Supreme Court No. 90988-1
COA No. 70358-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WARREN EUGENE BELL, JR.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Warren Eugene Bell, Jr., requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Bell, No. 70358-7-I, filed September 22, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), this Court held that the "void for vagueness" doctrine stemming from the Due Process Clause does not apply to exceptional sentence aggravating factors. But a short time later, in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court made clear that the protections of the Due Process Clause *do* apply to Washington's exceptional sentence aggravators. In State v. Duncalf, 177 Wn.2d 289, 296, 298, 300 P.3d 352 (2013), this Court assumed without deciding that the vagueness doctrine applies to statutory aggravators, but concluded the aggravator at issue was not unconstitutionally vague. Should this Court grant review to decide the important constitutional question left unanswered in Duncalf, that is, whether, in light of Blakely, the vagueness doctrine actually applies to aggravating factors? RAP 13.4(b)(3), (4).

2. In State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), this Court held that the harassment statute was unconstitutionally vague to the extent it criminalized threats to harm a person's "mental health." Washington's exceptional sentence statute authorizes a court to impose an exceptional sentence based on a jury finding that the current offense was part of an "ongoing pattern of *psychological* . . . abuse." RCW 9.94A.535(3)(h)(i) (emphasis added). Is the statute unconstitutionally vague in light of Williams, warranting review? RAP 13.4(b)(1), (3).

3. Mr. Bell was convicted of cyberstalking based upon a text message he sent which contained the words "bitch" and "shit." Were these terms sufficient for a jury to find the message contained "lewd, lascivious, indecent, or obscene words," or "suggest[ed] the commission of any lewd or lascivious act"?

4. Was defense counsel deficient for failing to argue that the 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 sentencing court could have found the offenses involved the same objective criminal intent?

5. The Court of Appeals held Mr. Bell could not demonstrate prejudice from counsel's failure to argue same criminal conduct

because, in part, "[s]hould Bell face a future sentencing, the trial court will have to make an independent determination of whether the convictions constituted the same criminal conduct." Slip Op. at 9 (citing RCW 9.94A.525(5)(a)(i)). Contrary to the court's conclusion, RCW 9.94A.525(5)(a)(i) provides that when a sentencing court finds two current offenses encompass the same criminal conduct, all future courts are bound by that determination. Does the Court of Appeals' misunderstanding of the statute warrant review? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Kimyata Bell claimed that one day, her estranged husband Warren Bell knocked on her apartment door. RP 402-04. She said that when she answered the door, he grabbed her by the hair and put his hands around her neck. RP 405. He pulled her down the stairs, kicked her head and stomped on her rib cage, then grabbed her neck with both hands, causing her to have difficulty breathing. RP 407-11. She blacked out briefly and when she woke up, Mr. Bell had his hands around her neck and said he was going to kill her. RP 415-18, 459.

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.

The State charged Mr. Bell with one count of second degree assault, one count of felony harassment, and one count of cyberstalking. CP 25-27. For counts one and two, the State alleged the statutory aggravating factor 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)."[1] CP 25-27.

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 alleged aggravating factors. 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.

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

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[1] The State alleged the additional aggravator 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)." CP 25-27.

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

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to determine the important constitutional question of whether, in light of Blakely v. Washington, the void for vagueness doctrine applies to Washington's statutory aggravators

The Court of Appeals relied on this Court's decision in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), in rejecting Mr. Bell's argument that the void for vagueness doctrine applies to statutory aggravating factors. Slip Op. at 7-8. In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013), the petitioner argued, as Mr. Bell does here, that Baldwin did not survive the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Duncalf 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. Duncalf, 177 Wn.2d at 296-97. The Court concluded that even if the doctrine applied, the aggravating factor was not impermissibly vague. Id.

Once again the question is squarely presented: in light of Blakely, does the void for vagueness doctrine stemming from the Due

Process Clause apply to statutory aggravating factors? This Court should grant review to decide this important constitutional question, which is bound to recur if left unanswered. RAP 13.4(b)(3), (4).

