

NO. 45962-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICK IN YOUNG PARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 13-1-00564-4

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 17, 2015, Port Orchard, WA 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

 1. Count I—Violation of a Court Order (DV)2

 2. Count II—Violation of a Court Order (DV).....3

 3. Count III—Cyberstalking4

 4. Count IV—Cyberstalking6

 5. Count V—Cyberstalking7

 6. Count VI—Cyberstalking (DV).....9

 7. Count VII—Cyberstalking.....10

 8. Count VIII—Harassment11

 9. Count IX—Telephone Harassment.....12

 10. Count X—Harassment12

III. ARGUMENT14

 A. PARK’S CONSTITUTIONAL RIGHT TO REMAIN SILENT WAS NOT VIOLATED WHEN HE CHOSE TO TESTIFY AT TRIAL BECAUSE THE TRIAL COURT HAD NO OBLIGATION TO READ HIM HIS RIGHTS PRIOR TO HIS TESTIMONY AND HE HAD SIGNED A STIPULATION AGREEING THAT HIS STATEMENTS TO LAW ENFORCEMENT WERE ADMISSIBLE BECAUSE HE WAS READ HIS *MIRANDA* WARNINGS AND ACKNOWLEDGED THAT HE WAS ENTERING THE STIPULATION KNOWINGLY AND VOLUNTARILY.....14

 B. PARK WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CANNOT OVERCOME THE

PRESUMPTION THAT HIS COUNSEL WAS EFFECTIVE BECAUSE THE DECISIONS OF HIS TRIAL COUNSEL WERE STRATEGIC AND HE CANNOT SHOW THAT HE WAS PREJUDICED.....	18
1. Trial counsel had no duty to object to testimony by Ms. McCormick regarding her history with Park because this information was relevant to how she was able to identify Park and contemplated by both counsel in pre-trial motions and Park cannot show that his case was prejudiced by this information.....	19
2. Trial counsel’s choice not to move for severance of Count IX was not ineffective assistance of counsel because Park cannot show that he was prejudiced by the inclusion of this count and that the motion to sever would have been granted.....	23
3. Trial counsel’s decision not to object to Exhibit 33 and the testimony about it during re-direct was not ineffective assistance of counsel because it was not beyond the scope of cross-examination and Park cannot show that this decision was anything but a legitimate trial strategy or that he was prejudiced by this evidence.	27
4. Trial counsel was not deficient at sentencing because Park cannot show that the decisions she made were anything but strategic and that a different approach would have resulted in a lower sentence.....	30
C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING AN EXCEPTIONAL SENTENCE OF 300 MONTHS BECAUSE THE SENTENCE WAS BASED ON THE FREE CRIMES PRINCIPLE AND JUSTIFIED GIVEN PARK’S EXTENSIVE CRIMINAL HISTORY AND THE EGREGIOUS NATURE OF HIS ACTIONS IN THIS CASE.	34
IV. CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

<i>In re Davis</i> , 152 Wash.2d 647, 101 P.3d 1 (2004).....	27
<i>State v. Barragan</i> , 102 Wash.App. 754, 9 P.3d 942 (2000).....	21
<i>State v. Bythrow</i> , 114 Wash.2d 713, 790 P.2d 154 (1990).....	24, 25
<i>State v. Fanger</i> , 34 Wash.App. 635, 663 P.2d 120 (1983).....	15, 16
<i>State v. France</i> , 176 Wash.App. 463, 308 P.3d 812 (2013).....	35
<i>State v. Gasteazoro-Paniagua</i> , 173 Wash.App. 751, 294 P.3d 857 (2013).....	16
<i>State v. Gerdts</i> , 136 Wash.App. 720, 150 P.3d 627 (2007).....	27
<i>State v. Goldberg</i> , 123 Wash.App. 848, 99 P.3d 924 (2004).....	30
<i>State v. Madison</i> , 53 Wash.App. 754, 770 P.2d 662 (1989).....	28
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	19
<i>State v. McNeal</i> , 145 Wash.2d 352, 37 P.3d 280 (2002).....	28, 30
<i>State v. Price</i> , 126 Wash.App. 617, 109 P.3d 27 (2005).....	20, 21
<i>State v. Russ</i> , 93 Wash.App. 241, 969 P.2d 106 (1998).....	15, 18
<i>State v. Russell</i> , 125 Wash.2d 24, 882 P.2d 747 (1994).....	24
<i>State v. Russell</i> , 171 Wash.2d 118, 249 P.3d 604 (2011).....	20
<i>State v. Stein</i> , 144 Wash.2d 236, 27 P.3d 184 (2001).....	22
<i>State v. Sutherby</i> , 165 Wash.2d 870, 204 P.3d 916 (2009).....	19
<i>State v. Taylor</i> , 30 Wash.App. 89, 632 P.2d 892 (1981).....	15
<i>State v. Thomas</i> , 128 Wash.2d 553, 910 P.2d 475 (1996).....	15, 16

<i>State v. Warren</i> , 55 Wash.App. 645, 779 P.2d 1159 (1989).....	23
<i>State v. Williams</i> , 137 Wash.2d 746, 975 P.2d 963 (1999).....	14, 15
<i>State v. Zatkovich</i> , 113 Wash.App. 70, 52 P.3d 36 (2004).....	35, 37, 38
<i>State v. Zatoovich</i> , 113 Wash.App. 70, 78, 52 P.3d 36 (2002).....	34
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984).....	19
<i>Wiggins v. Smith</i> , 539 U.S. 510, 123 S. Ct. 2527 (2003).....	31

STATUTORY AUTHORITIES

RCW 9.94A.585.....	34
--------------------	----

RULES

ER 404(b).....	19, 20, 27
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Park's right to remain silent was violated when he testified where the trial court had no obligation to read him his rights prior to his testimony and after he had signed a stipulation that his statements to law enforcement were admissible because he was read his *Miranda* warnings, and he acknowledged that he was entering the stipulation knowingly and voluntarily?

2. Whether Park was denied his right to effective assistance of counsel when he cannot overcome the presumption his counsel was effective because the decisions of his trial counsel were strategic and he cannot show prejudice?

