

70807-4

70807-4

No. 70807-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES WILLIAM SCHUMACHER,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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FILED  
COURT OF APPEALS  
DIVISION ONE  
JAMES WILLIAM SCHUMACHER

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**A. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in admitting Ms. Schumacher's out-of-court statement expressing fear of Mr. Schumacher because her state of mind was not relevant.

2. The trial court abused its discretion in admitting evidence of prior disputes between Mr. and Ms. Schumacher because the evidence was precluded by ER 404(b).

3. The trial court abused its discretion in admitting Ms. Schumacher's out-of-court statements to medical providers because they did not fall under the hearsay exception provided in ER 803(a)(4).

4. The "ongoing pattern of psychological, physical or sexual abuse" aggravating factor is unconstitutionally vague in violation of constitutional due process to the extent it references "psychological abuse."

5. The State did not prove beyond a reasonable doubt that the current offense was part of an ongoing pattern of psychological or physical abuse.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Generally, in a murder prosecution, evidence regarding the decedent's state of mind and whether she was afraid of the defendant is

inadmissible because it is not relevant to the charged crime and is overly prejudicial. In this prosecution for murder, did the trial court abuse its discretion in admitting the decedent's statement expressing fear of the defendant?

2. Evidence of prior disputes between spouses is relevant and admissible to prove motive or intent in a spousal murder case only if the prior disputes were close in time to the current offense. Did the court abuse its discretion in admitting evidence of prior disputes between Mr. and Ms. Schumacher that occurred at least a year, and up to 40 years before the offense?

3. A trial court may admit a declarant's hearsay statements made to medical providers under ER 803(a)(4) only if (1) the declarant's motive in making the statements was to promote medical diagnosis or treatment; and (2) the medical provider reasonably relied on the statements for the purpose of providing medical diagnosis or treatment. Here, the trial court admitted Ms. Schumacher's hearsay statements made to a physician and social worker in which she vaguely alleged that Mr. Schumacher abused her in the past. Where the statements were not pertinent to medical diagnosis or treatment, did the court abuse its discretion in admitting them under ER 803(a)(4)?

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

5. The State bears the burden to prove sentencing aggravators beyond a reasonable doubt. Here, the State alleged Mr. Schumacher committed the charged crime as part of an ongoing pattern of psychological or physical abuse. The only evidence offered in support of the aggravator was: Ms. Schumacher’s vague allegations made to medical providers regarding prior “abuse,” evidence that Mr. Schumacher pushed his wife to the floor on one prior occasion, and the children’s testimonies that Mr. Schumacher had a habit of yelling at his wife and calling her derogatory names. Did the State fail to prove an ongoing pattern of psychological or physical abuse beyond a reasonable doubt?

### C. STATEMENT OF THE CASE

#### 1. The incident and Mr. Schumacher's impaired mental state

On the afternoon of March 23, 2012, 71-year-old James Schumacher entered the Bellevue Police Station and said that he wanted to talk to a police officer and make a report. 5/21/13RP 17-18. He told police officers that he had killed his wife Jean and left her body in the house. 5/21/13RP 34. The two had been married for more than 40 years. 5/28/13RP 128. Mr. Schumacher said that two or three days earlier, he and his wife had argued and she had approached him with a hammer and held it over his head as if to hit him. 5/21/13RP 36. He had been sick in bed with the flu and she was yelling at him to get out of bed and help out around the house. 5/21/13RP 133. She threatened divorce and said he would “pay through the nose.” 5/21/13RP 36. Then she put the hammer away, said she was going to bed and did not want to be bothered, and went to her room<sup>1</sup> and locked the door. 5/21/13RP 36.

Mr. Schumacher said he did not sleep that night and stayed awake “seething” about the incident. 5/21/13RP 36. He got up the next morning, retrieved a hatchet from the garage, went to Ms.

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<sup>1</sup> The couple slept in separate bedrooms. 5/21/13RP 37.

Schumacher's room, and picked the lock on her door. 5/21/13RP 37. He took the hatchet merely to scare her and did not intend to hit her with it. 5/21/13RP 131. When he opened the door, he saw she was in bed sleeping. 5/21/13RP 37. He said, "Jean, let's talk," and when she did not respond, he thought she was ignoring him. 5/21/13RP 131. He then struck her in the forehead with the hatchet. 5/21/13RP 38.