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

The vagueness doctrine of the Due Process Clause 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, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); U.S. Const. amend. XIV; Const. art. I, § 3.

In Baldwin, 150 Wn.2d 448, the Court concluded that statutory aggravating factors are 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, 542 U.S. 296.[2]

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

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 (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 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 not 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 do not merely direct judicial discretion.

Baldwin also concluded no liberty interest is 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 (internal quotation marks and citation omitted). This conclusion is also contrary to the Supreme Court's opinions in Blakely and Apprendi, which 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). The Sixth Amendment jury trial 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). "[T]he 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 the Sixth Amendment 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 enable a court to impose a sentence that is longer than what would otherwise be allowed.

Apprendi and Blakely 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 raise a vagueness challenge only 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, 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 free to exercise its discretion to impose any sentence within the standard range. Likewise, the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the imposition of a particular sentence, or, indeed, 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, courts routinely permit such challenges. See, e.g., State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

This Court should grant review and hold that the vagueness doctrine of the Due Process Clause applies to statutory aggravators.

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." Duncalf, 177 Wn.2d at 296-97 (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 aggravating factor required the jury to find whether the current offense involved domestic violence and "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) (emphasis added). The statute does not define the term "psychological abuse." Under the 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, a person of reasonable understanding must guess at what conduct was prohibited by the term "mental health." 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 term "mental health" 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.

Like the term "mental health," the statutory term "psychological abuse" is vague 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 his or her 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 must guess at the conduct 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.

2. The evidence was insufficient to prove one alternative means of committing the crime of cyberstalking

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 relied-upon alternative. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). The evidence must be sufficient for a rational trier of fact to find each means proved beyond a reasonable doubt. Id.

Here, two alternative means of committing the crime of cyberstalking were charged and submitted to the jury. The jury was instructed it could find Mr. Bell guilty if it found that, with an intent to harass, intimidate, or torment another person, he made an electronic communication to Ms. Bell (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 of Kimyata Bell." CP 89; see RCW 9.61.260.

Yet, the evidence was not sufficient to support the "lewd or lascivious" alternative. The only evidence to support the cyberstalking charge was the text message sent by Mr. Bell which 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.

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." 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.

3. Mr. Bell received ineffective assistance of counsel due to his attorney's failure to argue that the assault and harassment convictions encompassed the same criminal conduct

a. Counsel provided deficient representation by failing to argue same criminal conduct at sentencing

Two crimes encompass the same criminal conduct and count as one offense in the offender score 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).

If defense counsel does not argue same criminal conduct at sentencing, the argument is waived on appeal unless the defendant can establish he received ineffective assistance of counsel. State v. Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed .2d 674 (1984); U.S. Const. amend. VI. The question is whether there is a reasonable possibility the sentencing court would have found the two offenses encompassed the same criminal conduct had counsel so argued. Phuong, 174 Wn. App. at 548.

Here, there is a reasonable possibility 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 assault. RP 416-18, 459.

Moreover, the sentencing court could have found the two offenses were committed with the same objective intent. Two crimes

may involve the same objective intent if one crime furthers the other. Graciano, 176 Wn.2d at 540. Here, the court could easily have found the assault furthered the felony harassment, as the assaultive conduct must have contributed to Ms. Bell's fear of being killed.

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. 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 assault and 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, counsel provided deficient performance by not arguing same criminal conduct. Phuong, 174 Wn. App. at 548.

b. The Court of Appeals misinterpreted and misapplied the sentencing statute in concluding Mr. Bell was not prejudiced, warranting review by this Court

In concluding that Mr. Bell did not suffer prejudice from counsel's failure to argue same criminal conduct, the Court of Appeals reasoned, in part, "[s]hould Bell face a future sentencing, the trial court

will have to make an independent determination of whether the convictions constituted the same criminal conduct. See RCW 9.94A.525(5)(a)(i)." Slip Op. at 9. This conclusion is erroneous because the statute provides that if a sentencing court concludes that two current offenses encompass the same criminal conduct, any future sentencing court is bound by that determination.

