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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that a *Petrich* instruction was required for the charge of Unlawful Imprisonment must fail when the evidence indicates one continuing course of conduct?

2. Whether the Defendant's claim that the charges of unlawful imprisonment and assault in the second degree constituted the same criminal conduct must fail when: (1) the Defendant waived this issue by not raising it below; and, (2) the two offenses had different statutory and factual intents and, therefore, did not constitute the same criminal conduct?

3. Although the Defendant's convictions for Assault in the Second Degree and Violation of a No Contact Order did not violate double jeopardy, the State nevertheless concedes that the conviction for felony violation of a no contact order must be vacated because the jury was not properly instructed on all of the elements of that crime.

4. Whether the trial court abused its discretion in excluding certain evidence and witnesses when: (1) the evidence was either irrelevant or properly excluded because its probative value was substantially outweighed by the danger of unfair prejudice or confusion; and, (2) the trial court's exclusion of two defense witnesses based on a clear discovery violation was proper because the exclusion of witnesses due to a discovery violation is within the sound discretion of a trial court

5. Whether the cumulative error doctrine does not apply when the trial court did not err as alleged by the Defendant and when, even if this court were to find error, any such error was not egregious?

6. The State concedes that resentencing is necessary to clarify the basis for the exceptional sentence and to enter written findings of fact and conclusions of law should the trial court impose an exceptional sentence on remand.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Nance was charged by information filed in Kitsap County Superior Court with rape in the first degree, unlawful imprisonment, felony violation of a no contact order, assault in the second degree, felony harassment, and attempting to elude. CP 97. At trial, a jury found the Defendant guilty on all counts except the count of rape in the first degree, and found that the Defendant committed all five offenses shortly after his release from custody (rapid recidivism). CP 196-211. The trial court imposed an exceptional sentence of 84 months on the assault in the second degree charge (the standard range was 53-70 months), and the other counts were run concurrently.¹ This appeal followed.

¹ The trial court also imposed an exceptional sentence on the charges of unlawful, felony harassment, and attempting to elude, but these counts were run concurrently with the sentence on the assault in the second degree charge. CP 212-222.

B. FACTS

The named victim, Shelly McGlaun, dated the Defendant for almost two years, and they have a child in common.² RP 716-17. Ms. McGlaun explained that her relationship with the Defendant was fine at first, but that after about three months the Defendant became controlling, possessive, and abusive. RP 717. The Defendant threatened to kill Ms. McGlaun numerous times. RP 718. Eventually, after the Defendant assaulted Ms. McGlaun several times, a no contact order was entered prohibiting the Defendant from contacting Ms. McGlaun.³

In November of 2005, the Defendant went to jail and was not released until January of 2006. RP 718-20. During this period, the Defendant wrote Ms. McGlaun several letters and said that she would always be his, they would always be a family, and that “he didn’t care about anybody, not the police, he just didn’t give a fuck, [they] would always be together.” RP 719. Ms McGlaun did not want to be with the Defendant, and she moved while he was in jail because she didn’t want him to know where she was. RP 719.

On January 6, 2006, Ms. McGlaun went to a Seven Eleven store on her lunch break and was surprised to find the Defendant at the store. RP 719-

² The child was two and half years old at the time of trial. RP 716-17

³ In April of 2005, Ms. McGlaun called the police after the Defendant hit her and knocked her to the floor during an argument. RP 717. In October of that year, Ms. McGlaun again called the police after the Defendant hit her and left with their son. RP 718. After the October incident there was a no contact order in place prohibiting the Defendant from

20. The Defendant was sitting in his car at the store, and Ms McGlaun briefly went into the store and then went straight to her family's home to check on her son. RP 720, 746-47. Although Ms. McGlaun described that she saw the Defendant and the Defendant saw her, there was no direct communication or contact between the two at this time. RP 746-47. She explained that she was "terrified" to learn that the Defendant was out of jail. RP 724-25. Ms McGlaun then had her mother and brother (who both lived nearby) stay with her or she would stay with friends, as she didn't like to stay alone. RP 725.

The Defendant then began calling Ms McGlaun, but Ms. McGlaun did not initially know that it was the Defendant calling and did not talk to him at first. RP 720. Ms. McGlaun admitted that she eventually did talk to the Defendant on the phone and that he asked to see his son. RP 720-21. When asked why she spoke to the Defendant about seeing his son despite the fact that she was afraid of the Defendant, Ms McGlaun explained that she didn't want to take the Defendant's son away from him and that she wanted to work out a plan where she and the Defendant would not be together but where the Defendant could still see his son. RP 721. She further explained that her son was very young and she "didn't want him to not have a father." RP 721.

Ms McGlaun testified that the Defendant called her a lot after January 6th, and the conversations involved his expressing a desire to see his son and

contacting Ms. McGlaun, and the order was admitted as an exhibit at trial. RP 718, 203-04.

to get back together with her. RP 722. Ms McGlaun told the Defendant she was not going to get back together with him, but she did eventually agree to meet the Defendant at a Burger King so he could see his son. RP 722. She chose this location because there would be other people around, she didn't want the Defendant at her house alone with her and her son, and because she did not want the Defendant to know where she lived (as she thought that the Defendant did not know where she was living at this time). RP 722-23.

During the meeting at the Burger King, the Defendant ordered some food for their son and talked to the boy for a few minutes. RP 752. The Defendant then spoke to Ms. McGlaun about his desire to get back together, but she informed him that she did not want to be in a relationship with him. RP 752. After about 30 minutes, the Defendant left. RP 753. When Ms McGlaun eventually left with her son, she didn't see the Defendant outside the restaurant, but she still chose not to walk directly home because she did not want the Defendant to know where she lived. RP 754.

In the days leading up to January 13th, Ms McGlaun received a number of calls that she later learned originated from the Chieftain Motel. RP 725, 754-55. She eventually called the number back and asked who had been calling her. RP 726. At that time, Ms McGlaun was unaware that the Defendant was staying at the Chieftain. RP 726.

On January 13th, Ms McGlaun packed up some things as she was planning on spending the night at a female friend's house that evening. RP 728. Ms McGlaun ate dinner and waited for her friend to pick her up. RP 729. While she was waiting, Ms McGlaun had her mother watch her son for a period of time so that she could walk to a nearby Seven Eleven. RP 730-31.

At about 10:00 pm, Ms McGlaun began walking to the store, and as she walked she the Defendant's car start to "creep down the hill" behind her. RP 732. The Defendant grabbed her by the back of her hair and told her to get in the car or he would kill her. RP 733. She told him no, but the Defendant threw her into the car. RP 733. The Defendant asked where his son was, and Ms McGlaun told him that their son was at her house. RP 734. The Defendant then drove straight to Ms. McGlaun's home as if he already knew where it was. RP 734. Upon arrival at her apartment complex, the Defendant told Ms. McGlaun that if she said anything or if she didn't go in and get their son that he would kill her and her family, and he then followed her into the hallway as she went inside to get their son. RP 734-35. Ms McGlaun went inside and got her son and told her mother that she loved her. RP 735. She explained that she didn't call the police at that moment because she was terrified and it didn't occur to her, and also because she thought that if she got her son she might be able to calm the Defendant down. RP 735.

Ms. McGlaun then walked outside with her son and the Defendant

followed her back to the Defendant's car and he then drove them to the Chieftain Hotel. RP 736. At the hotel, the Defendant picked up the child and carried him up the stairs to a room on the top floor. RP 736. In the room, the Defendant talked to Ms. McGlaun about his desire to get back together and asked her why she wouldn't be with him. RP 737. Ms McGlaun told him that she didn't want to be with him, that he was too aggressive, and that they had been through this before. RP 737. The Defendant repeatedly asked Ms. McGlaun if she had had sex with anybody else and the Defendant became angry when Ms. McGlaun continually told him "no." RP 737-38.