3. Whether the trial court abused its discretion by imposing an exceptional sentence of 300 months when its sentence was based on the free crimes principle and justified given Park's extensive criminal history and the egregious nature of his actions in this case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Nick In Young Park was charged by first amended information filed in Kitsap County Superior Court with two counts of Felony Violation of a Court Order (domestic violence) (counts I and II), four counts of Felony Cyberstalking (counts III, IV, VII and X), two counts of Felony

Cyberstalking (domestic violence) (counts v. and VI), one count of Felony Harassment (Threat to Kill) (count VIII) and one count of Felony Telephone Harassment (count IX). CP 22-23. A jury found Park guilty of Counts I through IX (including the special allegations that Counts I, II and VI were committed against a family or household member). CP 169-174. The jury acquitted Park on Count X. CP 171, 175. The trial court imposed an exceptional sentence of 300 months. CP 293-308.

B. FACTS

1. Count I—Violation of a Court Order (DV)

On March 10, 2013, Janice Melendres and Park went out to dinner at the Olive Garden. RP (1/15) 137. While there, Park told her that he wanted to go to Bainbridge Island. RP (1/15) 137-138. This concerned Ms. Melendres, in part, because he had told her that his ex-girlfriend Naree McCormick lived there with her boyfriend. RP (1/15) 138. She was initially under the impression that they were going to Bainbridge Island for an excursion, but when Park continued to talk about his ex-girlfriend, she became “weirded out.” RP (1/15) 139. Park drove to Pleasant Beach Drive where he said his ex-girlfriend lived and they circled a couple of times before parking near his ex-girlfriend’s house for a short period of time. RP (1/15) 140. On the way back from Bainbridge Island they stopped at the Clearwater Casino, where Park told Ms. Melendres his ex-girlfriend worked. RP (1/15) 142. They circled around the back of the

building where the employees would park and he pointed out a vehicle that was similar to what his ex-girlfriend drove. RP (1/15) 142. Later, Ms. Melendres told Park via text that he needed to let his ex go, but she was under the impression that he was not going to do so. RP (1/15) 144.

2. *Count II—Violation of a Court Order (DV)*

Naree McCormick met Nick Park at the Clearwater Casino in 2005 while she was working there. RP (1/15) 77-79. They moved in together for about 3 months. RP (1/15) 79-80. Ms. McCormick became scared of Park because he would push her around and slap her. RP (1/15) 81. She tried to leave him, but Park would continue to contact her, following her everywhere. RP (1/15) 82. She eventually reported him to the police and a no contact order was imposed in 2006, preventing Park from contacting Ms. McCormick. RP (1/15) 83-84. Park continued to contact Ms. McCormick, calling her from jail and following her to work. RP (1/15) 84-85. In 2009, Park was convicted of Stalking and Violation of Court Order. RP (1/15) 85-86; CP 43-45. Park was released from prison in June 2012. RP (1/15) 90.

In March 2013, Ms. McCormick was contacted over Facebook by an individual named Daniel Kim. RP (1/15) 86, 89. At first, Ms. McCormick thought Daniel Kim was an old co-worker, so she began to exchange friendly messages with him. RP (1/15) 86-89. She became

concerned when “Kim” asked her if she was single and asked him who he was. RP (1/15) 89. “Kim” responded “Believe me, you know who I am. You know me well. We’ve known each other for a long time. I will have a surprise for you soon...A big bang.” RP (1/15) 92-93. Though she was scared, Ms. McCormick continued to exchange messages with “Kim” because at this point, she was very sure it was Park. RP (1/15) 93-94. Once “Kim” began to ask about her daughter and told her that she knew his parents, Ms. McCormick knew for certain “Kim” was Park and she stopped exchanging messages with him. RP (1/15) 95-96. Although she continued to receive messages from Park, Ms. McCormick did not respond. RP (1/15) 98.

3. Count III—Cyberstalking

Nicole Torricellas met Park in May or June 2012 while she was a dealer at Chips Casino in Bremerton. RP (1/16) 204-205. She was also attending the Gene Juarez academy at the same time and as part of their requirements, students had to have guests come out to the school they could cut their hair. RP (1/16) 205. When Park went out to the academy and found that Ms. Torricellas was not able to cut his hair, he confronted her. RP (1/16) 206-207. Park was hostile and accused her of giving him the wrong date before leaving and telling her that he would see her at the casino on Sunday when she was scheduled to work. RP (1/16) 207. Park showed up at Ms. Torricellas’ work and confronted her again, claiming

repeatedly that she had given him the wrong date. RP (1/16) 208. Park played a few hands and left, but continued to come into the casino and tell Ms. Torricellas that he was going to go see her at school. RP (1/16) 208. Ms. Torricellas explained to Park that he could not just show up without an appointment, so he made one for that up-coming Friday. RP (1/16) 209. Students were not allowed to refuse appointments or they would be sent home. RP (1/16) 209. When Ms. Torricellas explained the situation to her school, they took Park off of her appointment schedule and he stopped coming into the casino. RP (1/16) 210.

Ms. Torricellas then received a friend request on Facebook from “Daniel Kim.” RP (1/16) 210. She ignored the request, but on February 3, 2013 received a message from “Kim” stating “I need to make an appointment at Gene Juarez, rub my hands on your pantyhose leggs, make you put on a pair of black nylons.” RP (1/16) 210. Ms. Torricellas noted that “Kim” misspelled the word “legs.” RP (1/16) 210. Ms. Torricellas was able to block “Daniel Kim” and received no more messages from him. RP (1/16) 210. She was also told by a former co-worker, Lance Provost that he had spoken to Park. RP (1/16) 212-213. Park told Mr. Provost that he wanted to shoot her; he wanted to kill her; and that she had a “purdy” face. RP (1/16) 213. Ms. Torricellas took the threats seriously and contacted law enforcement. RP (1/16) 213.

4. Count IV—Cyberstalking

Nicole Wurscher was a classmate of Park's in elementary school, though she did not keep in touch with him after she moved to California. RP (1/21) 268-271. In September 2012, Ms. Wurscher received an email from "Zach Baughman", a former classmate whom she used to date, through her Avvo attorney profile. RP (1/21) 283-284. In the email, the sender stated that he wanted to smell her nylons and that he knew she used to wear black and white pantyhose; he also told her that she had beautiful "leggs". RP (1/21) 284. The message also gave details about how and where he had taken her virginity. RP (1/21) 285. Because the details were accurate, Ms. Wurscher assumed the message was from Baughman; other than reporting the email to Avvo, she did not do anything further about it. RP (1/21) 285-286.