RCW 9.94A.525(5)(a)(i) provides: "Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score." Under the plain language of the statute, if prior offenses "were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct," then they must be counted at future sentencing proceedings as "one offense" in the offender score. Id.

In State v. Johnson, the Court of Appeals examined RCW 9.94A.525(5)(a)(i) and 9.94A.589(1)(a) and concluded that together they mean

> that a court considering whether multiple prior convictions constitute the same criminal conduct is bound by a decision of the trial court that convicted the defendant of the prior offenses. This may reflect the legislature's determination that the court convicting a defendant of a crime has the most complete information about the facts and circumstances of that crime.

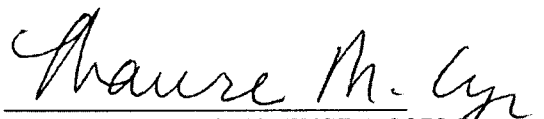
State v. Johnson, 180 Wn. App. 92, 102-03, 230 P.3d 197, review denied, 181 Wn.2d 1003, 332 P.3d 984 (2014).

In sum, when a court determines that current offenses encompass the same criminal conduct, all future sentencing courts are bound by that determination. Thus, contrary to the Court of Appeals' conclusion, if counsel had argued, and the sentencing court had found, that Mr. Bell's assault and harassment convictions were the same criminal conduct, all future sentencing courts would be required to count them as one offense. Because the Court of Appeals' opinion reflects a misinterpretation of the statute, review is warranted.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 22nd day of October, 2014.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WARREN EUGENE BELL, JR., Appellant.	DIVISION ONE No. 70358-7-I UNPUBLISHED OPINION FILED: September 22, 2014

DWYER, J. – After Warren Bell kicked and choked his wife, he drove away and then sent her a text message in which he called her a "bitch" and threatened to kill her. The jury found him guilty of assault in the second degree, felony harassment, and felony cyberstalking, and the trial court imposed an exceptional sentence. On appeal, we hold that sufficient evidence supports both charged alternative means of cyberstalking. We also reject Bell's claims that the ongoing pattern of abuse sentence aggravator is unconstitutionally vague and that he was denied effective assistance of counsel at sentencing. Bell's statement of additional grounds for review does not raise any meritorious issue. Accordingly, we affirm.

I

Warren Bell and Kimyata Bell married in 2000; they have two young sons. The couple's relationship was troubled, and Warren assaulted Kimyata several

times over the years. The couple separated in 2009 but continued to have some contact.

In August 2012, Kimyata was living in a house in Kent with her two children. James Denslow, Kimyata's nephew, was staying at the house temporarily. On August 6, Kimyata's boyfriend Gabe spent the evening with Kimyata and the children for a barbecue in the backyard.

After Gabe left, Kimyata and the children went inside. Sometime later, Kimyata heard a loud knock at the door and thought that Gabe might have returned. When she opened the door, Warren immediately reached out and grabbed her by the neck. He was angry, smelled of alcohol, and complained that the children had been calling Gabe "dad."

Kimyata turned and attempted to escape up the stairs. But Warren grabbed her by the hair and dragged her back down the stairs, where she hit her head on the concrete landing. Warren told the two boys, who were watching nearby and screaming, to "[g]et the fuck away; get the fuck away." He then put his hand down Kimyata's pants to see if she "smelt like another guy." At some point, the older boy called 911.

As Kimyata attempted to get up, Warren began kicking her in the head and chest and stomped on her rib cage. He eventually grabbed Kimyata's neck with both hands, choked her, and yelled, "you're going to die." Kimyata could hardly breathe and briefly lost consciousness.

Denslow returned to the house and heard "blood-curdling" screams as he went through the front door. He went downstairs and saw Warren with his hands around Kimyata's neck. Warren broke off his assault and chased Denslow into the front yard. After throwing a metal scooter towards Denslow, Warren got into a white van and drove away.

A short time later, Warren sent Kimyata the following text message:

> Bitch i hope u show them this bitch u want to control me ill kill u and them whenever they don't know shit tell them to go home or else its on.