The Defendant then asked her who the man was that had left her home the night before. RP 738. Ms. McGlaun felt "creeped out" because she didn't know that the Defendant knew where she was living and because the Defendant had been watching her apartment. RP 738. The Defendant "firmly" and "aggressively" asked Ms. McGlaun over and over if she had had sex with this man and Ms McGlaun kept telling him "no." RP 738. Finally, after about three minutes of this questioning, Ms McGlaun changed her response and said, "Yeah, you know, if that's what you want to hear, yeah." RP 739. The Defendant then punched Ms McGlaun multiple times on the left and right side of her face and in her stomach. RP 739.

Ms McGlaun also stated that the Defendant held a knife to her throat and told her that he was going to kill her and said he would bury her body

where nobody would ever find her. RP 740. He also put his hands around her neck and Ms McGlaun described that she must have lost consciousness because she saw “nothing but white.” RP 740. When the Defendant eventually released her she ran for the door, but the Defendant grabbed her and threw her back towards the bed. RP 741. At some point he asked her if she was pregnant with somebody else’s child, and when she responded “no,” he punched her in the stomach. RP 741.⁴

Ms. McGlaun described that later, when the Defendant got off of her, she ran for the door and escaped. RP 742. Another guest at the hotel, Nick Harris, heard Ms. McGlaun screaming and went outside to find her on the balcony. RP 235-37. As Mr. Harris started to go up the stairway, a male came down past him at a “brisk pace” and went to a car. RP 237-39. Mr. Harris contacted the hotel manager who then called the police. RP 241-42.

Officer Donnell Rogers responded to the scene and contacted Ms. McGlaun in the lobby. RP 186. Officer Rogers observed that Ms. McGlaun was extremely upset and was shaking and crying profusely. RP 189. Officer Rogers saw that Ms. McGlaun had numerous injuries, including: swelling and

⁴ Ms. McCain also described that the Defendant raped her in the hotel room and that the rape was very painful, and a sexual assault nurse examiner testified that the victim sustained numerous vaginal injuries which would have made intercourse “profoundly painful.” RP 556-58, 741. The jury, however, acquitted the Defendant of the charge of Rape in the First Degree which required the State to prove that the Defendant used a deadly weapon or kidnapped the victim. The jury was not instructed on Rape in the Second or Third Degree.

distinct finger marks on her neck; swelling, redness and puncture marks that appeared to be from a blow to the ear (which caused the earring to push into the neck); and other scratches. RP 190-97. Photographs were taken of the injuries and were admitted as exhibits at trial. RP 194-99. An aid crew transported Ms. McGlaun to Harrison Hospital. RP 201.

Officers were unable to locate the Defendant on the night of the assault, but several days later a police officer saw the Defendant's car parked on the street. RP 680. The car was unoccupied so the officer parked his unmarked police vehicle nearby and began watching the car. RP 680-81. About an hour and a half later the officer saw a male approach the suspect car. RP 682. This individual looked around the corner and was checking up and down the roads and "seemed to be doing a very intense surveillance of the vehicles." RP 682. He then walked over to the suspect vehicle, started it, and then got out of the car and walked back on the sidewalk and looked around some more. RP 683. The officer was able to confirm that this male was the Defendant after double-checking a photo of the Defendant. RP 683. When the Defendant began to drive away, the officer followed him and waited for a marked patrol vehicle to arrive. RP 685.

Officer Renfro, who was in a marked patrol car, then caught up with the Defendant and activated his emergency lights and attempted to stop the Defendant's car. RP 686, 702. The Defendant, however, did not stop. RP

702. Officer Renfro activated his siren, and the Defendant responded by speeding up to about ten miles over the speed limit, but still did not stop. RP

703. Officer Renfro described that it was dark outside and that the lights on his patrol car were intense and included a strobe light. RP 703-04.

The Defendant continued driving and eventually came to a stop sign where he briefly stopped his car, but he then turned westbound onto another street. RP 704. The Defendant increased his speed to almost 60 miles per hour while driving in a 25 m.p.h. zone. RP 705. Officer Renfro continued the pursuit with his lights and sirens activated. RP 705. At another intersection the Defendant made a left turn signal, slid through the intersection past the stop sign, and then made a right turn. RP 705-06. The pursuit continued and Officer Renfro saw that Officer Sherman was now behind him in another marked patrol car. RP 706. After receiving permission from a sergeant, Officer Sherman then performed a "PIT maneuver" on the Defendant's vehicle in which the officer turned his car into the Defendant's car causing it to spin out and stop in a ditch. RP 691, 707, 711. Officer Renfro then approached the Defendant's vehicle and instructed him to raise his hands and the Defendant complied. RP 711-12. The Defendant was arrested and handcuffed. RP 712-13. Officer Renfro explained that he went back and retraced the path that the Defendant took that night and found that the distance from the point where Officer Renfro activated his lights to the

location where the pursuit terminated was 2.5 miles. RP 714.

The Defendant testified that he spent the night of January 12 with the victim. RP 898-99.⁵ The Defendant admitted that he knew he was not supposed to contact the victim, and that if the victim's mother found out he was spending the night with the victim she would call the police. RP 900. When he woke up on the morning of the 12th he went to work for Labor Ready. RP 899. That evening, after work, the Defendant claimed he called the victim to ask her if they were going to see each other that night. RP 900. He later called her to "clarify things" because he had made plans to get a hotel room that night because he wanted them to have privacy. RP 901.

The Defendant testified that he received a phone call from the victim while he was at the Chieftain, and he waited at the hotel until he went to pick her up at 10:15. RP 904. He claimed that when he arrived at the victim's apartment she "already knew I was coming," so he just waited outside and she came out after about five minutes. RP 905.

The Defendant claimed that at the hotel he and the victim talked and watched TV and then took a bath together. RP 906. He described that they then had sex, but that he didn't force himself on the victim. RP 907, 910.

The Defendant described that the two later had a "heated argument."

⁵ The Defendant also testified that in the week leading up to the 13th he had spent the night at the victim's house every night and had sex with her "the whole week." RP 910.

RP 908. Although he admitted that he had been convicted of assaulting the victim in the past, he claimed that in the hotel room the victim “charged him,” and that when she came at him again he put his hands “basically around her neck” and pushed her towards the wall and held her there, but only to prevent her from hitting him. RP 908-09, 931-32. He admitted that after he put his hands on her neck he “squeezed” and “pushed.” RP 928. He also stated that he slapped the victim and that he “lost [his] temper” after they had a conversation about their son. RP 909, 928. The Defendant said the fight went on for approximately seven minutes, and that afterwards the victim started getting hysterical and was crying, so he left. RP 909-10.

With respect to the eluding charge, the Defendant stated that he didn’t attempt to flee from the police and that he didn’t know that it was the police that were behind him. RP 923.

III. ARGUMENT

A. THE DEFENDANT’S CLAIM THAT A *PETRICH* INSTRUCTION WAS REQUIRED FOR THE CHARGE OF UNLAWFUL IMPRISONMENT MUST FAIL BECAUSE THE EVIDENCE INDICATES ONE CONTINUING COURSE OF CONDUCT.