Mr. Schumacher said he did not know why he killed his wife and did not know what he was thinking at the time. 5/21/13RP 136; 5/22/13RP 5. He said he hit her more than once with the hatchet because, once he began, he wanted to make sure she was dead. 5/21/13RP 139; 5/22/13RP 5. He said he "couldn't help it." 5/22/13RP 6.

The police noted that Mr. Schumacher expressed no emotion and was unusually calm while explaining what he had done. 5/21/13RP 45, 60, 120. He was exceedingly matter-of-fact and discussed killing his wife in the same tone that he discussed going to McDonald's. 5/21/13RP 63, 66, 126. He also appeared disheveled and looked like he needed a shower and a shave. 5/21/13RP 92.

Officers went to the Schumacher residence and confirmed that Ms. Schumacher's dead body was in her bedroom. 5/21/13RP 40, 74-75, 79. Mr. Schumacher was arrested. 5/21/13RP 93.

Craig Beaver, a licensed psychologist who works extensively with patients with dementia and diabetes, evaluated Mr. Schumacher in jail. 5/22/13RP 37-39. Mr. Schumacher suffered from diabetes and, during the years preceding the incident, had not been taking his medication or eating well. 5/22/13RP 24, 56. His blood sugar levels were significantly elevated when he entered the jail. 5/22/13RP 56. People with poorly-managed diabetes commonly have significant deficits in their cognitive functioning. 5/22/13RP 22, 58.

Dr. Beaver concluded that Mr. Schumacher had mild to moderate dementia, which was exacerbated by his poorly-managed diabetes. 5/22/13RP 48, 58. Dementia affects not only a person's memory but also his higher level problem solving skills and ability to control his impulses. 5/22/13RP 25-28. At the time of the incident, Mr. Schumacher was also under stress due to the conflicts with his wife and was suffering from the flu. 5/22/13RP 25, 62. Together, these factors caused significant impairment in his cognitive functioning and impulse control. 5/22/13RP 25, 62, 91. Dr. Beaver concluded that Mr.

Schumacher's cognitive deficits affected his ability to form an intent to kill and to control his actions. 5/22/13RP 70, 77-80, 134. They also helped to explain why Mr. Schumacher suddenly killed his wife after so many years of marriage. 5/22/13RP 126.

## 2. The charge, pretrial rulings and jury trial

Mr. Schumacher was charged with first degree premeditated murder with a deadly weapon enhancement allegation. CP 1-2. The State also alleged that the offense involved domestic violence and "was part of an ongoing pattern of psychological, physical or sexual abuse<sup>[2]</sup> of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 1-2 (citing RCW 9.94A.535(3)(h)(i)).

To prove motive and intent, the State offered evidence of prior disputes between Mr. and Ms. Schumacher. 5/14/13RP 113-18; 5/15/13RP 58. The State moved to admit evidence that Mr. Schumacher had been arrested in November 2010 and later convicted of fourth degree assault after he pushed Ms. Schumacher to the floor during an argument. 5/14/13RP 113-18. The State also moved to admit evidence that Ms. Schumacher told her daughter that she was

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<sup>2</sup> At trial, the jury instruction omitted the "sexual abuse" allegation because there was no evidence to support it. CP 76.

afraid of Mr. Schumacher when she heard he was to be released from jail following the 2010 incident. 5/15/13RP 58. Finally, the State moved to admit Ms. Schumacher's hearsay statements made to a physician and a hospital social worker following the 2010 incident, in which she alleged that Mr. Schumacher had verbally and emotionally abused her for years. CP 120.

Defense counsel objected to the evidence. 5/14/13RP 122-23. Counsel argued the 2010 incident and events occurring before that time were too remote to be relevant to Mr. Schumacher's intent on the present occasion. 5/14/13RP 123-25; 5/15/13RP 59-60, 69-71, 109-11. Counsel also argued Ms. Schumacher's statement to her daughter expressing fear of Mr. Schumacher was inadmissible because her state of mind was not at issue. 5/15/13RP 59-60, 67, 109-11. He argued her out-of-court statements regarding a history of abuse were inadmissible hearsay. CP 8-30.