In July 2012, Wurscher received a friend request from Park on Facebook. RP (1/21) 271. She ignored the request, but responded to a message from him in November of 2012 when he wished her a Happy Thanksgiving. RP (1/21) 272. They exchanged a few messages back and forth, "catching up." RP (1/21) 273-277. On February 27, 2013, Park told Ms. Wurscher that she had the best pair of "leggs" at Kings West and that they look even sexier in nylons. RP (1/21) 278. Ms. Wurscher thought Park crossed the line and told him so in a subsequent message. RP (1/21) 279.

During the same time period that Ms. Wurscher was communicating with Park, she began receiving messages from “Daniel Kim” on Facebook. RP (1/21) 280-281. “Kim” asked her if she wore pantyhose and mentioned Kings West, where Ms. Wurscher used to go to school with Park. RP (1/21) 281. “Kim” told her that she used to wear black and white pantyhose, and that she had a great pair of “leggs”. RP (1/21) 282. Ms. Wurscher checked, but could not find “Daniel Kim” in any of her class yearbooks. RP (1/21) 282. She did, however, begin to think that there was some connection between “Kim” and Park based on the similarity of their messages to her. RP (1/21) 282-283. She also realized that the email from “Baughman” may also be connected to Park based on the same misspellings and similar phraseology. RP (1/21) 287. Zach Baughman joined Facebook a few years ago, and eventually started receiving messages from friends who were getting disturbing messages from his account. RP (1/21) 296-297. Mr. Baughman did some research and found that there were two Facebook profiles in his name—one that he created and one that he did not. RP (1/21) 297.

5. Count V—Cyberstalking

Amy Igloi Creed, owner of Amy’s on the Bay, a restaurant in Port Orchard, first had contact with Park over Facebook in December 2012. RP (1/15) 105-106. They chatted over Facebook about her restaurant and Park came in twice for meals. RP (1/15) 105-106. Ms. Igloi was clear

that she had a boyfriend and was not interested in a romantic relationship with Park. RP (1/15) 109-110. Park told Ms. Igloi how much he loves pantyhose and asked her if she wore them. RP (1/15) 117. Ms. Igloi began to see some red flags in her conversations with Park and on January 24, 2013, she received a message from Janice Melendres telling her she could not trust Park. RP (1/15) 110. Park told Ms. Igloi that Ms. Melendres was jealous of the relationship he and Ms. Igloi had and after he made a threat to kill Ms. Melendres, Ms. Igloi ended her contact with Park by deleting and blocking him on Facebook. RP (1/15) 114-116, 130.

On January 29, 2013, Ms. Igloi began receiving messages from “Billy Phelps”, someone she had never met before. RP (1/15) 116, 118. During that conversation, “Phelps” asked Ms. Igloi if she enjoyed wearing pantyhose and she realized that she was likely speaking with Park. RP (1/15) 118-119. After she deleted and blocked “Phelps”, Ms. Igloi received a Facebook message from “Daniel Kim” on February 2, 2013. RP (1/15) 119-120. In the first message to Ms. Igloi, “Kim” stated he enjoyed the food at her restaurant, that he did not know she had a boyfriend and stated “I was watching the two of you do it last night. The hill you live on is steep.” RP (1/15) 120. The comment scared Ms. Igloi because she knew at that point “Kim” was Park and that he knew where she lived. RP (1/15) 121. “Kim” continued by saying “You have great

taste in men. I'm bisexual. Maybe I can join you guys. Do you wear pantyhose." RP (1/15) 122. "Kim" then made derogatory comments about Ms. Igloi's boyfriend, including details about his job. RP (1/15) 123. After these messages, Ms. Igloi was concerned about Park coming to her house and ready to move away. RP (1/15) 123.

6. Count VI—Cyberstalking (DV)

Janice Melendres went to high school with Park. RP (1/15) 133. They reconnected in September 2012 over Facebook. RP (1/15) 134. When Park began to send her messages about how he wanted to get married and settle down, she got the impression he was trying to pursue her. RP (1/15) 134. He also told her that he had a "fetish" with pantyhose. RP (1/15) 137. They began to meet in person, but by January, Ms. Melendres realized that the romantic relationship was not going anywhere because he told her that he had met someone named Amy. RP (1/15) 135-136. Ms. Melendres sent Amy a message, telling her to be wary of Park, but when Park found out, he threatened to kill Ms. Melendres. RP (1/15) 148-149. She then unfriended Amy because she did not want any trouble. RP (1/15) 149. Ms. Melendres and Park continued to have a sexual relationship after he threatened her because she thought he might have been just joking and she "didn't want to stir the pot or anything." RP (1/15) 152.

Communication slowed between Ms. Melendres and Park until April 23, when she began receiving derogatory messages from him. RP (1/15) 145-148. Ms. Melendres told Park that she wanted to end their relationship, but Park continued to contact her, threatening to send out naked pictures of her and talking about where she worked. RP (1/15) 147-148. She became afraid that he was going to come to her work and do something violent or mean. RP (1/15) 148.

Ms. Melendres also began receiving messages via Facebook from James Curry, a former classmate of hers. RP (1/15) 150. When he began to talk about where she worked and mentioned pantyhose, she knew she was speaking to Park. RP (1/15) 150. She had no more conversations with Curry after Park was arrested. RP (1/15) 150.

7. *Count VII—Cyberstalking*

Monica Burgess, a dealer at some of the casinos in Kitsap County, also received a message on Facebook from “Daniel Kim” on February 6, 2013. RP (1/16) 241. “Kim” asked her whether or not she wore pantyhose, claiming that he was doing a research project for college. RP (1/16) 241. “Kim” told her that he had attended North Kitsap High School with her and that he, like her, was from Poulsbo. RP (1/16) 243. At first, Ms. Burgess assumed the messages were from one of her players, so she did not take them seriously. RP (1/16) 244. “Kim” then continued to

make comments about how he wanted her to wear pantyhose, and that he would make love to her if she were wearing a pair of sheer black pantyhose. RP (1/16) 245. When Ms. Burgess told “Kim” to go away, he told her that her boyfriend could watch them. RP (1/16) 245. She was uncomfortable with the conversation and told “Kim” that she was going to tell her boyfriend if he did not stop. RP (1/16) 246. “Kim” responded by again asking if she wore pantyhose and said he was going to beat up her fiancé. RP (1/16) 246. Ms. Burgess was creeped out and concerned because “Kim” knew where she lived, so she blocked him on Facebook. RP (1/16) 246. She felt harassed by the conversation once she realized she did not know who the person was and that it was not someone playing a joke on her. RP (1/16) 248. She posted a snapshot of the messages on Facebook and found out from others that “Daniel Kim” was Nick Park. Once Ms. Burgess realized “Kim” was a real person, she had an employee work with her at night so she would not be alone and she started carrying a gun. RP (1/16) 247-248.