The Defendant argues that a *Petrich* instruction was required on the Unlawful Imprisonment charge because the State presented evidence that the Defendant held Ms. McGlaun in the hotel room, against her will, in several

different ways. App.'s Br. at 13, citing RP 981-82. This claim is without merit because a *Petrich* instruction is not needed where the evidence indicates a continuing course of conduct, as in the present case.

Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989), citing *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). This rule applies only where the State presents evidence of "several distinct acts" and does not apply where the evidence indicates a "continuing course of conduct." *Handran*, 113 Wn.2d at 17, citing *Petrich*, at 571, 683 P.2d 173. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. *Handran*, 113 Wn.2d at 17, citing *Petrich*, at 571, 683 P.2d 173. For example, where the evidence involves conduct at different times and places, then the evidence tends to show "several distinct acts." *Handran*, 113 Wn.2d at 17, citing *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911); *Petrich*, 101 Wn.2d at 571, 683 P.2d 173. On the other hand, the evidence tends to show one continuing act if the criminal conduct occurred in one place during a short period of time between the same aggressor and victim. *Handran*, 113 Wn.2d at 17.

Other cases have held that actions occurring over periods of time

similar to the one in the present case constitute a “course of conduct” negating the need for a *Petrich* instruction. See *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991)(No *Petrich* instruction required because assaults over a two hour period constituted “continuous conduct”); *State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993)(In a second degree assault prosecution, repeated assaults on a child during a three week period constituted a continuing course of conduct, not requiring juror unanimity); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995)(Drug sales in two different locations in a city constituted a continuing course of conduct); *State v. Marko*, 107 Wn. App. 215, 221, 27 P.3d 228 (2001)(Intimidation of witnesses case in which defendant's statements to two victims over a 90-minute period constituted one continuous stream of conduct).

In the present case, a common sense evaluation of the facts shows that the unlawful imprisonment charge was based on one continuing course of conduct. The Defendant abducted the victim and then held her at a hotel. This conduct took place over short period of time and involved the same victim. Furthermore, the Defendant’s specific argument on appeal is that the State offered two theories of unlawful imprisonment: (1) that the Defendant held the victim against a wall; and, (2) that the Defendant held the victim in the hotel through the use of deception. App.’s Br. at 13. Although the State disagrees with the Defendant’s characterization of the State’s argument at

trial, the issue raised is whether the acts of holding the victim in the hotel room and holding the victim against a wall in the same hotel room constituted the same course of conduct. As outlined in the cases above, because these two acts of criminal conduct described above occurred in one place during a short period of time and were between the same aggressor and victim, the evidence shows one continuing act. *See, Handran*, 113 Wn.2d at 17. Accordingly, a unanimity instruction was not required.⁶

B. THE DEFENDANT'S CLAIM THAT THE CHARGES OF UNLAWFUL IMPRISONMENT AND ASSAULT IN THE SECOND DEGREE CONSTITUTED THE SAME CRIMINAL CONDUCT MUST FAIL BECAUSE: (1) THE DEFENDANT WAIVED THIS ISSUE BY NOT RAISING IT BELOW; AND, (2) THE TWO OFFENSES HAD DIFFERENT STATUTORY AND FACTUAL INTENTS AND, THEREFORE, DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

The Defendant next claims that the trial court erred in not finding that his convictions for unlawful imprisonment and second degree assault were the same criminal conduct. App.'s Br. at 14. This claim is without merit because the Defendant waived this issue by not raising it below, and because the trial court's implicit determination regarding same criminal conduct was not an abuse of discretion.

⁶ Furthermore, even if the acts in the present case were characterized as distinct, any error would be harmless if a rational trier of fact could have found each incident proved beyond a reasonable doubt. *Handran*, 113 Wn.2d at 17-18; *Petrich*, at 573, 683 P.2d 173. There appears to be no dispute that there was substantial evidence of each act presented below.

A defendant must argue to the sentencing court that crimes were the same criminal conduct or the issue is not properly before the appellate court. RAP 2.5; *State v. Nitsch*, 100 Wn. App. 512, 521-24, 997 P.2d 1000, *review denied*, 11 P.3d 827 (2000); *State v. George*, 67 Wn. App. 217, 221 n. 2, 834 P.2d 664 (1992), *overruled on other grounds by*, *State v. Ritchie*, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995); *but see State v. Soper*, 135 Wn. App. 89, 104, 143 P.3d 335 (2006)(allowing same criminal conduct argument to be raised for the first time on appeal). The Washington Supreme Court has specifically clarified that while a defendant is not precluded from raising a *legal error* regarding his sentence for the first time on appeal, a defendant is precluded from raising a *factual error* or an *alleged error involving a matter of trial court discretion* for the first time on appeal. *In re Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). The *Goodwin* court cited *Nitsch* (and its holding that the defendant waived his same criminal conduct argument) with approval as an example of an error that cannot be raised for the first time on appeal, stating that,

The Court of Appeals noted that application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. *Nitsch*, 100 Wn. App. at 523, 997 P.2d 1000. The court held that the defendant's "failure to identify a factual dispute for the court's resolution and ... failure to request an exercise of the court's discretion" waived the challenge to his offender score. *Id.* at 520, 997 P.2d 1000.

Goodwin, 146 Wn.2d at 875. As the Defendant failed to argue same criminal conduct below and deprived the trial court of an opportunity to exercise its discretion, this court should hold that the Defendant has waived this argument on appeal.

If this court were to find, however, that the Defendant could raise the same criminal conduct argument for the first time on appeal, his argument would still fail. A trial court's particular offender score calculation may be deemed an implicit determination that the defendant's current offenses do not constitute the same criminal conduct. *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). An appellate court is not to reverse a court's implicit determination absent an abuse of discretion or misapplication of the law. *Anderson*, 92 Wn. App. at 62.

Under RCW 9.94A.589, a trial court has the discretion to count two or more current offenses as the same criminal conduct for calculating a convicted defendant's offender score. This same criminal conduct requires that the offenses: (1) had the same objective criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. RCW 9.94A.589(1)(a); *State v. Walden*, 69 Wn. App. 183, 187-88, 847 P.2d 956 (1993). If any one of these elements is missing, the offenses cannot be the same criminal conduct and the court must count the crimes separately. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). In

addition, a court is to construe the same criminal conduct requirements narrowly. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The crimes of assault in the second degree and unlawful imprisonment have different statutory intents and thus do not satisfy the statutory requirements for same criminal conduct. The intent for unlawful imprisonment is to knowingly restrain another person. RCW 9A.40.040(1). To commit second degree assault, a defendant must act with an intent to cause bodily harm or to create in the victim's mind a reasonable apprehension of harm. *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Thus, each offense involves different objective intents. *See, State v. Brown*, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000)(rape and assault fail to satisfy the requirements of RCW 9.94A.400 because they have separate intents).

Furthermore, while the trial court could have reasonably concluded that the objective intent of some of the minor assaults was to further the unlawful imprisonment of the victim, the court could have also concluded that the intent of strangulation itself was to injure and further demean the victim. It was within the trial court's discretion to conclude that the two offenses had different intents and, therefore, did not constitute the same criminal conduct. *See State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). In *Rodriguez*, this court stated that,

[I]f the facts, objectively viewed, can only support a finding that the defendant had the same criminal intent with respect to each count, then the counts constitute the same criminal conduct. If the facts, objectively viewed, can only support a finding that the defendant had different criminal intents with respect to each count, then the counts constitute different criminal conduct. If the facts are sufficient to support either finding, then the matter lies within the trial court's discretion, and an appellate court will defer "to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score."