Dr. Larry Kadeg, an emergency room physician at Valley Medical Center, diagnosed Kimyata with abrasions to her neck and a chest wall contusion involving a possible rib fracture. Dr. Kadeg also noted petechiae around Kimyata's eyes, ruptured blood vessels associated with recent choking.

Warren claimed that he acted in self-defense. He testified that when he was at Kimyata's house on previous occasions, she repeatedly pestered him until he had sex with her. But he consistently declined Kimyata's requests to reconcile.

Warren maintained that on the evening of the alleged assault, he stopped by to drop off a birthday present for his younger son. Kimyata invited him in, and the two talked for a while. When he once again rebuffed Kimyata's efforts to resume their relationship, she became angry, "jumped" on his back and held on to him by his neck and shirt. Warren asserted that he had to scratch her and pull her hair in order to escape. He denied kicking or choking Kimyata. He explained

that the text was a "crude way" of explaining that "somebody was . . . commit[ting] a crime against me."

The State charged Warren with one count of assault in the second degree – domestic violence (count I), felony harassment – domestic violence (count II), and felony cyberstalking – domestic violence (count III). The jury found Warren guilty as charged.

The jury also returned special verdicts finding that all three counts involved domestic violence and were part of "an ongoing pattern of psychological or physical abuse." See RCW 9.94A.535(3)(h)(i). The jury further found that the assault and felony harassment counts were committed "within the sight or sound of the victim's children who were under the age of 18 years." See RCW 9.94A.535(3)(h)(ii).

Based on the aggravating factors, the court imposed a 120-month exceptional sentence on the assault count. The court imposed concurrent 60-month standard-range terms on the felony harassment and felony cyberstalking counts.

II

Bell contends that he was denied his right to a unanimous jury verdict because insufficient evidence supported one of the two charged alternative means of committing cyberstalking. The trial court instructed the jury that to convict Bell of cyberstalking, the State had to prove that, with the "intent to

harass, intimidate, or torment another person," Bell made an electronic communication:

> using lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of a lewd or lascivious act, **or**
>
> . . . threatening to inflict injury on the person of Kimyata Bell.

Instruction 38 (emphasis added). See RCW 9.61.260(1)(a), (c). "Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt." State v. Killingsworth, 166 Wn. App. 283, 286-87, 269 P.3d 1064, review denied, 174 Wn. 2d 1007 (2012).

Criminal defendants in Washington have the right "to an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial evidence." State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006). In such circumstances, "we infer that the jury rested its decision on a unanimous finding as to the means." Ortega-Martinez, 124 Wn.2d at 708.

Bell asserts that his text message did not use "lewd, lascivious, indecent, or obscene words" or suggest the commission "of a lewd or lascivious act." He argues that the evidence was therefore insufficient to establish the alternative means of cyberstalking set forth in RCW 9.61.260(1)(a).

The court rejected a comparable challenge in State v. Lansdowne, 111 Wn. App. 882, 46 P.3d 836 (2002). In Lansdowne, the defendant telephoned a school secretary and threatened to send someone "to beat the shit" out of her daughter's teacher. The defendant also referred to the teacher as a "bitch." 111 Wn. App. at 887. Based on the call, the State charged Lansdowne with telephone harassment under RCW 9.61.230(1), which required proof that she used "lewd, lascivious, profane, indecent, or obscene words" or suggested "the commission of any lewd or lascivious act."

The trial court dismissed the charge, concluding that the use of the words "bitch" and "shit" could not establish the elements of the charge as a matter of law. On appeal, the court disagreed.

> "Indecent" is defined as: "not decent: . . . altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly." WEBSTER'S[THIRD NEW INTERNATIONAL DICTIONARY], at 1147. "Obscene" is defined as: "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage." WEBSTER'S, *supra*, at 1557. Ms. Lansdowne used the word "bitch" not in reference to a female dog, but in reference to a female human being. Such usage is both indecent and obscene as those words are commonly defined. A rational trier of fact could have determined that Ms. Lansdowne's words were indecent or obscene.

