, who was 10 years old at the time of

trial, and Kamicah, who was six. RP 382. Although the marriage was happy at first, it deteriorated over time and the couple separated in around 2008 or 2009. RP 396, 696-97. Both Ms. and Mr. Bell began to see other people. RP 397-98. They continued to have contact with each other for the sake of the boys. RP 397-98.

On August 6, 2012, Ms. Bell was living in an apartment in Kent with her two sons and her friend James Denslow. RP 402. That day, Ms. Bell and the boys spent time at home with her boyfriend "Gabe," barbecuing and eating dinner in the backyard. RP 403. Toward evening, soon after Gabe left, Mr. Bell came to the apartment and knocked on the front door. RP 404. According to Ms. Bell, when she answered the door, Mr. Bell immediately grabbed her by the hair and put his hands around her neck. RP 405. She said he smelled of alcohol and made comments indicating he was angry about her and the boys spending time with Gabe. RP 405-06.

Ms. Bell said Mr. Bell pulled her down the stairs by her hair into the living room below. RP 407-10. She fell to the floor, where he kicked her head and stomped on her rib cage. RP 411. He then grabbed her neck with both hands so that she could hardly breathe. RP 411. She blacked out briefly. RP 415. When she woke up, Mr. Bell

had his hands around her neck and said he was going to kill her. RP 416-18, 459.

The two boys were present during the altercation. RP 482, 628-29. The older boy, Kalijah, used Ms. Bell's cell phone to call 911. RP 483-87.

Mr. Denslow arrived home and heard Ms. Bell screaming downstairs. RP 321. He said he went down the stairs and saw Mr. Bell with his hands around Ms. Bell's neck. RP 324-25. When Mr. Bell saw Mr. Denslow, he chased him back out the front door and into the front yard. RP 325-26. A neighbor who was outside yelled to Mr. Bell and Mr. Denslow that the police were on their way. RP 144. Mr. Bell jumped in his van and drove off. RP 144-45. The police arrived soon afterward. RP 532-33.

Ms. Bell was taken to the hospital by ambulance. RP 181. She complained of pain in her chest, back and neck. RP 180-83. She had abrasions on her neck but no significant injury. RP 183-84, 204-07. A chest x-ray was normal. RP 189. She was discharged from the hospital later that night. RP 200.

That night, Mr. Bell sent Ms. Bell a text message that said:

> Bitch I hope u show them this bitch u want to control me ill kill u and them whenever they dont know shit tell them to go home or else its on.

RP 736; Exhibit 12.

Mr. Bell was charged with one count of second degree assault, RCW 9A.36.021(1)(a) and (g). The information alleged that he assaulted Ms. Bell by strangulation and, in the alternative, that he intentionally assaulted her and thereby recklessly inflicted substantial bodily harm. CP 25-26. The State also alleged two aggravating factors: (1) that the offense involved domestic violence and was committed "within sight or sound of the victim's or the offender's minor child under the age of eighteen years, under the authority of RCW 9.94A.535(3)(h)(ii)"; and (2) that the offense involved domestic violence and "was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time, under the authority of RCW 9.94A.535(3)(h)(i)." CP 25-26.

The State also charged Mr. Bell with one count of felony harassment, RCW 9A.46.020(1), (2)(b). CP 26-27. The State alleged the same two aggravating factors as for the second degree assault charge. CP 26-27.

Finally, the State charged Mr. Bell with one count of cyberstalking, RCW 9.61.260(1), (3), based on the text message he sent to Ms. Bell on the night of the incident. CP 27. The State alleged only the "pattern of abuse" aggravating factor for the cyberstalking charge. CP 27.

Following a trial on the substantive offenses, the jury found Mr. Bell guilty of each count as charged. CP 105-07.

A separate proceeding was held to determine the two alleged aggravating factors. Prior to the proceeding, Mr. Bell moved to dismiss the "ongoing pattern of abuse" aggravator, arguing the term "psychological abuse" was unconstitutionally vague. CP 11-20; RP 874-76, 899. The court denied the motion. RP 874-76.