Rodriguez, 61 Wn. App. at 816 (quoting *Burns*, 114 Wn.2d at 317). Using this analysis, the trial court did not abuse its discretion or misapply the law when it counted each of the offenses separately in calculating the Defendant's offender score. First, as outlined above, the statutory intents are different in each offense. Viewing the facts objectively the trial court could also have reasonably concluded that the objective intent of some of the assaults was to further the unlawful imprisonment of the victim while the intent of the strangulation was simply to injure the victim. Stated another way, the court could have reasonably concluded that the strangulation of the victim to the point where her breathing was cut off and finger marks were left on her neck was motivated by more than just intent to detain the victim and restrict her movements. Thus, it was within the trial court's discretion to conclude that the two offenses had different intents and, therefore, did not constitute the same criminal conduct. *See Rodriguez*, 61 Wn. App. at 816.

As a court's particular offender score calculation may be deemed an implicit determination that the current offenses do not constitute the same criminal conduct, and because it was within the trial court's discretion to conclude that the two offenses had different intents (and thus did not constitute the same criminal conduct), the Defendant's claim that the trial court erred in not finding that the unlawful imprisonment and assault in the second degree convictions constituted the same criminal conduct must fail.

C. ALTHOUGH THE DEFENDANT'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AND VIOLATION OF A NO CONTACT ORDER DID NOT VIOLATE DOUBLE JEOPARDY, THE STATE NEVERTHELESS CONCEDES THAT THE CONVICTION FOR FELONY VIOLATION OF A NO CONTACT ORDER MUST BE VACATED BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON ALL OF THE ELEMENTS OF THAT CRIME.

The Defendant next claims that his convictions for violation of a no contact order and assault in the second degree violated his right to be free from double jeopardy. App.'s Br. at 15. Although the convictions did not violate double jeopardy, the State concedes that the violation of a no contact order conviction must be vacated because the jury was not properly instructed on all of the elements of that offense.

Although the State does not agree with the Defendant's conclusion that the charges of violation of a no contact order and assault in the second

degree violated double jeopardy, the State concedes that the felony violation of a no contact order charge must be vacated pursuant to *State v. Azpitarte* and *State v. Ward*, either because the jury may have improperly relied on the second degree assault as a basis for the felony violation of a no contact order charge (thereby creating a sufficiency of the evidence issue), or because the jury instructions regarding the no contact order charge were insufficient because they did not contain the statutory language requiring the jury to find an assault that “did not amount to an assault in the first or second degree.”

1. *The Defendant’s convictions for Assault in the Second Degree and Violation of a No Contact Order did not Violate Double Jeopardy.*

In the present case, the two charges did not violate double jeopardy because the legislative intent clearly allows for the prosecution of both the charges of felony violation of a no contact order and assault in the second degree with the caveat that the same specific act of assault cannot serve as the basis for both crimes.⁷ In addition, each charge contained elements not

⁷ The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *Baldwin*, 150 Wn.2d at 454. Within this constraint, however, the legislature has the power to define criminal conduct and to specify punishment. *Baldwin*, 150 Wn.2d at 454, 78 P.3d 1005 (citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). “Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005), citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Thus, a court first looks to the legislative intent to determine if the two crimes were intended to be punished separately. *Freeman*, 153 Wn.2d at 771-72.

In the present case, felony violation of a no contact order must be based on assault does not

included in the other, thus the offenses were not identical in law.⁸

amount to an assault in the first or second degree. RCW 26.50.110. The legislative intent, therefore, clearly allows for the prosecution of both the charges of felony violation of a no contact order and assault in the second degree with the caveat that the same specific act of assault cannot serve as the basis for both crimes. The Washington Supreme Court has “repeatedly rejected the notion that offenses committed during a ‘single transaction’ are necessarily the ‘same offense.’” *Vladovic*, 99 Wn.2d at 423, citing *State v. Roybal*, 92 Wn.2d 577, 512 P.2d 718 (1973). Rather, to be the “same offense” for purposes of double jeopardy, the offenses must be the same in law and in fact. *Vladovic*, 99 Wn.2d at 423. Additionally, factually separate acts charged as separate crimes do not constitute double jeopardy, even if they occur during a relatively short period of time. See, e.g., *Fletcher*, 113 Wn.2d at 49 (assault did not take place until after robbery and kidnapping were complete).

While a course of conduct may be relevant to an analysis of whether the offenses were the “same criminal conduct” pursuant to RCW 9.94A.589, this analysis is not relevant to a double jeopardy claim. Rather, attempting to characterize the various acts as a continuous course of conduct is essentially trying to impose a “same transaction” test rather than the “same evidence” test. The same transaction test, however, has been previously rejected by Washington courts in the double jeopardy context, as mentioned above. *Vladovic*, 99 Wn.2d at 423, citing *Roybal*, 92 Wn.2d at 577.

⁸ Under Washington law, even if the relevant statutes do not expressly authorize multiple convictions, the inquiry is not at an end; rather, the courts next apply the *Blockburger* ‘same evidence’ test. *Graham*, 153 Wn.2d at 404, 103 P.3d 1238, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Freeman*, 153 Wn.2d at 773, citing *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). If each crime contains an element that the other does not, a court presumes that the crimes are not the same offense for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772, citing *Calle*, 125 Wn.2d at 777, 888 P.2d 155; *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (establishing “same evidence” or “same elements” test). Furthermore, under the ‘same evidence’ test, a defendant’s double jeopardy rights are violated if he or she is convicted of offenses that are identical in fact and law. *Calle*, 125 Wn.2d at 777. But, ‘if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand.’ *Calle*, 125 Wn.2d at 777, 888 P.2d 155; see also *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

When applying the *Blockburger* test, a court does not consider the elements of the crime on an abstract level, rather, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Freeman*, 153 Wn.2d at 772, citing *Orange*, 152 Wn.2d at 817, 100 P.3d 291 (quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (citing *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))).

Stated another way, under the same evidence test, offenses must be identical in law to invoke double jeopardy. *Baldwin*, 150 Wn.2d at 454, 78 P.3d 1005. If each offense includes elements not included in the other, the offenses are not identical in law, and multiple punishments can be imposed. *In the Matter of the Personal Restraint of Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989) (citing *Vladovic*, 99 Wn.2d at 423). Elements of the offenses

Specifically, the assault in the second degree charge required proof that the Defendant assaulted the victim with a deadly weapon or inflicted substantial bodily harm, while the violation of a no contact order charge required proof that the Defendant's actions violated the terms of a no contact order. The two charges, therefore, did not violate double jeopardy.

2. *Although the two charges at issue did not violate double jeopardy, the State nevertheless concedes that the conviction for felony violation of a no contact order must be vacated.*

The statute regarding the charge of felony violation of a no contact order (RCW 26.50.110) provides that the crime is committed when the defendant: (1) commits an assault in violation of a no contact order; and, (2) the assault does not amount to an assault in the first or second degree.

The Washington Supreme Court has held that the phrase "does not amount to assault in the first or second degree" is not an essential element of the crime when the State does not additionally charge the defendant with first or second degree assault. *State v. Ward*, 148 Wn.2d 803, 812-13, 64 P.3d 640 (2003). This holding, however, implies that the statutory language is an essential element when the State does charge first or second degree assault.