The court ruled all of the evidence was admissible and probative of motive and intent. CP 120-21; 5/14/13RP 134, 142-43, 149; 5/15/13RP 63-65. The court acknowledged Ms. Schumacher's state of mind was not relevant but incongruously ruled her statement expressing fear of Mr. Schumacher was admissible because it showed she

anticipated he might be violent again. 5/15/13RP 65-66, 116-17. The court also ruled that Ms. Schumacher's statements to medical personnel were admissible under the hearsay exception for statements made for the purposes of medical diagnosis and treatment. 5/14/13RP 143.

Pursuant to the trial court's rulings, Thomas Miller, an emergency room physician at Overlake Medical Center, testified about treating Ms. Schumacher following the November 2010 incident. 5/28/13RP 106-08. He said Ms. Schumacher told him her husband pushed her down and as a result she had pain in her tailbone and hip and a bump on the back of her head. 5/28/13RP 108, 112. Ms. Schumacher told him her husband had verbally and emotionally abused her for years and the abuse was escalating. 5/28/13RP 109, 113-14. She said this was the worst physical abuse she had suffered. 5/28/13RP 109. Dr. Miller testified he routinely gathers social information from a patient following such incidents in order to understand any potential danger to the patient. 5/28/13RP 108.

Debora Kunka, an emergency room social worker, also testified about her conversation with Ms. Schumacher following the 2010 incident. 5/28/13RP 122. According to the social worker, Ms. Schumacher said there was a history of verbal and emotional abuse in

her marriage which had increased in severity. 5/28/13RP 122. She said her husband had hit her and shoved her before, causing her to have a black eye, but this was the worst physical violence so far. 5/28/13RP 123. Ms. Kunka testified she asks patients whether they have a history of domestic violence in order to assess any safety issues they face. 5/28/13RP 122.

Darin Karosich, a Bellevue police officer, testified he responded to the Schumachers' residence following the November 2010 incident. 5/28/13RP 126-27. He said both Mr. and Ms. Schumacher told him that Ms. Schumacher was angry at her husband because he had been in bed most of the day and not helping out around the house. 5/28/13RP 128, 139. When he was in the kitchen pouring himself some cereal, she became angry and knocked the cereal box out of his hand. 5/28/13RP 128, 140. Mr. Schumacher then put his hands on her shoulders and pushed her backwards and she fell to the floor. 5/28/13RP 129-30, 140. She called the police and Mr. Schumacher was arrested. 5/28/13RP 131, 140.

The Schumachers' 46-year-old son James testified. 5/29/13RP 3. He remembered his parents screaming and arguing with each other often while he was growing up. 5/29/13RP 14. He said his father

would call his mother derogatory names. 5/29/13RP 14-15. One time, about five years earlier, his father admitted to him that he had been “abusive” to his mother but he provided no further details. 5/29/13RP 15-16. James also attended a court hearing following the 2010 incident at which his father expressed remorse for “the physical abuse, the verbal abuse,” but again provided no further details. 5/29/13RP 19. James said his mother had increasingly expressed concerns to him that his father was “crumbling.” 5/29/13RP 30-39. She said he was sleeping on soiled sheets, not bathing, becoming forgetful, and isolating himself more than usual. 5/29/13RP 30, 38-39, 45-47.

The Schumachers’ 43-year-old daughter Susan also testified. 5/29/13RP 51-52. Like her brother, she remembered her parents screaming at each other while she was growing up and remembered her father calling her mother derogatory names. 5/29/13RP 52-53. She said she called her mother after learning that her father would be released from jail following the November 2010 incident. 5/29/13RP 54. Her mother “started screaming and crying” and said, “He is going to kill me. Oh, my God, what am I going to do?” 5/29/13RP 54-55. She noticed that her father’s personal hygiene was getting worse in the years preceding the current incident. 5/29/13RP 57. Her mother

recently told her that her father had stopped going to the doctor.

5/29/13RP 61-62.

Dr. Beaver testified as to his conclusions regarding Mr. Schumacher's diminished capacity. 5/22/13RP 12-134. The jury was instructed that "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditated intent or intent." CP 66.

### 3. Verdict and sentencing

The jury did not find Mr. Schumacher guilty of first degree murder but found him guilty of second degree murder instead. CP 80-81. The jury answered "yes" on the verdict form regarding whether the crime was an aggravated domestic violence offense. CP 82.

The court concluded the history of domestic violence was a substantial and compelling reason justifying an exceptional sentence and imposed an exceptional sentence of 300 months. CP 107, 118.