8. Count VIII—Harassment

Lance Provost, an acquaintance of Ms. Torricellas, exchanged messages with Park about her in March of 2013. RP (1/15) 155-157. In the exchange, Park said “I’m going to kill that bitch. I never stalked that broad. She gave me a flyer to come get a haircut.” RP (1/15) 158. When Provost told Park to slow down, Park responded by calling Ms. Torricellas

a bitch and said “she’s been a problem for awhile. I would rather shoot her. She works out at Clearwater with my ex. They’ve been swapping information.” RP (1/16) 159. Provost provided Ms. Torricellas with a copy of the messages at her request. RP (1/15) 159-162. Ms. Torricellas took the threats seriously, contacted law enforcement, and obtained a protection order. RP (1/16) 213.

9. Count IX—Telephone Harassment

Kristine Felt knew Park and from May 16, 2013 to July 8, 2013, Park repeatedly called her from jail. RP (1/16) 254. Detective Brittany Gray found that Park was sending and receiving messages from Kristine on his cell phone that told him to stop contacting her. RP (1/21) 318. Park made over 100 calls to that same number while he was in custody at the Kitsap County Jail. RP (1/21) 318, 330-331.

10. Count X—Harassment

Park was acquitted by the jury on this count. CP 171.

Detective Keeler spoke with Park on March 20, 2013. RP (1/16) 227. Park was read his *Miranda* rights and agreed to speak with Detective Keeler. RP (1/16) 229. Park admitted that Ms. McCormick was an ex-girlfriend, but denied having any contact with her. RP (1/16) 230-231. Park also said that he knew Ms. Igloi, that he had been in her restaurant twice, and that they had some contact via Facebook. RP (1/16) 231-232.

Park admitted to knowing Ms. Torricellas and said that he was upset with her when she did not show up for his haircut. RP (1/16) 234. Park also told Detective Keeler that he did have a conversation with Mr. Provost on Facebook about Ms. Torricellas. RP (1/16) 235. When confronted, Park denied making any threatening statements, but admitted to the less innocuous statements in the conversation. RP (1/16) 236. Park denied that he was “Daniel Kim” and claimed that someone else must have hacked into his Facebook profile and had sent message in “Kim’s” name to get revenge on him. RP (1/16) 237, RP (1/21) 354-356.

Detective Brittany Gray, the lead detective, was initially tasked with getting Facebook records to determine if “Daniel Kim” was Park. RP (1/21) 313-314. She also obtained the records from two of Park’s cell phones. RP (1/21) 314-316. Detective Gray found a pattern in all of Park’s communication with others—she noted that he appeared to have an infatuation with pantyhose and nylons, often asking his target female if she was wearing them. RP (1/21) 322-323. Detective Gray found the same pattern in “Daniel Kim’s” Facebook communications. RP (1/21) 323. She also found that “Kim” and Park were never on Facebook at the same time, but there were numerous times when they were logged in within minutes of each other. RP (1/21) 332-333. Detective Gray was never able to identify an actual individual named Daniel Kim, but did find

that a phone number provided by Kim was the same phone number for Park. RP (1/21) 337. Detective Gray also found that in all of the names Park used to communicate with others, the email addresses were of a similar format and that the word “legs” was always spelled “leggs”, like the spelling one would see on that brand of pantyhose. RP (1/21) 334-337.

III. ARGUMENT

A. **PARK’S CONSTITUTIONAL RIGHT TO REMAIN SILENT WAS NOT VIOLATED WHEN HE CHOSE TO TESTIFY AT TRIAL BECAUSE THE TRIAL COURT HAD NO OBLIGATION TO READ HIM HIS RIGHTS PRIOR TO HIS TESTIMONY AND HE HAD SIGNED A STIPULATION AGREEING THAT HIS STATEMENTS TO LAW ENFORCEMENT WERE ADMISSIBLE BECAUSE HE WAS READ HIS *MIRANDA* WARNINGS AND ACKNOWLEDGED THAT HE WAS ENTERING THE STIPULATION KNOWINGLY AND VOLUNTARILY.**

Park argues that his constitutional right to remain silent was violated when he was allowed to testify at trial without a knowing, voluntary and intelligent waiver. This claim is without merit because a court is not required to remind a defendant of his right to remain silent prior to him taking the stand. *State v. Williams*, 137 Wash.2d 746, 753, 975 P.2d 963 (1999). Further, Park signed a stipulation to the admissibility of his statements to law enforcement, acknowledging that he

was provided with his *Miranda* warnings when he spoke to Detectives Tim Keeler and Phil Doremus on March 20, 2013, that he understood those rights, and that he made a knowingly, voluntarily, and intelligent waiver of his rights. CP 46-47.

The constitution does not require a trial court to inform a defendant of his constitutional right to testify at trial. *Williams*, 137 Wash.2d at 753. A discussion between the court and the defendant could have an undesirable effect on whether or not a defendant testifies. *State v. Thomas*, 128 Wash.2d 553, 560, 910 P.2d 475 (1996). Washington courts have expressly held that “there is no general obligation of a court to inform a defendant of the right to testify in one’s behalf or to conduct a knowing, voluntary, and intelligent waiver of that right.” *State v. Russ*, 93 Wash.App. 241, 247, 969 P.2d 106 (1998).

Criminal Rule (CrR) 3.5(a) provides “when the statement of an accused is to be offered in evidence, the judge...shall hold...a hearing...for the purpose of determining whether the statement is admissible.” The purpose of a 3.5 hearing is to allow the court to rule on the admissibility of potentially sensitive evidence. *State v. Taylor*, 30 Wash.App. 89, 92, 632 P.2d 892 (1981). A 3.5 hearing may be waived so long as that waiver is done knowingly and voluntarily. *State v. Fanger*, 34 Wash.App. 635, 637, 663 P.2d 120 (1983). A defendant may also

impliedly waive his rights under CrR 3.5 by “failing at trial level to raise the issue of invalid express waiver and to object to the officers’ testimony.” *Id.* at 638. Findings of fact made by the trial court after a hearing on the admissibility of a defendant’s statements are verities on appeal. *State v. Gasteazoro-Paniagua*, 173 Wash.App. 751, 755, 294 P.3d 857 (2013).

Park argues that there is no proof on the record that his choice to testify was made knowingly, intelligently, and voluntarily. However, there is no requirement that the court conduct such a colloquy with Park before he makes his decision to testify; to do so could have an impermissible effect on Park’s decision to testify. *State v. Thomas*, 128 Wash.2d 553, 560, 910 P.2d 475 (1996).