Lansdowne,111 Wn. App. at 891-92.

The analysis in Lansdowne is persuasive here. Warren used the terms "bitch" and "shit" in a comparable manner in his text message. A rational trier of

fact could have found those words to be indecent or obscene. Sufficient evidence supported his conviction for cyberstalking under RCW 9.61.260(1)(a).

III

Bell contends that RCW 9.94A.535(3)(h)(i), the "ongoing pattern of psychological, physical, or sexual abuse" aggravator, is unconstitutionally vague and that his exceptional sentence must therefore be reversed. Bell concedes, however, that our Supreme Court has expressly held that "the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The court also determined that the sentencing guideline statutes do not create "a constitutionally protectable liberty interest." Baldwin, 150 Wn.2d at 461.

Bell maintains that Baldwin is no longer good law following the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But Bell has not provided any cogent legal argument suggesting how Blakely, a decision firmly anchored in the Sixth Amendment right to a jury trial, has modified the due process vagueness analysis in Baldwin. Under the circumstances, former Chief Judge Easterbrook's trenchant observations in a similar context are also appropriate here:

> Plaintiffs say that a decision of the [United States] Supreme Court has "direct application" only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals

> could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, IL, 567 F.3d 856, 857-58 (7th Cir. 2009), rev'd on other grounds by McDonald v. City of Chicago, IL, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). Under Baldwin, we must reject Bell's vagueness challenge. See State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984).

Moreover, the trial court based the exceptional sentence not only on the "ongoing pattern" of abuse factor, but also on the jury's finding that the offense occurred "within sight or sound of the victim's or the offender's minor child." RCW 9.94A.535(3)(h)(ii). During sentencing, the court observed that the latter factor, which Bell does not challenge, "affected me the most." The court also ruled that it would impose the same sentence based on either one of the aggravating factors. Bell's challenge to his exceptional sentence would therefore fail even if we invalidated the "ongoing pattern" of abuse aggravator. See State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (appellate court will uphold exceptional sentence if convinced that the trial court would impose the same sentence on the basis of the valid factors).

IV

Bell contends that he received ineffective assistance of counsel when trial counsel failed to argue at sentencing that his assault and harassment convictions

constituted the "same criminal conduct" for purposes of calculating his offender score. See RCW 9.94A.589(1)(a). To prevail on this claim, Bell must establish both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); see also State v. Rattana Keo Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013), petition for review filed May 31, 2013.

At sentencing, the court calculated Bell's offender score at 15 for the assault conviction and 11 for the harassment and cyberstalking convictions. Defense counsel acknowledged that Bell's offender score for the assault conviction was 15 and that offender scores greater than 9 were "off the grid."

A determination that the assault and harassment convictions constituted the same criminal conduct would have reduced Bell's offender scores by two points. See RCW 9.94A.525. Because the standard range remains the same for offender scores of 9 or greater, a finding of same criminal conduct would not have affected the calculation of Bell's standard range or any other element of his sentence. See RCW 9.94A.510. Should Bell face a future sentencing, the trial court will have to make an independent determination of whether the convictions constituted the same criminal conduct. See RCW 9.94A.525(5)(a)(i). Consequently, Bell cannot demonstrate any prejudice resulting from defense counsel's failure to argue same criminal conduct, and his claim of ineffective

assistance fails. Because Bell cannot establish prejudice, we need not decide whether defense counsel's performance was deficient. See State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (if ineffective assistance claim fails on one prong, court need not address other prong).

V

In his statement of additional grounds for review, Bell contends that he was denied effective assistance of counsel. He alleges that defense counsel failed to seek admission of Dr. Kadeg's prior inconsistent statements and failed to adequately cross-examine Dr. Kadeg.

Bell has not identified the nature of Dr. Kadeg's prior inconsistent statements or indicated how the evidence would have assisted defense counsel in cross-examining Dr. Kadeg. Nor has he provided any details about the remaining alleged errors. Because he has not sufficiently identified "the nature and occurrence of [the] alleged errors," we will not consider them. RAP 10.10(c).

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70358-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 22, 2014