In order to prove the "pattern of abuse" aggravator, the State was permitted to introduce judgments from five prior felony convictions for violation of a no-contact order and three prior misdemeanor domestic violence offense convictions. RP 652; Exhibits 34-38; Post-Verdict exhibits 1-3.

The jury answered "yes" on the special verdict forms, finding the State had proved the aggravating factors as charged. CP 108-16.

The court found the aggravating factors justified an exceptional sentence above the standard range. RP 940-42; CP 160.

D. ARGUMENT

1. MR. BELL'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE JURY WAS INSTRUCTED ON A STATUTORY ALTERNATIVE MEANS OF COMMITTING CYBERSTALKING THAT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Criminal defendants in Washington have a fundamental constitutional right to a unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, jury unanimity is not required as to the means by which the crime was committed only if substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Thus, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

Two purposes of the alternative means doctrine are to prevent jury confusion about what criminal conduct must be proved beyond a

reasonable doubt, and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

An "alternative means case" is one where the State alleges and the jury is instructed on more than one means of committing the crime. Id. at 790. The question on review is whether substantial evidence supports each of the means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

If the evidence is insufficient to support each means, either the prosecutor must elect the means supported by the evidence, or the court must instruct the jury to rely on only that means during deliberations. State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006).

Here, two alternative means of committing the crime of cyberstalking were charged and submitted to the jury. The information alleged that Mr. Bell, with intent to harass, intimidate, or torment

Kimyata Bell, sent her an electronic communication (1) "using lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of a lewd or lascivious act," or (2) "threatening to inflict injury on the person or property of Kimyata Bell, or any member of her family or household."[1] CP 27. The jury was instructed on both of these means. CP 86, 89. The prosecutor did not elect either of the means in closing argument. See RP 839-40.

Yet, the evidence was not sufficient to support the "lewd or lascivious" alternative means of committing the crime. The only evidence to support the cyberstalking charge was the text message Mr. Bell sent to Ms. Bell on the night of the incident. The message read:

> Bitch I hope u show them this bitch u want to control me ill kill u and them whenever they dont know shit tell them to go home or else its on.

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[1] The cyberstalking statute, RCW 9.61.260, sets forth three alternative means:

> (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:
>
> (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
>
> (b) Anonymously or repeatedly whether or not conversation occurs; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household. . . .

RP 736; Exhibit 12. The message contains no "lewd, lascivious, indecent, or obscene words, images or language," and does not suggest the commission of a "lewd or lascivious act." See RCW 9.61.260(1)(a). No rational trier of fact could have found the text message satisfied this means of committing the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11. Therefore, the conviction for cyberstalking must be reversed. Id.

2. THE STATUTORY TERM "PSYCHOLOGICAL ABUSE," CONTAINED IN THE "ONGOING PATTERN OF ABUSE" AGGRAVATOR, IS VAGUE IN VIOLATION OF CONSTITUTIONAL DUE PROCESS

a. The "void for vagueness" doctrine of the Due Process Clause applies to statutory aggravating factors

The vagueness doctrine of the Due Process Clause[2] rests on two related principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104,

[2] The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." In addition, article I, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. A statute fails to adequately guard against arbitrary enforcement if it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); O'Day v. King County, 109 Wn.2d 796, 811-12, 749 P.2d 142 (1988).

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), the Washington Supreme Court overturned its prior decision in State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that statutory aggravating factors were not subject to a vagueness challenge. The court's holding in Baldwin is untenable in light of the United States Supreme Court's later decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).[3,4]

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[3] In Blakely, the Supreme Court held "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

In Baldwin, the court held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct' and that it was 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.'" 150 Wn.2d at 458 (quoting State v. Jacobson, 92 Wn. App. 958, 966, 967, 965 P.2d 1140 (1998)) (internal quotation marks and citation omitted). Baldwin concluded that because the sentencing guidelines statutes "do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature," the void-for-vagueness doctrine "ha[s] no application in the context of sentencing guidelines." Id. at 459.