Park analogizes his choice to testify to the colloquy of rights a defendant is given during a plea of guilt or as part of a 3.5 hearing. Even if the court were to find such a colloquy was necessary before Park testified, the parties entered a “Stipulation to the Admissibility of Statements of the Defendant” on January 13, 2014. CP 46-47. The stipulation outlined the rights enumerated in CrR 3.5 and specifically found that when contacted by KCSO Detectives Tim Keeler and Phil Doremus on March 20, 2013, Park was advised of his *Miranda* rights; that he indicated to the detectives that he understood these rights; and that any

statements Park made to the detectives were the result of a knowing, intelligent, and voluntary waiver of his *Miranda* rights. CP 47. The stipulation further stated that Park understood all of the rights that he was giving up, including his right to have a hearing to determine the admissibility of his statements to Detectives Keeler and Doremus. CP 47. The stipulation was signed by the deputy prosecuting attorney, Park's defense attorney, the trial court judge, and Park himself. CP 47. The stipulation stated that it all parties were entering into it freely, knowingly, and voluntarily. CP 47.

The trial court also conducted a colloquy with Park before entering the stipulation. RP (1/13) 15-17. During the colloquy, Park indicated that he had signed the stipulation after reviewing it with his attorney and that no one had threatened him to get him to sign the form. RP (1/13) 16. Park further agreed that he had a right to a hearing on the admissibility of his statements and that *Miranda* warnings were read to him. RP (1/13) 16. The trial court then signed off on the stipulation. RP (1/13) 16. Not once during the colloquy did Park object to the entry of the stipulation or indicate that he did not understand it. RP (1/13) 15-17. This review of Park's right to remain silent occurred 8 days before he testified and certainly provided him with the opportunity to make an informed choice as to whether or not he should testify. CP 46-47.

Park's constitutional right to remain silent was not violated when he testified without a review of his rights because that is not a required discussion during trial. *State v. Russ*, 93 Wash.App. 241, 247, 969 P.2d 106 (1998). Moreover, Park entered a 3.5 stipulation acknowledging that his statements to law enforcement were admissible, that he had been read his *Miranda* rights at an earlier date, and that he was knowingly and voluntarily giving up these rights. CP 46-47. Thus it was not error for the trial court to let him testify without reviewing these rights first.

B. PARK WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CANNOT OVERCOME THE PRESUMPTION THAT HIS COUNSEL WAS EFFECTIVE BECAUSE THE DECISIONS OF HIS TRIAL COUNSEL WERE STRATEGIC AND HE CANNOT SHOW THAT HE WAS PREJUDICED.

Park next claims that he was denied his right to effective assistance of counsel. He has four arguments for his claim: trial counsel's failure to object to other irrelevant bad act evidence; trial counsel's failure to move for severance of Count IX; trial counsel's failure to object to the entry and testimony surrounding exhibit 33; and trial counsel's ineffective performance at sentencing. This claim is without merit because in each of these situations, trial counsel was exercising a legitimate trial strategy and her conduct was what any other reasonable counsel would have done in these situations. Moreover, Park cannot show that his trial counsel's

alleged deficient performance prejudiced his defense.

A claim that counsel was ineffective is reviewed de novo. *State v. Sutherby*, 165 Wash.2d 870, 883, 204 P.3d 916 (2009). The reviewing court begins its review with the strong presumption that trial counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail, a defendant has the burden to show (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). The first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Id.* The second prong requires a defendant to show that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A defendant must establish both prongs to prevail on an ineffective assistance claim. *Id.*

1. Trial counsel had no duty to object to testimony by Ms. McCormick regarding her history with Park because this information was relevant to how she was able to identify Park and contemplated by both counsel in pre-trial motions and Park cannot show that his case was prejudiced by this information.

Park argues that it was ineffective for trial counsel to not object to Ms. McCormick's testimony about her prior relationship with Park as inadmissible evidence under ER 404(b). His argument fails because the

history between Park and Ms. McCormick was relevant to how she was able to identify “Daniel Kim” as Park. Further, evidence of this nature was contemplated in pre-trial motions and admissible for this purpose. Even if the Court were to find error with the admission of this testimony, Park cannot show that his case was prejudiced.

The general rule is that evidence of a defendant’s prior bad acts is not admissible to demonstrate his propensity for committing the charged crime. Evidence Rule (ER) 404(b). However, evidence of other crimes, wrongs, or acts may be admissible for other purposes such as identity, common scheme or plan. ER 404(b). If such evidence is admitted, then a limiting instruction may be requested. However, a trial court does not commit reversible error for failing to give a limiting instruction on ER 404(b) evidence if no request is made for one. *State v. Russell*, 171 Wash.2d 118, 124, 249 P.3d 604 (2011).

In *Price*, the Court permitted testimony about incidents involving the defendant and victim, incidents that Price argued on appeal constituted prior bad acts under ER 404(b) and that it was ineffective assistance for trial counsel to not request a limiting instruction. *State v. Price*, 126 Wash.App. 617, 648, 109 P.3d 27 (2005). The *Price* Court disagreed, finding that defense counsel’s decision not to request “a limiting instruction on the remaining four incidents can reasonably be

characterized as trial strategy or tactics.” *Price*, 126 at 649. A court can presume when trial counsel makes a decision not to request a limiting instruction that he or she decided not to do so “because to do so would reemphasize this damaging evidence.” *State v. Barragan*, 102 Wash.App. 754, 762, 9 P.3d 942 (2000).

Here, Park did sign a stipulation for his prior convictions of two counts of Violation of a Court Order and one count of Stalking. CP 43-45. The purpose of the stipulation was to expedite the process of proving Park’s prior convictions—rather than having the State bring in multiple witnesses to show that Park was indeed the individual convicted of these prior crimes, the parties simply agreed that those convictions were his. CP 43-45. There is nothing in the stipulation that prevents the State from having Ms. McCormick testify about the extent of her relationship with Park; their shared history, including the fact that she was the victim of numerous crimes by Park, was certainly relevant to Ms. McCormick’s credibility and to help the jury understand why she was able to figure out that “Daniel Kim” was indeed Park. RP (1/15) 86-94.