In addition, the Washington Supreme Court has held that an assault in the second degree cannot serve as the predicate assault for the crime of felony

are different where each provision requires proof of a fact, within the context of the case, which the other does not. *See Freeman*, 153 Wn.2d at 772; *see also, Orange*, 152 Wn.2d at

violation of a no contact order. *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). In *Azpitarte*, the defendant was charged with second degree assault and felony violation of a court order based on two assaults on the victim. *Azpitarte*, 140 Wn.2d at 139. No special verdict forms were used to determine which assault the jury used to support the felony violation of a court order count, and during closing arguments the State invited the jury to rely on either assault to enhance the violation to a felony. *Azpitarte*, 140 Wn.2d at 140. After holding that second degree assault cannot serve as the predicate to felony violation of a court order, the Supreme Court held that the violation of a no contact order charge must be set aside because the jury could have relied on the second degree assault in finding the defendant guilty of felony violation of a court order. *Azpitarte*, 140 Wn.2d at 141-42.

Under *Ward* and *Azpitarte*, therefore, when the State charges both assault in the second degree and felony violation of a court order, the jury must be informed (either through an instruction or an election) that a specific assault cannot serve as the basis for both counts. In addition, the jury instructions for violation of a court order failed to include the language “did not amount to assault in the first or second degree,” which the *Ward* court implied would be necessary when (as in the present case) the State files charges of both violation of a court order and assault in the second degree.

See Ward, 148 Wn.2d at 812, 814. For these reasons, the State concedes that the felony violation of a court order conviction must be set aside.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING CERTAIN EVIDENCE AND WITNESSES BECAUSE: (1) THE EVIDENCE WAS EITHER IRRELEVANT OR PROPERLY EXCLUDED BECAUSE ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE OR CONFUSION; AND, (2) THE TRIAL COURT'S EXCLUSION OF TWO DEFENSE WITNESSES BASED ON A CLEAR DISCOVERY VIOLATION WAS PROPER BECAUSE THE EXCLUSION OF WITNESSES DUE TO A DISCOVERY VIOLATION IS WITHIN THE SOUND DISCRETION OF A TRIAL COURT.

Nance next claims that the trial court erred in excluding evidence and witnesses. App.'s Br. at 18-36. This claim is without merit because the trial court's decisions were within the sound discretion afforded to a trial court regarding the admissibility of evidence.

A criminal defendant has a constitutional right to cross-examine and confront opposing witnesses. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The right, however, is subject to some limitations such as the requirement that the evidence sought must be relevant and the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *State v. Hudlow*, 99 Wn.2d 1, 15, 659

P.2d 514 (1983). In addition, a trial court has discretion to limit the admission of such testimony under the rules of evidence. *See State v. Rupe*, 101 Wn.2d 664, 686, 683 P.2d 571 (1984).

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent a manifest abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869; *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

Furthermore, an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), *quoting Bourgeois*, 133 Wn.2d at 403.

The Name of the Victim’s Workplace

During the cross examination of the Ms. McGlaun, defense counsel asked her where she was employed in 2006. RP 781. The victim responded

by stating that she was “still employed at that place, so I’d rather not say.” RP 781. Defense counsel then asked for a sidebar and the court had the jury leave the courtroom. RP 781-82. Defense counsel explained that she had asked the victim in a previous deposition if she knew two individuals named Stephanie and Tyrone, and the victim stated she knew these two from work. RP 783. Defense counsel then stated that she could demonstrate an inconsistency in the victim’s statements because the victim claimed that these two individuals later became friends with the Defendant, while defense counsel believed the evidence led to the conclusion that these two were actually friends of the victim, and that this fact somehow supported the further conclusion that the victim and the Defendant had contact after the Defendant was released from jail. RP 783. Defense counsel’s explanation of how she reached this conclusion, however, is far from clear.

The State responded by reading the relevant portions of the prior defense interview of the victim to the court that demonstrated that the defense was aware of the victim’s explanations of her relationship with Stephanie and Tyrone, and that the victim knew Stephanie from her job at KCR where she worked in child care. RP 784-87. The court ultimately ruled that the name of the victim’s workplace was not relevant, but that,

With regard to direct questions concerning, “Have you met before? Did you know these people? How did you get together?” You can try to – you can go into that. But not

based upon where she works now.

RP 789. Although defense counsel argues on appeal that the trial court “prohibited inquiry into Ms. McGlaun’s employment,” the record demonstrates that the parties and the court understood that Ms. McGlaun met these people through work. RP 784-85. Thus, the trial court’s ruling above, allowing counsel to ask Ms. McGlaun if she had met these people and “How did you get together” did not prohibit counsel from asking Ms. McGlaun if she knew these people from work. Rather, counsel was only precluded from mentioning the name of the workplace; a fact that, in and of itself, had no relevance. When the testimony resumed, however, defense counsel did not re-raise any questions about the victim’s relationship with Stephanie and Tyrone despite the fact that the trial court had ruled that such questions were permissible.

On appeal, the Defendant argues that prior cases support a claim that a defendant is entitled to inquire about a witness’s “employment situation,” but the citations themselves make it clear that the holdings in those rather old cases was based on a premise that such questioning could lead to other evidence. *See*, App.’s Br. at 20-21, *citing Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931) *and Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

In the present case, however, defense counsel was not in a position of having to search for information, as counsel was already aware of the name of the workplace. Rather, defense counsel's stated purpose in asking these questions was to attempt to establish the victim's relationship with two other individuals. RP 783. The trial court specifically stated that defense counsel could inquire about these matters (such as how the victim knew these people, and how did they get together), with the functional result that only the actual name of the workplace (and the fact that the victim still worked there) was not admissible. RP 789.

The Defendant, both in the trial court and on appeal, has failed to demonstrate or argue why the actual name of the workplace (the only evidence that was essentially excluded) was relevant. As the trial court did not preclude the defense from asking the relevant questions regarding the victim's relationship with the two individuals, there was no error. The fact that defense counsel chose not to address the issue further during cross examination was counsel's choice, and was not due to any error on the part of the trial court.

Exclusion of Testimony of Defense Investigators
Who Were Not Listed as Witnesses

At the close of the three week trial, the defense counsel for the first time expressed a desire to call two defense investigators as witnesses despite

the fact that they had never been listed as witnesses. RP 946-47. No meaningful offer of proof was made regarding their testimony since defense counsel only stated that she wanted to call one of the investigators “to state what these phone numbers are.” RP 947. No offer of proof was made, however, regarding: (1) what phone numbers counsel was referring to; (2) who or what the numbers belonged to or how the investigator would be able to identify the numbers without having to rely on hearsay; or, (3) what the relevance was for this information, or what information the defense investigator could add to the case that wasn’t already before the jury.

Defense counsel also wished to call a second defense investigator, stating only,

And I would want to call Jim Harris to rebut Miss McGlaun’s testimony that when he went there to take her interview, that he told her she had to talk with him, and he was there with another detective. And to rebut what occurred. Because back in June of 2006 it was a different attorney on the case and a different investigator. And I want that investigator to be able to testify to what occurred then.

RP 947.⁹

⁹ The defense argument appeared to reference the victim’s description of how the interview was conducted. The defense interview and a later deposition were both transcribed, and during the cross examination of the victim defense counsel sought to introduce the entire transcript of the deposition to rebut the victim’s assertions. RP 837. The trial court did not allow the defense to admit the entire transcript, but stated that the defense could go through the relevant portions of the transcript with the victim to point any areas that were inconsistent with the victim’s description of how the deposition occurred. RP 857-58. The defense, however, never pursued this line of questioning.

The State explained that it had no indication that the defense intended to call these people as witnesses and that it would have expected them to be on a witness list. RP 948. The trial court ultimately excluded the witnesses, and explained that it would have expected the witnesses to be listed as such and that was one of the reasons for the exclusion. RP 948. The court also explained that another reason for the exclusion was because the witnesses were not available to testify that day despite the fact that the defense had concluded its case, and stated,

[T]his trial has been going for sometime, waiting for trial. Now it's been in trial. We're in the third week at this time. And to have the witnesses not available, and with the given amount of time the court was faced with, that was a decision I made.