Baldwin's conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" is indisputably incorrect following Blakely. There, the Court held statutory aggravating factors *do* alter the statutory maximum of

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submitted to a jury, and proved beyond a reasonable doubt.'" Blakely, 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

[4] In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013), the petitioner similarly argued that Baldwin did not survive Blakely. The Washington Supreme Court did not decide the issue and instead assumed without deciding that the vagueness doctrine applied to the petitioner's challenge to the aggravating factor. Id. at 296-97. The court concluded that even if the vagueness doctrine applied, the aggravating factor at issue was not impermissibly vague. Id.

the offense. Blakely, 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." Baldwin, 150 Wn.2d at 458. The vast majority of aggravating factors may no longer be considered by a sentencing judge at all, unless they are first found by a jury beyond a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-Blakely scheme, aggravating factors are not matters that merely direct judicial discretion.

Baldwin also concluded there was no liberty interest at stake in the determination of an aggravating factor, stating "before a state law can create a liberty interest, it must contain 'substantive predicates' to the exercise of discretion and 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" Baldwin, 150 Wn.2d at 460 (quoting In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). This conclusion is also contrary to the United States Supreme Court's opinions in Blakely and Apprendi. Those cases concluded the Due Process Clause *does* apply to aggravating factors.

Blakely concluded that the Sixth Amendment right to a jury trial applies to statutory aggravating factors. Blakely, 542 U.S. at 305. It is by virtue of the Fourteenth Amendment Due Process Clause that the Sixth Amendment jury trial right is incorporated against the states. Duncan v.

Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In concluding that the Sixth Amendment jury trial right applies in state criminal trials, the Court first determined that the right is "among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, . . . is basic in our system of jurisprudence, and . . . is a fundamental right, essential to a fair trial." Id. at 148-49 (internal quotation marks and citations omitted). The Court reasoned that "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id. at 156. Thus, the Sixth Amendment right to a jury applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake. Because it applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

In Apprendi, the Court stated:

> As we made clear in [In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)], the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S. at 363, 90 S. Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." Id. We thus require this,

> among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. Id.

Apprendi, 530 U.S. at 484. Thus, Apprendi, which the Court specifically extended to Washington's exceptional sentence statute in Blakely, applied the Due Process Clause's protections to sentence enhancements because of the loss of liberty associated with the finding. Apprendi also noted "we have made clear beyond peradventure that Winship's due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Id. (brackets in original, internal quotation marks and citation omitted). Thus, liberty interests arise from factual determinations that establish the length of the sentence.

Apprendi and Blakely clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as Apprendi expressly noted, sentencing enhancements impact the most basic of liberty interests—the right to be free from confinement. 530 U.S. at 484. It is because they affect the most basic liberty interest that enhancements and aggravating factors, just like traditional elements, must be proved beyond a reasonable doubt. With the recognition that

this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of Baldwin's underpinnings is lost.

Baldwin's reasoning is analytically unsound. Under Baldwin, a defendant may only raise a vagueness challenge to elements that require a particular result. Baldwin, 150 Wn.2d at 460. By that logic, no such challenge could ever be raised to the elements of an offense in jurisdictions that do not employ determinate sentencing, such as the federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is always free to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, and, for that matter, does not require the court to impose any sentence at all. Nor would Baldwin's reasoning permit vagueness challenges to conditions of community custody, as a violation of such conditions does not dictate an outcome. Yet, not only do Washington courts permit such challenges, they have struck several conditions as

unconstitutionally vague. See, e.g., State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

Finally, the reasoning of Cashaw, relied on in Baldwin, is of limited value in assessing the applicability of the vagueness doctrine to a statutory factor that increases punishment. The parole statutes at issue in Cashaw concerned whether a defendant had a right to be freed prior to the expiration of his lawfully imposed sentence. Cashaw, 123 Wn.2d at 145-47. In Cashaw, since the defendant's confinement was lawful, he had no constitutional right to demand something less than what was lawfully ordered, unless he could demonstrate a statutory directive that required a different outcome. Id. By contrast, the challenge here concerns the lawfulness of the sentence in the first instance. In this scenario a defendant must be afforded the opportunity to challenge the constitutionality of the confinement, such as by arguing that it violates the Due Process Clause's prohibition against vague statutes.