Additionally, State’s Motion in Limine number 14 it stated that it intended to introduce a number of statements made by Park and his other aliases as a way of proving that these other individuals were indeed Park. CP 38-39. The statements included evidence about the continued

discussion of pantyhose and his tendency to spell the word legs as “leggs.” CP 38-39. That motion was discussed and granted during pre-trial motions. RP (1/13) 14-15, 27-28.

It is clear from the record that the prior history between Ms. McCormick and Park was not used to argue that because he had been convicted of similar crimes, he must have committed the crimes in the present case. RP (1/22) 431-469. Rather, Ms. McCormick’s testimony was used with the testimony of the other witnesses to establish that Park was indeed Daniel Kim and others. Further, the issue had been discussed and permitted in pre-trial motions. There was no need for trial counsel to object to this brief testimony from Ms. McCormick and not ineffective assistance for her not to do so. Even if it had been advisable for her to object, Park cannot show that it was anything but a legitimate trial strategy to not draw attention to this prior history.

Further, if the Court were to find that trial counsel should have objected to this portion of Ms. McCormick’s testimony, Park cannot show that he was prejudiced by the evidence. Park argues that the jury very likely used this evidence to enter convictions where proof was insufficient, such as in Count VI. A jury is presumed to follow the instructions given by the trial court. *State v. Stein*, 144 Wash.2d 236, 247, 27 P.3d 184 (2001). One of the instructions given by the trial court was “A separate

crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 139. There is simply no basis for Park’s claim that the jury likely used Ms. McCormick’s testimony to convict him on counts where the evidence may have been weaker. In fact, the jury acquitted Park on Count X, a clear sign they were following the given instructions.

Park fails to show that trial counsel’s decision not to object to a portion of Ms. McCormick’s testimony was anything but trial strategy. Even if the Court were to find that she should have objected, Park fails to show any prejudice to his case.

2. Trial counsel’s choice not to move for severance of Count IX was not ineffective assistance of counsel because Park cannot show that he was prejudiced by the inclusion of this count and that the motion to sever would have been granted.

Park next argues that trial counsel was ineffective because she did not move to sever Count IX, which allowed the jury to use evidence from that count when making a decision on the other counts. To prevail on a trial counsel’s failure to seek severance, Park must show both that the motion should have been granted and a reasonable probability that but for trial counsel’s deficient performance, the outcome would have been different. *State v. Warren*, 55 Wash.App. 645, 653-54, 779 P.2d 1159 (1989). Park’s argument fails because he cannot make a showing on either prong.

Severance of charges is important if there is a risk that the jury will use the evidence of one crime to convict the defendant of another crime or infer a general criminal disposition. *State v. Russell*, 125 Wash.2d 24, 62-63, 882 P.2d 747 (1994). A defendant may demonstrate prejudice by showing that (1) the defendant may have to present separate, possibly conflicting, defenses; (2) the jury may infer guilt on one charge from evidence on another charge; or (3) the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge. *State v. Bythrow*, 114 Wash.2d 713, 718, 790 P.2d 154 (1990). If a defendant is able to show prejudice, then the court must determine whether or not a charge should have been severed. There are four factors for the court to consider: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) the court's instructions to the jury; and (4) the admissibility of evidence on the other charges if not joined for trial. *Russell* 125 Wash.2d at 63.

Park cannot show prejudice because evidence in Count IX was presented with the other counts. He was able to take the stand and deny that his conduct by calling Ms. Felt repeatedly was harassing. RP (1/21) 386-393. And that did not prevent him from denying that he was Daniel Kim or any of the other individuals that were sending messages to the

victims. RP (1/21) 345-399. Park was certainly not embarrassed or confounded in presenting his defenses. *Bythrow* 114 Wash.2d at 718. Nor can he show that the jury inferred guilt on one charge from the evidence on another charge. The jury was instructed to consider each count separately and it is clear from their acquittal on Count X that they did just that. CP 139, 171. Park argues that the jury was asked to use evidence from Count IX, where identity was not an issue, to infer that Park regularly engaged in harassing behavior. But that is simply not the case. The State presented a plethora of evidence regarding Park's behavior as both himself and when he was acting as "Daniel Kim" and others. It was up to the jury to make a credibility determination about each of the victims who testified and to evaluate each piece of evidence that was admitted to determine whether or not the State had met its burden and whether Park was indeed harassing victims under other names. The jury was able to come to this conclusion without mixing in the evidence from Count IX. It was not the volume of evidence that led the jury to its guilty verdicts; rather, it was the similarities in the communications by Park and all of the others that was the basis for each guilty verdict.

Even if the Court were to find that Park was prejudiced because the evidence on Count IX was presented with the other counts, he cannot show that it is likely trial counsel's motion to sever would have been

granted. The State had strong evidence on each count with the exception of Count X, for which Park was acquitted. CP 171. The victims for each of the counts testified about their interactions with Park/Daniel Kim, and the State provided tangible evidence of these conversations. CP 181-183. Detective Gray was able to explain the similarities between the communications by Park and the communications by Daniel Kim et al. RP (1/21) 332-337. She was also able to determine that both used the same phone numbers and email addresses of similar format. RP (1/21) 334-337. Park's defense on each of the charges was essentially the same—it was not him; and if it was him, then what he was doing was not harassment. RP (1/21) 345-399. Severing Count IX would not have changed that defense.

Additionally, the victims of all of the charges had the chance to testify and therefore the jury had every opportunity to evaluate both their credibility as well as Park's. There is simply no basis for the court to conclude that the outcome would have been different had Count IX been severed from the other charges. The jury was instructed that each could be decided separately. CP 139. They acquitted Park of Count X, clearly demonstrating they were able to separate the evidence and decide each charge on its own merits. CP 171. And had Count IX been tried separately, it is likely that some of the evidence from the other counts

would have been admissible under ER 404(b).

Once again, Park cannot meet his burden here to show that trial counsel was ineffective for not moving to sever Count IX. He fails to demonstrate how he was prejudiced by this count remaining with the others and he cannot show that it is likely a motion to sever would have been granted.

3. Trial counsel's decision not to object to Exhibit 33 and the testimony about it during re-direct was not ineffective assistance of counsel because it was not beyond the scope of cross-examination and Park cannot show that this decision was anything but a legitimate trial strategy or that he was prejudiced by this evidence.

Park next claims that trial counsel should have objected to the admission of Exhibit 33 because its admission and the questions surrounding it were outside the scope of cross-examination. This argument fails because he cannot show that the decision of trial counsel was anything but legitimate trial strategy and he fails to show how he was prejudiced by this evidence.