RP 948. The Defense then rested its case and the State later rested its case that same day. RP 935, 944. Again, no offer of proof was made regarding what the second defense investigator's testimony would actually be or how, if it all, it would contradict the victim's description of events.¹⁰

¹⁰ The following morning, during the discussion regarding jury instructions, defense counsel re-raised the issue regarding the two defense investigators and explained that they were now available. RP 956. The State argued, as before, that the witnesses were not on the defense witness list and added that if they had been the State would have interviewed them or taken a deposition and would have been able to do some independent investigation. RP 956-57. The State also pointed out that the trial court had instructed both parties to have witnesses available and that the State had gone to great pains to do that (by having witnesses at court multiple times, including two detectives who were at court three days in a row). RP 957.

The trial court denied the invitation to reconsider its previous ruling and stated, "I'm standing on my previous ruling." RP 957. The discussion regarding jury instructions then continued, and the court then gave the instructions to the jury. RP 958-60.

Under Washington law, an offer of proof serves three purposes: it informs the court of the relevant legal theory under which evidence is offered, it gives the specific nature of the evidence so that the court can assess its admissibility, and it creates a record for review. *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000). To preserve an issue for appeal, an offer of proof must be made at the time the court excludes evidence. ER 103(a)(2). “[I]n the absence of an offer of proof, no error can be found.” *State v. Denton*, 58 Wn. App. 251, 257, 792 P.2d 537 (1990).

In the present case, there is nothing in the record that shows that their testimony would have included anything that wasn’t already available to the defense through the transcripts of the defense interview with the victim (which defense counsel chose not to use despite the court’s offer to allow the defense to use transcripts to impeach Ms. McGlaun, if possible). *See* RP 857-59).

On appeal, the Defendant argues that the trial court erred in excluding the defense witnesses based on the fact that they were not listed as witnesses. App.’s Br. at 27, *citing State v. Thacker*, 94 Wn.2d 276, 616 P.2d 655 (1980). The *Thacker* case, however, was later revisited by the Washington Supreme Court in *State v. Hutchinson*, 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998) which specifically upheld a trial court’s exclusion of proposed defense testimony and held that, although exclusion is an extraordinary

remedy,

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Hutchinson, 135 Wn.2d at 882-83 (citations omitted). In addition, CrR 4.7(b)(1) specifically states that,

Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

In the present case, the Defendant did not disclose an intention to call the defense witnesses at issue prior to trial, nor did it disclose them during the State's case. Rather, defense counsel made no mention of the witnesses until essentially the end of the defense case at the conclusion of a three week trial. Under these circumstances, the record demonstrates that: (1) the Defendant was given the opportunity to cross examine the victim using the transcripts of prior interviews, but chose not to do so; (2) the Defendant failed to announce an intention to call the defense witnesses after the victim testified (when

defense counsel would have been aware of any rebuttal issues) and made no mention of the witnesses until the very end of the three week trial; (3) that the prosecution was surprised and was unable to conduct any independent investigation or interviews in any meaningful way given the timing of the defense disclosure; (4) that the timing of the disclosure supported a reasonable conclusion that the violation was willful or in bad faith. Given these facts, the trial court did not abuse its discretion in excluding the defense witnesses.

Furthermore, the United States Supreme Court had held that the exclusion of a defense witness that was not disclosed as a witness does not violate the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), *rehearing denied* 485 U.S. 983, 108 S. Ct. 1283, 99 L. Ed. 2d 494 (1988) (it is not a violation of the defendant's Sixth Amendment right to compulsory process to secure attendance of witnesses to exclude the testimony of a proffered witness not disclosed in violation of a discovery rule).

Most importantly, as the Defendant failed to make a specific offer of proof regarding what the defense witnesses would have actually stated, and because transcripts were available that could have been used to impeach the witness, any error, had there been one, would have been harmless.

Exclusion of Testimony That The Defendant had Reported the Victim to CPS and That the Victim's Mother Lived With a Convicted Sex Offender

Prior to trial the State filed motions in limine including a request that the court order that there be no reference to the victim's alleged prior drug use, citing ER 403, 607, and *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). CP 90. When the court addressed this motion, the Defendant objected, and argued that such evidence should be admitted. RP 95. The defense explained that the Defendant had sent a letter to CPS complaining that he was concerned about the safety of his child, the child's environment, and the victim's drug use. RP 96. Defense counsel then claimed that CPS started an investigation and that Ms. McGlaun failed a urine test. RP 96. Defense counsel concluded that this was highly relevant.

The State explained that shortly after the Defendant was convicted of assault he sent a letter from jail to CPS about the Ms. McGlaun, and that Ms. McGlaun did test positive once for THC. RP 97. Subsequent tests, however, were clean and CPS ultimately held that the allegations in the complaint were ultimately "unfounded." RP 98-99. The State, therefore, argued that the evidence was irrelevant and that its admission would create a mini trial within a trial. RP 99. The trial court granted the State's motion in limine and excluded mention of drug use, but told the defense that she was free to reference that the Defendant had made a CPS complaint. RP 100-01.

The CPS complaint was addressed again when the court dealt with the State's written motion in limine to exclude the allegations the Defendant made to CPS. CP 92. The defense objected to this motion in limine arguing that the evidence was relevant to show that the victim made up allegations in retaliation. RP 106. The defense also argued that the reason that CPS concluded that the Defendant's allegations were unfounded was because of his arrest on the present charges. RP 106. The defense also stated that the specific allegations in the CPS complaint were that the victim used drugs and that the victim's mother sometimes took care of the child and the victim's mother was living with a sex offender. RP 108.

The trial court explained that he was inclined to allow the defense to show that there had been a CPS complaint, but that he was going to exclude mention of what the specific allegations were, and would allow testimony that the complaint was found to be unfounded "since I'm not going to allow the allegation to linger out there in limbo." RP 107. The trial court then explained its ruling to defense counsel as follows,

You are entitled to present the case that a complaint was filed by your client. The reasons for the complaint will not be stated. It will also be the case that CPS found the complaint to be unfounded. That will be admitted. Your client is entitled to make the argument that the CPS complaint was the motive, was the reason, or retaliation against that, why this was brought up, and what was alleged. I am not going to raise specters of the drugs or sex offenders. It is clear that whatever was happening, your client felt it required him to

file a complaint. That can be gone into.

RP 111. Defense counsel again protested that the defendant would “look like an idiot” if the evidence was that he filed a CPS complaint that was determined to be unfounded (despite the fact that everyone agreed that CPS had, in fact, made this finding), and again argued that the Defendant’s concerns were serious and true. RP 111. The court responded,

The issue in this trial is not whether the victim’s mother was living with a sex offender or that the victim smoked marijuana.

RP 112.¹¹

¹¹ The following day the defense asked the court to revisit its ruling regarding the CPS reports and added that it wanted to cross examine the victim regarding the fact that she had been the victim of a child molestation. RP 771. The State argued that the fact that the victim had been molested was irrelevant. RP 773-74. The trial court then stated that it was standing by its previous ruling. RP 774.

The Defense again objected, this time arguing that the Defendant would testify that he was arguing with Ms. McGlaun on the night of the assault over the fact that Ms McGlaun would leave the child with Ms McGlaun’s mother who was living with a sex offender. RP 774-75.