Baldwin is incorrect and should not be followed. After Apprendi and Blakely, it is clear that the Due Process Clause applies to the factual finding of whether an aggravating factor exists. The vagueness doctrine of the Due Process Clause must also apply.

b. The statutory aggravator is unconstitutionally vague to the extent it requires the jury to find the offense was part of an "ongoing pattern of psychological abuse"

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation marks and citation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. Id. at 297. The Court considers whether the statute is vague as applied to the particular facts at issue in the case. Id. The Court reviews a vagueness challenge *de novo*. State v. Williams, 159 Wn. App. 298, 319, 244 P.3d 1018 (2011).

The statutory aggravating factor at issue requires the jury to find whether

> [t]he current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and . . . [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(3)(h)(i). The statute does not define the term "psychological abuse." Under the Washington Supreme Court's decision in State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), the term is unconstitutionally vague.

In Williams, the court considered the constitutionality of the criminal harassment statute. The statute provided that a person was guilty of harassment if, without lawful authority, he or she knowingly threatened "'[t]o cause bodily injury in the future to the person threatened or to any other person," or "[m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or *mental health* or safety," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.'" Id. at 203 (quoting former RCW 9A.46.020(1)(a)(i), (1)(a)(iv), (b) (1992)) (emphasis in Williams). The court concluded the term "mental health," which was not defined in the statute, was impermissibly vague. Id. at 205-06.

First, the court concluded the term "mental health" was vague because a person of reasonable understanding must guess at what conduct was prohibited by the term. Id. at 204. For example, the statute did not make clear whether a person was prohibited from

making threats that cause others mere irritation or emotional discomfort, or whether it prohibited only those threats causing others to suffer a diagnosable mental condition. Id. The court explained, "[w]ithout knowing what is meant by mental health, the requirement that one intentionally commit an act designed to substantially harm the mental health of another does not tell us what that act might be." Id.

Second, the court concluded the term "mental health" was unconstitutionally vague because it was inherently subjective. Id. at 205-06. "[T]he average citizen has no way of knowing what conduct is prohibited by the statute because each person's perception of what constitutes the mental health of another will differ based on each person's subjective impressions." Id. at 206. Similarly, the statute offered law enforcement no guide beyond the subjective impressions of the person responding to a citizen complaint. Id.

Thus, the court concluded the statute was unconstitutionally vague to the extent it referenced "mental health." Id. The court held the term "mental" must be severed from the statute. Id. at 212-13.

The statutory term "psychological abuse" is no less vague than the term "mental health," and for similar reasons. A person of reasonable understanding must necessarily guess at what conduct the

term encompasses. Does it encompass behavior that merely causes ongoing irritation or emotional discomfort, or does it require that the behavior cause a substantial, diagnosable psychological condition? The answer is not clear. A person of reasonable understanding is left to guess at what is meant by "psychological abuse."

Similarly, as with the term "mental health," the term "psychological abuse" is inherently subjective. Each person's perception of what constitutes "psychological abuse" differs based on each person's subjective impressions. The statute offers the jury no guide beyond the subjective impressions of each juror in determining whether an ongoing pattern of "psychological abuse" occurred.