To establish deficient performance in this situation, Park must show that if trial counsel had objected to Exhibit 33 as outside the scope, these objections would likely have been successful. *State v. Gerdts*, 136 Wash.App. 720, 727, 150 P.3d 627 (2007). Park must also show that the result of the trial would have been different if the evidence had not been admitted. *In re Davis*, 152 Wash.2d 647, 714, 101 P.3d 1 (2004).

Whether or not trial counsel objects is the classic example of trial tactics. *State v. Madison*, 53 Wash.App. 754, 763, 770 P.2d 662 (1989). The onus is on the defendant to rebut the presumption that the failure of trial counsel to object was not a legitimate trial strategy. *State v. McNeal*, 145 Wash.2d 352, 362, 37 P.3d 280 (2002).

The admission of Exhibit 33, a map showing the location of Naree McCormick's home, occurred during the re-direct of Ms. McCormick. CP 182; RP (1/15) 105-106. During direct examination, Ms. McCormick testified that she lived on Bainbridge Island and had for about the past seven years. RP (1/15) 77. She also testified that she had been receiving messages on her computer from "Daniel Kim" and when she received these messages, she was at her home on Bainbridge Island. RP (1/15) 89-90. Much of the cross-examination centered on the conversation that Ms. McCormick had over the computer with "Kim." RP (1/15) 100-104. Therefore, the State's questions about Exhibit 33 and its admission during re-direct was not outside the scope of cross-examination—they were simply questions clarifying exactly where Ms. McCormick lived on Bainbridge Island. Further, this was not information that was omitted on direct examination—though she did not provide her exact address on direct, Ms. McCormick did testify that she lived on Bainbridge Island. RP (1/15) 77. It is highly unlikely that an objection for "outside the scope"

would have been sustained. Nor can Park overcome the presumption that trial counsel's failure to object was anything but legitimate trial strategy. Even if counsel had objected, she was undoubtedly aware that information about exactly where Ms. McCormick lived on Bainbridge Island would come in through other evidence.

Even if Park were able to show that trial counsel's objection would have been sustained, he cannot demonstrate prejudice. Park argues that but for trial counsel's failure to object, there would have been no other evidence the State could have produced to show where Ms. McCormick's residence was, but a review of the record reveals that is not the case. During her direct testimony, Janice Melendres testified that she was with Park when he drove to Bainbridge Island and went to Pleasant Beach Drive, where he told her that his ex-girlfriend lived. RP (1/15) 139-140. She further testified that they circled a few times and then parked there for a bit before leaving. RP (1/15) 140. Ms. Melendres was also able to identify on Exhibit 33 the house they saw and the one Park identified as belonging to Ms. McCormick. RP (1/15) 140-141. This evidence alone would certainly have been sufficient evidence for the jury to convict Park of Count II, violation of a court order.

Park cannot show that an objection to Exhibit 33 for "outside the scope" would likely have been successful nor can he show there would

have been a different result in the trial had this evidence not been admitted. This ground for ineffective assistance of counsel also fails.

4. Trial counsel was not deficient at sentencing because Park cannot show that the decisions she made were anything but strategic and that a different approach would have resulted in a lower sentence.

Park also argues that trial counsel was deficient at sentencing because she did not investigate or present any mitigating evidence on his behalf and because she conceded that the counts would have to run consecutively. Park's argument fails because trial counsel was not ineffective at sentencing; rather she made strategic decisions to paint Park in the best light she possibly could for the trial court and Park cannot show that a different approach would have resulted in a lower sentence.

The court presumes that trial counsel performed adequately at sentencing. *State v. McNeal*, 145 Wash.2d 352, 362, 37 P.3d 280 (2002). Alleging an unsuccessful or poor quality sentencing argument "alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between the argument and the eventual sentence. We must be persuaded the result would have been different." *State v. Goldberg*, 123 Wash.App. 848, 853, 99 P.3d 924 (2004).

Park argues that trial counsel should have requested evaluations and a pre-sentence investigation, stating that it is standard professional practice when a defendant is facing a long sentence or when trial counsel

intends to argue treatment amenability as a mitigating factor. Park relies on *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003) for this proposition, but that reliance is misplaced. In *Wiggins*, a death penalty case, the Supreme Court held that the defense attorney did not conduct a reasonable investigation into Wiggins background, a background that contained potentially significant mitigating evidence. *Wiggins* 539 at 511-12. Of note to the Court was the fact that defense counsel's failure to conduct an investigation beyond the PSI and the DSS records fell short of both the professional standards in Maryland at the time and the American Bar Association standards for capital defense work. *Wiggins* 539 at 524. No such standards are present in Washington.

Trial counsel was faced with a tough job at sentencing. Park came before the sentencing judge with an offender score of "18", twice the maximum offender score of "9". RP (2/28) 492-493. He was looking at 8 new points based on his convictions at trial. CP 287-292. The facts of the case were also tough to overcome—Park's convictions were a continuation of behavior that began in 2009, including two new convictions for the same victim. RP (2/28) 517. Even when arrested, Park continued to commit crimes from the Kitsap County Jail. RP (2/28) 520. When he testified, Park showed a distinct lack of remorse for his crimes, continuing to blame his acts on others, including one of the named victims

in the present case. RP (1/21) 354-399. At sentencing, he told the court that he could not apologize to Ms. McCormick because of “promises” she had made to him. RP (2/28) 513.

Given all of these factors, trial counsel made a strategic decision to push for treatment for Park while acknowledging that the counts would have to run consecutive; to argue otherwise would have been disingenuous. She also had Park’s mother present at sentencing, though his mother elected not to address the trial court. RP (2/28) 512-513. Trial counsel made a strategic choice to focus her argument on solutions that Park could take advantage of while he was in-custody. Because of the deference courts give to a defense attorney’s performance, it cannot be said that trial counsel was deficient here.

Even if the Court were to find that trial counsel’s performance at sentencing fell below an objective standard of reasonableness, Park cannot show prejudice. It is highly unlikely that a different approach by trial counsel at sentencing would have persuaded the trial judge to take a rehabilitative approach. The exceptional sentence was based on Park’s lengthy criminal history, which included multiple “free crimes.” RP (2/28) 515-516. The trial judge was clearly concerned about the egregious nature of the case, including his repeated victimization of Naree McCormick, and the fact that Park had accumulated seven new victims in

the crimes that were before the sentencing court, repeatedly victimizing those women as well. RP (2/28) 517-521. The trial court was further bothered by Park's "lack of insight and remorse" as well as his "utter lack of sympathy for women as a whole, and the women he's terrorizing in particular." RP (2/28) 520-521. There is nothing that trial counsel could have done to overcome these factors as it was clear from the trial court's reasoning for its exceptional sentence that treatment was simply not a viable option for Park. As the trial court noted, "any treatment opportunities presented to the court for the limited time that he would be on community custody would probably hardly make a dent in the overall need." RP (2/28) 522.