The court held that the Defendant could testify to whatever he said occurred that night (but that there would be no collateral evidence brought in on this subject) and that there would be no cross examination on this subject until there was an offer of proof made. RP 775-77. The court then repeated that any questions regarding the sex offender or all of these issues would only come after an offer of proof and stated again,

As far as the cross examination of this witness, you’re limited to what I just said, so you understand that, until the offer of proof.

RP 777. During the cross examination of Ms. McGlaun, the defense never asked to make an offer of proof and therefore did not inquire about the CPS complaint, regarding her drug use and her mother living with a sex offender. See RP 802.

Finally, during the Defendant’s testimony, defense counsel again raised the issue of the CPS complaint and the sex offender issue. RP 907, 918-19. Defense counsel complained that she couldn’t bring in evidence that the Defendant was concerned that Ms McGlaun’s mother was living with a sex offender. RP 918-19. The trial court explained its ruling again, stating,

A defendant has a constitutional right to present a defense consisting of admissible, relevant evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But the trial court may exclude relevant evidence if its probative value is outweighed by its prejudicial effect. ER 403. A trial court's evidentiary ruling is reviewed for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Brown*, 132 Wn.2d at 572. A trial court may exclude relevant evidence if its prejudicial effect substantially outweighs its probative value. ER 403. The danger of unfair prejudice exists when the evidence is likely to stimulate an emotional rather than a rational response. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In determining whether the probative value of evidence outweighs its unfair prejudice, the court should consider the availability of other means of proof and other factors. *Powell*, 126 Wn.2d

The issue cannot be brought in. You can raise the question that he was concerned while in jail about the well-being of his son that led to a report being filed, if you wish to do that.

RP 919. The trial court then repeatedly explained that counsel could not mention that the child's grandmother was living with a sex offender. RP 919-20. The court also pointed out that if the defense introduced evidence that the Defendant threatened to take the child away if she didn't rectify the situation (under the theory that this would explain the victim's motive to fabricate), this would open the door for the State to introduce evidence that the victim viewed these threats as "hollow" and her reasons for that conclusion. RP 920-21. Despite the fact that defense counsel's argument for the admission of this evidence was because it was relevant to the victim's state of mind, the defense argued that the State's potential rebuttal evidence was not be relevant because it "went to her state of mind." RP 921. The trial court, however, explained that her state of mind was relevant. RP 921. When the testimony resumed, defense counsel made no further attempts to mention the CPS complaint or the Defendant's threats to take the child away.

at 264.

In the present case the trial court did not abuse its discretion in excluding testimony that Ms. McGlaun had previously failed a drug test or that her mother was living with a sex offender, as the danger of unfair prejudice (from the likely emotional response to drug use or evidence of a sex offender) substantially outweighed any probative value. In addition, the Defendant had other means of proof regarding his description of the reasons for the argument, and the trial court allowed him the opportunity to testify that he had concerns for the child and that his concerns were so serious that he filed a CPS complaint.

Furthermore, the trial court did not abuse its discretion in excluding the evidence despite the defense claims that the CPS complaint and the sex offender claim gave the victim a motive to fabricate. The trial court carefully and repeatedly ruled that the Defendant was entitled to make the argument that the CPS complaint was the victim's motive in reporting the crime, but that the Defendant was not allowed to "raise specters of the drugs or sex offenders." RP 111. In crafting this ruling, the trial court carefully balanced the Defendant's right to argue the victim had a motive to fabricate against the very real danger of unfair prejudice. The trial court ruling was not "manifestly unreasonable," and thus, was not an abuse of discretion.

Exclusion of Proposed Defense Witness Aurora Thomas

During its case the defense stated its intention to call Aurora Thomas as a witness. The State objected to this witness and asked the court to exclude her testimony. RP 886. Defense counsel stated that it was expected that Ms. Thomas would testify that she had lunch with the Defendant shortly after he was released from jail, and that a woman (whose name she did not know) with a baby also joined them for lunch. RP 887. The State argued that there was no indication that this female was in fact the victim and that it was unclear which date Ms. Thomas claimed that this lunch occurred. RP 888-89. The State pointed out that Ms Thomas could only describe that the woman was “heavy” and had shoulder length hair, but the State pointed out that the victim did not have shoulder length hair. RP 890.

The trial court asked defense counsel if she agreed that Ms. Thomas could not identify the woman that was at the lunch, and defense counsel said she wasn't certain. RP 889. The court then suggested that Ms Thomas take the stand for a brief offer of proof. RP 890-91.

In the offer of proof, Ms. Thomas recalled having the Defendant over to her house for lunch, but she could not remember the date that this occurred. RP 891-92. She described that the Defendant asked if a woman and a child could also join them, and Ms. Thomas said that would be no

problem. RP 893. Ms. Thomas never said who this woman was, and when asked to describe her she said,

Well, the only thing I can remember, since it's been awhile already is kind of heavy, heavy woman, you know, and what – because I don't really, you know, I didn't really pay attention to look at her.

RP 894. The only additional description provided was that the woman was white and had hair “up the shoulder, if I'm not mistaken.” RP 894. Ms. McGlaun, however, had extremely long hair at the time. RP 733. Ms Thomas also stated that she did not know if the Defendant had a relationship with the baby that the woman brought over. RP 892. The trial court then asked the witness if she could remember what month this lunch took place during, and she responded that she couldn't remember. RP 895.¹²

The court then ruled as follows,

I've concluded that this witness will not be allowed to testify for the following reasons: First of all, there's no specificity in the time when this happened. She cannot remember the date. She doesn't have a good memory of the individual. She said there's no relationship she knew between the Defendant and the baby, from her memory. And I believe that although the Defendant of course can testify to all of these events, I'm not going to allow this witness to speak to that, because I don't believe it's specific enough to allow it to happen.

¹² When the Defendant eventually testified at trial, he claimed that he and the victim had had lunch “at some people's house [he] had just met,” but he never said who these people were and never said that this event occurred at Ms. Thomas' house or that Ms. Thomas was present. RP 912-13.

RP 896.

ER 401 provides that evidence is relevant if it has 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. In the offer of proof, Ms. Thomas could only describe that she had lunch with the Defendant and an unidentified woman, but she could not identify the date or even the month that this occurred. RP 891-95. In addition, her description of the woman did not match Ms. McGlaun with respect to the length of her hair. RP 733, 895. Thus, the Defendant failed to establish that the testimony of Ms. Thomas was relevant, and the trial court did not abuse its discretion in excluding the evidence.

Exclusion of the Physical Phone Records

During cross examination, defense counsel presented some phone records to the victim and asked her questions about them. RP 811. The victim explained that her home phone number was "405-0707." RP 812. Defense counsel then asked if the records showed that there was a call from the victim's phone to the number "204-8874," and the victim stated yes, but that she had no idea whose number that was. RP 813. Defense counsel then had the victim write the information down on a board as it was written on the phone records. RP 814-15. The victim also admitted that there were numerous other calls to the "204-8874" number, and again counsel had the

victim write this information on a board. RP 814-16, 821. Defense counsel also had the victim agree that the records showed several calls to the number "479-3113." RP 818.¹³

When defense counsel moved to admit the phone records themselves, the State objected, but the court admitted the exhibits over the objection. RP 823. Later, however, the court stated that it had reflected upon its decision to admit the records and was concerned that this may have been an improper ruling and explained that it wanted to hear further argument on this point and that it should have allowed argument before initially ruling on the matter. RP 845.

The State argued that there was no evidence in the record concerning who these other phone numbers belonged to, that the records were extremely confusing and that it was not at all clear how long each of the reported calls lasted due to the way the records were listed. RP 846. The State went through some of the confusing entries with the trial court. RP 850-52.