Because a reasonable person is left to guess at what conduct is encompassed by the term "psychological abuse" and the term is inherently subjective, the statute is unconstitutionally vague to the extent it references "psychological abuse." Williams, 144 Wn.2d at 205-06. The term "psychological" must therefore be severed from the statute. Id. at 212-13.

c. The exceptional sentence must be reversed

When an appellate court concludes that a statute is unconstitutional, it must ensure that the defendant was convicted under

the statute as it is subsequently construed and not as it was originally written. Williams, 144 Wn.2d at 213. The defendant is presumed prejudiced and the State bears the burden to show beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Id. The case must be reversed if it is impossible to discern whether the jury relied upon the unconstitutional aspect of the statute in reaching its verdict. Id.

Here, the jury was instructed to find whether each of the three charged offenses was "part of an ongoing pattern of psychological or physical abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 109, 111, 113. The jury was not provided a special verdict form requiring it to indicate whether it found the offenses were part of an ongoing pattern of psychological abuse or an ongoing pattern of physical abuse. Therefore, it is impossible to discern whether the jury found an ongoing pattern of psychological abuse, an ongoing pattern of physical abuse, or both. To prove the aggravator, the State presented judgments for five prior convictions for felony violation of a no-contact order, one conviction for third degree malicious mischief, and two convictions for fourth degree assault. Exhibits 34-38; Post-Verdict exhibits 1-3. Thus,

most of the prior offenses relied upon to prove a pattern of abuse did not involve physical abuse. It is therefore impossible to say that the jury did not rely upon the unconstitutional statutory term "psychological abuse" in reaching its verdicts. The special verdicts must therefore be vacated. Williams, 144 Wn.2d at 213.

In addition, the exceptional sentence must be reversed. A reviewing court must reverse an exceptional sentence if the trial court record does not support the sentencing court's articulated reasons or those articulated reasons do not justify a sentence outside the standard range. State v. Hayes, __ Wn. App. __, 312 P.3d 784, 786-87 (2013); RCW 9.94A.585(4). Here, the sentencing court found the jury's finding on the "pattern of abuse" aggravator justified an exceptional sentence. RP 940-42; CP 160. But that aggravator was unconstitutionally vague in violation of due process. Therefore, the exceptional sentence must be reversed and Mr. Bell must be resentenced.

3. MR. BELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO ARGUE AT SENTENCING THAT THE ASSAULT AND HARASSMENT CONVICTIONS ENCOMPASSED THE SAME CRIMINAL CONDUCT

a. A defendant receives ineffective assistance of counsel if his attorney fails to argue same criminal conduct at sentencing and there is a reasonable possibility that the sentencing court would have found the offenses encompassed the same criminal conduct had counsel so argued

When a person is convicted of two or more offenses, they count as only one crime in the offender score if they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). Two crimes encompass the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a).

Whether two crimes involved the same criminal intent for purposes of RCW 9.94A.589(1)(a) is measured by determining whether the defendant's criminal intent, viewed objectively, changed from one crime to another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Intent, as used in this analysis, "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective

criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

If defense counsel does not argue same criminal conduct at sentencing, the argument is waived on appeal. State v. Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013). But because the claim of error is of constitutional magnitude, the defendant may claim ineffective assistance of counsel for the first time on appeal. Id.

To establish ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that his defense was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed .2d 674 (1984); U.S. Const. amend. VI. Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results where "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*'" State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (alteration in original) (quoting Strickland, 466 U.S. at 694).

Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. Phuong, 174

Wn. App. at 547; State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). The question is whether there is a reasonable possibility that the sentencing court would have found the two offenses encompassed the same criminal conduct had counsel so argued. Phuong, 174 Wn. App. at 548. If two offenses were committed at the same time and place and involved the same victim, and a sentencing court could find they were committed with the same objective criminal intent, counsel's failure to argue same criminal conduct amounts to deficient performance that prejudiced the defendant. Id.

b. Mr. Bell received ineffective assistance of counsel

There is a reasonable possibility that the sentencing court would have found the assault and felony harassment convictions encompassed the same criminal conduct had counsel so argued. The assault and harassment were undeniably committed at the same time and place and involved the same victim. Ms. Bell testified that Mr. Bell threatened to kill her while he had his hands around her neck and in the midst of the altercation. RP 416-18, 459.