There was nothing ineffective about trial counsel's performance at sentencing. The choices she made were strategic ones and Park cannot show a nexus between her alleged deficient performance and his sentence. It is clear from the trial judge's reasoning that treatment was not a viable sentencing option given Park's extensive criminal history and his continued harassing behavior.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING AN EXCEPTIONAL SENTENCE OF 300 MONTHS BECAUSE THE SENTENCE WAS BASED ON THE FREE CRIMES PRINCIPLE AND JUSTIFIED GIVEN PARK'S EXTENSIVE CRIMINAL HISTORY AND THE EGREGIOUS NATURE OF HIS ACTIONS IN THIS CASE.

Park next claims that the trial court abused its discretion by sentencing him to 300 months, arguing that the basis for this exceptional sentence was improper. The trial court based its exceptional sentence on the free crimes principle, which Park concedes was applicable in his case. However, Park argues that the trial court also based his sentence on the factor of future dangerousness, which is an improper basis for an exceptional sentence. This claim is without merit because there nothing in the record to indicate that the trial court based its exceptional sentence of 300 months on any factor other than the free crimes principle. RP (2/28) 516. However, even if it had also based its sentence on future dangerousness, an exceptional sentence can still be upheld if one of the factors on which the trial court based its sentence was proper. *State v. Zatovich*, 113 Wash.App. 70. 78, 52 P.3d 36 (2002).

RCW 9.94A.585(4) states “[t]o reverse a sentence which is outside the standard range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the

record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” To determine whether an aggravating factor supports departure from the standard range, the reviewing court employs a two part test: (1) if the trial court based its exceptional sentence on factors the legislature considered when establishing the standard sentence range; (2) if the aggravating factor was sufficiently substantial and compelling to distinguish the crime from others in the same category. *State v. Zatkovich*, 113 Wash.App. 70, 79, 52 P.3d 36 (2004).

When a reviewing court examines whether an exceptional sentence is improper, there are three potential issues for it to review: whether there is a factual basis for the court’s reasons for imposing the sentence, which is reviewed under a clearly erroneous standard; whether there is legal justification for the court’s reasons for the sentence, which is reviewed as a matter of law; or whether the sentence is clearly too lenient or excessive, which is reviewed under an abuse of discretion standard. *State v. France*, 176 Wash.App. 463, 469, 308 P.3d 812 (2013).

Here, at sentencing the State detailed Park’s lengthy criminal history, noting that based on its assessment Park had received seven free crimes and the benefit of an incorrectly calculated offender score that

saved him from serving a year and a half in a Pierce County case. RP (2/28) 496. Because Park had an offender score of 18 prior to being sentenced in this matter, he was well above the maximum offender score of 9 under the SRA. RP (2/28) 514. Therefore he was looking at the statutory maximum on Counts I and II and a range of 51 to 60 months on the other counts. RP (2/28) 499. If the trial court were to impose a standard range sentence and run the counts concurrently, Park would only be looking at a sentence of 60 months. RP (2/28) 499.

The trial court agreed with the State, finding that the free crimes aggravating factor was applicable in Park's case. RP (2/28) 516. The trial court found that Park's conduct continued to be concerning, noting that after he was arrested, he continued to harass one of his victims while in jail, calling her over 120 times. RP (2/28) 520. The trial court noted that the commission of this crime underscored "again the reason why the free-crimes aggravator is not only necessary to achieve justice in cases like this in general but also why in this case the court has to impose a consecutive sentence, with regard to this charge in particular, because to do otherwise would be essentially a slap in the face to Ms. Felt that he's in custody of the jail and he's committing crimes, and it's not going to count for anything." RP (2/28) 520.

The trial court found that the facts surrounding Park's behavior in

all of the counts was particularly egregious, and that he showed no remorse overall. RP (2/28) 521. Park's actions rose above the behavior one might find in a typical stalking/harassment case. The trial court observed that Park had multiple victims; that most of these victims felt fear due to his bizarre and disturbing conduct; and that he committed acts to intentionally scare his victims, including statements about a "big surprise", statements that he knew where they lived, and comments about murdering and killing women. RP (2/28) 518-519. Even when the women indicated that they wanted nothing to do with Park, he "stepped up his game", creating false identities to reach out and contact, harass, and scare the victims. RP (2/28) 519.

With multiple victims, to run the counts concurrent would allow Park a free pass. It is evident from the reasoning of the trial court that it based its exceptional sentence on the free crimes aggravator. RP (2/28) 516. Further, it is clear from the facts that Park's conduct and offender score were not factors that the Legislature considered when it established the standard sentencing range for these types of crimes. *Zatkovich* 133 at 79. Park's behavior, both in the present case and in his prior criminal history, was substantial and compelling enough to justify the use of the free-crimes aggravator in imposing an exceptional sentence as his behavior was beyond what was contemplated in crimes of this nature.

Zatkovich 133 at 79.

Moreover, even if the Court were to find that the trial court based its exceptional sentence at least, in part, on the aggravator of future dangerousness, which is only one of the factors utilized by the trial court. Case law is clear that if the court finds that at least one of the factors on which the court based its exceptional sentence is proper, then that sentence stands. *Zatkovich* 133 at 78.

Finally, Park argues that his sentence was clearly too excessive. Again, this argument is without merit. As the trial court noted, it had the discretion to sentence Park from 5 years to 45 years, and that 45 years was probably too excessive. RP (2/28) 523. The trial court elected to impose a mid-range exceptional sentence of 300 months that, given all of the factors in Park's case, was not an abuse of discretion.

Park's claim that the trial court based its sentence on an improper factor fails because the sentence was based on the free crimes principle. Further, the exceptional sentence of 300 months was excessive and clearly justified given Park's criminal history and the egregious facts in this case.

IV. CONCLUSION

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

DATED February 17, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Kellie L. Pendras". The signature is fluid and cursive, with the first name "Kellie" and last name "Pendras" clearly distinguishable.

KELLIE L. PENDRAS
WSBA No. 34155
Deputy Prosecuting Attorney

KITSAP DISTRICT COURT

February 18, 2015 - 9:51 AM

Transmittal Letter

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