The trial court then ruled that the exhibits would not be admitted, stating,

While it makes some sense to me, I don't have a person with background from this company to enlighten the jury exactly what's going on. I'm not admitting these documents, one,

¹³ During the later testimony of the Defendant, defense counsel also had the Defendant list a number of the phone calls that were made. RP 925-27.

because I think they are confusing; and secondly, because I believe that the details that are provided are as extrinsic to the testimony that's been given. And more importantly, as I said, the confusion that could be culled from the material, without someone to testify from the phone company exactly what it refers to, and how their system works, what the times are, is important.

You have the witness. You have the testimony documented by this diagram that's on the board, and the testimony that's been given. The issue here involves her credibility, which is always material to the case. But the issue itself does not involve the issue that's before the court, and that is the alleged rape and assault that occurred.

I allowed the testimony to be given because her credibility is material. But without more information from the telephone company, I'm not going to allow these exhibits. So I'm going to strike exhibits 129 and 130.

RP 852-53.

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. ER 403. A trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984); *State v. Gatalski*, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019, 699 P.2d 804 (1985). A trial court does not have to perform the ER 403 balancing test on the record. *State v. Gould*, 58 Wn. App. 175, 184, 791 P.2d 569 (1990).

Given the record below, the Defendant has failed to show that the trial court abused its discretion in excluding the records because of the danger of

confusion. In addition, the Defendant has failed to explain what information was contained in the physical records that was not brought out in trial. As the trial court pointed out, the records themselves were confusing and the court had allowed substantial testimony about the phone calls themselves and had even allowed defense counsel to instruct witnesses to write this information on a board for the jury to see. RP 852-53. Absent a claim that the records contained any additional, relevant, information that the jury had not otherwise heard or seen, the Defendant cannot show prejudice. Given all of these facts, the Defendant has failed to show that the trial court abused its discretion.

Objection Regarding Defendant's Testimony that the
Victim Told Him to Pick Her Up

The Defendant next argued that the trial court erred by suppressing evidence that he and Ms. McGlaun intended to "sleep together" or "stay together" at the Chieftain Hotel. RP 35. The record below (and the Defendant's citation to the record in his brief), however, does not show any mention of the victim's saying she intended to sleep with, or stay with, the Defendant. Rather, the record shows that during the direct examination of the Defendant, defense counsel asked the Defendant when he had talked to the victim about going to the hotel, and he responded, "I talked to her the day prior to it." RP 901. The State objected, and the court explained to the Defendant that he could not say what anybody else had told him, but that he

could speak to what he did. The court overruled the objections stating that is was “overruled for that reason, but limiting, striking any testimony not consistent with my ruling,” and invited defense counsel to re-ask the question. RP 901-02.

The Defendant then testified that he talked to the victim and then obtained the hotel room about half-an-hour after talking to her. RP 902. The Defendant said that he had also called the victim from a pay phone and that the phone conversation ended when the victim had something else that she had to do, but that she called him back at the pay phone and they talked for another 20-30 minutes. RP 903. He then later called her from the Chieftain Hotel, and testified that she had called him back and told him to come pick her up around 10 o’clock. RP 903. The State objected, and the court sustained the objection, and asked counsel to re-ask the question. RP 904. The Defendant then testified that he received a phone call from the victim while he was at the Chieftain, and he then waited until the hotel until he went to pick her up at 10:15. RP 904. He claimed that when he arrived at the victim’s apartment she “already knew I was coming,” so he just waited outside and she came out after about five minutes. RP 905.

The record is unclear about what evidence the Defendant was actually prevented from introducing. Again, defense counsel made no offer of proof. Although the trial court sustained an objection after the Defendant stated that

he had talked to Ms. McGlaun, the Defendant was allowed to testify that: he talked to the victim; obtained the hotel room half an hour after this conversation; had a second (and then a third) phone conversation with Ms. McGlaun and that he then waited to pick her up until 10:15; and, that she knew he was coming so he waited outside for her. The only objection that was actually sustained was in regards to the statement that Ms. McGlaun told the Defendant to pick her up. RP 903. The Defendant, however, was able to essentially introduce this evidence through his other testimony, and any error that occurred in the exclusion of this minor evidence was so minimal that it was harmless under any analysis.

The Defendant's characterization of the excluded evidence as evidence that the Defendant and Ms. McGlaun "intended to sleep together" or "intended to stay together" is completely unsupported by the record and implies that the evidence was much more important and relevant than it actually was. App.'s Br. at 35. The actual record never indicates that the victim intended to "sleep with" the Defendant or even to "stay with" him, rather, the only excluded evidence was that she asked him to pick her up around 10 o'clock. See RP 903.

An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is "not prejudicial unless, within reasonable

probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), quoting *Bourgeois*, 133 Wn.2d at 403.

Given the limited nature of the evidence at issue, the Defendant has failed to demonstrate prejudice because he has not shown that the evidence was such that, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Everybodytalksabout*, 145 Wn.2d at 469, quoting *Bourgeois*, 133 Wn.2d at 403). For these reasons, the Defendant’s claim must fail.

E. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE THE TRIAL COURT DID NOT ERR AS ALLEGED BY THE DEFENDANT AND BECAUSE EVEN IF THIS COURT WERE TO FIND ERROR, ANY SUCH ERROR WAS NOT EGREGIOUS.

Nance next claims that the cumulative error doctrine mandates reversal. App.’s Br. at 36. The cumulative error doctrine protects a criminal defendant’s right to a fair trial and applies only when a trial contains numerous egregious errors. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). But since the trial court did not err, the cumulative error doctrine does not apply. *Jackson*, 150 Wn.2d at 276. Furthermore, even if this court were to find error, any such error was not egregious and went to issues of only marginal relevance, especially in light of the fact that the Defendant

was acquitted of the rape count.

F. THE STATE CONCEDES THAT RESENTENCING IS NECESSARY TO CLARIFY THE BASIS FOR THE EXCEPTIONAL SENTENCE AND TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW, SHOULD THE TRIAL COURT IMPOSE AN EXCEPTIONAL SENTENCE ON REMAND.

Trial court was authorized to impose an exceptional sentence based on the jury's finding of rapid recidivism pursuant to RCW 9.94A.535(3)(t). Nevertheless, the State concedes that resentencing is necessary because the judgment and sentence incorrectly lists an additional aggravating factor (listed as "aggravating circumstance—domestic violence" with a citation to RCW 9.94A.535(3)(h)) that was charged in the second amended information but was not presented to the jury, and because the record shows that there may have been confusion at the time of sentencing regarding the status of this second aggravating factor. CP 212-213, RP (9/28/07) 2-4, 6.

Furthermore, written findings of fact and conclusion of law regarding the exceptional sentence were never entered. As the State has conceded that the felony violation of a no contact order charge must be set aside, a remand for resentencing will be required and the issue regarding the aggravating factors and an exceptional sentence (should the trial court decide to impose one at the resentencing) can be addressed at the resentencing hearing.

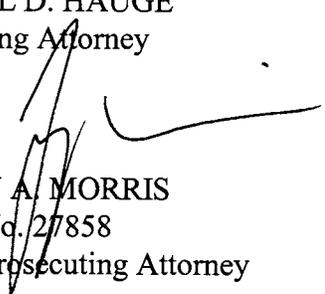
IV. CONCLUSION

For the foregoing reasons, Nance's conviction and sentence should be affirmed.

DATED August 8, 2008.

Respectfully submitted,

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