Moreover, the sentencing court could have found the two offenses were committed with the same objective criminal intent. To determine whether two crimes involved the same objective intent, courts look to whether one crime furthered another. Graciano, 176 Wn.2d at 540. One

crime furthers another if the first crime facilitates commission of the second. Saunders, 120 Wn. App. at 824-25. In Saunders, for example, a kidnap furthered a rape where the restraint of the victim allowed Saunders to accomplish his sexual agenda. Saunders, 120 Wn. App. at 824-25. Similarly, in State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988), a burglary furthered a rape and assault whether Collins's unlawful entry into the building allowed him to accomplish the attacks.

Here, the court could easily have found the assault furthered the felony harassment. Mr. Bell's assaultive conduct must have contributed to Ms. Bell's fear that he would actually kill her. See State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (Court of Appeals determined assault and felony harassment constituted same criminal conduct for sentencing purposes) (citing State v. Mandanas, No. 57738-7-I, 2007 WL 1739702 (Div. I, June 18, 2007)).

In determining whether two crimes involved the same objective criminal intent, courts also consider "'how intimately related the crimes are'" and "'whether, between the crimes charged, there was any substantial change in the nature of the criminal objective.'" Phuong, 174 Wn. App. at 546-47 (quoting State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). At issue is whether the second crime was sufficiently separated in time from the first so as to provide the defendant an

opportunity to reflect and form a new criminal intent. State v. Wilson, 136 Wn. App. 596, 613-15, 150 P.3d 144 (2007) (internal quotation marks and citation omitted).

In Saunders, for example, a rape and kidnap were products of the same criminal objective where the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Saunders, 120 Wn. App. at 825. Similarly, in Phuong, the court could have found an attempted second degree rape and unlawful imprisonment involved the same intent where Phuong's objective criminal purpose in dragging the victim to his bedroom and locking the door was to rape her. Phuong, 174 Wn. App. at 548.

Here, the court could have found Mr. Bell had the same primary motivation for assaulting Ms. Bell and threatening to kill her—to cause her pain and fear.

In sum, the second degree assault and the felony harassment were committed at the same time and place, against the same person, and the court could have found they were committed with the same objective criminal intent. Therefore, Mr. Bell received ineffective assistance of counsel due to his attorney's failure to argue same criminal conduct at sentencing. Phuong, 174 Wn. App. at 548.

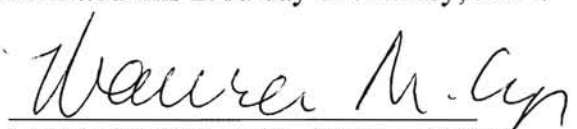
c. Mr. Bell must be resentenced

If a defendant received ineffective assistance of counsel for his attorney's failure to argue same criminal conduct at sentencing, the defendant is entitled to a new hearing at which counsel may make the argument. Phuong, 174 Wn. App. at 548; Saunders, 120 Wn. App. at 825. Therefore, Mr. Bell is entitled to a new sentencing hearing.

E. CONCLUSION

The jury was instructed on an alternative means of committing cyberstalking that was not supported by substantial evidence. The conviction must be reversed. In addition, the "ongoing pattern of abuse" statutory aggravating factor is unconstitutionally vague to the extent it references "psychological abuse." As a result, the jury's special verdicts must be vacated and the exceptional sentence reversed. Finally, Mr. Bell received ineffective assistance of counsel due to his attorney's failure to argue his assault and harassment convictions constituted the same criminal conduct. He is therefore entitled to a new sentencing hearing.

Respectfully submitted this 23rd day of January, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. EUGENE BELL, JR., Appellant.	)))))))))	NO. 70358-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JANUARY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710