#### D. ARGUMENT

1. **The trial court abused its discretion in admitting Ms. Schumacher's statement to her daughter expressing fear of her husband because Ms. Schumacher's state of mind was not at issue**

The trial court admitted, over objection, Susan Schumacher's testimony about what her mother said to her when she learned that Mr. Schumacher would be released from jail following the November 2010 incident. 5/15/13RP 59-60, 65-67, 109-11, 116-17. According to Susan, her mother "started screaming and crying" and said, "He is going to kill me. Oh, my God, what am I going to do?" 5/29/13RP 54-55. The court abused its discretion in admitting this evidence. It is well-established that a decedent's expressions of fear of the defendant are not relevant or admissible in a murder prosecution unless the decedent's state of mind is put at issue by the specific defense raised.

The controlling case in Washington is State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). In that case, Parr was charged with murdering his girlfriend by gunshot. Id. at 96-97. At trial, the girlfriend's brother testified that six months before the incident, his sister told him Parr had threatened her with a gun and she was afraid of him. Id. at 98. The Washington Supreme Court held that a victim's

expressions of fear of the defendant are ordinarily not relevant or admissible in a criminal case. Id. at 102-03. Such evidence is not relevant to prove the defendant's intent or conduct and carries great potential of unfair prejudice, particularly in a murder case where the defendant has no opportunity to cross-examine the declarant. Id. at 100-03. The evidence is relevant and admissible only if the decedent's state of mind is put at issue by the specific defense raised. If the defense is accident or self-defense, evidence regarding the decedent's state of mind may be probative of the question whether the victim was likely to act in the manner claimed by the defendant. Id. at 103. In Parr, for instance, the evidence was relevant and admissible to rebut Parr's claim that the gun went off accidentally during a struggle after the victim grabbed for the gun. Id. at 96, 106-07. Her state of mind had some bearing on the question whether she was likely to have reached for the gun. Id. at 106. If not for the claim of accident, however, the evidence would have been inadmissible. Id. at 100-03.

Another controlling case is State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983). In that case, Cameron was charged with premeditated first degree murder of his stepmother. Id. at 521. He admitted stabbing her but claimed he was insane at the time. Id. At

trial, the stepmother's daughter testified that two months before the incident, her mother told her she was having problems with Cameron. Id. at 530. The victim's ex-husband also testified she had told him she was afraid of Cameron. Id. at 529. The Supreme Court concluded that the evidence was not admissible because it was not relevant to prove Cameron's premeditation or his thought process and was not probative to prove any other material issue in the case. Id. at 531. Moreover, the error in admitting the evidence was not harmless because "the potential for misuse of the testimony or misunderstanding of its application is too great, carrying with it a substantial likelihood of prejudice to petitioner's case." Id.

These authorities make plain that the trial court abused its discretion in admitting Ms. Schumacher's out-of-court statement expressing fear of Mr. Schumacher. The evidence was not probative or admissible to prove whether Mr. Schumacher intended to kill his wife or had the capacity to form such an intent, which was the central issue in the case. Parr, 93 Wn.2d at 100-03; Cameron, 100 Wn.2d at 531. Mr. Schumacher did not assert a defense such as accident or self-defense which would have put his wife's state of mind at issue.

The trial court ruled that Ms. Schumacher's statement expressing fear of Mr. Schumacher was relevant because it showed she anticipated that he might be violent against her. 5/15/13RP 65-66, 116-17. But Parr and Cameron unambiguously hold that whether Ms. Schumacher believed her husband would be violent was immaterial. Only evidence regarding *Mr. Schumacher's* state of mind, not his wife's, was relevant and admissible in the case.

Finally, as in Cameron, admission of the evidence was unfairly prejudicial and requires reversal. An error in admitting evidence in violation of the evidence rules is prejudicial and requires a new trial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Benn, 161 Wn.2d 256, 266 n.4, 165 P.3d 1232 (2007). The improper admission of evidence is harmless error only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

The improperly admitted evidence was not of minor significance in this case. Ms. Schumacher's statement to her daughter following the 2010 incident that she was afraid her husband "was going to kill [her]" and her distress when she heard he was about to be released from jail greatly magnified the apparent seriousness of that

earlier incident. The facts of that incident were relatively innocuous and suggested that both parties were at fault to some degree. Both Mr. and Ms. Schumacher told the police that the two had argued, that Ms. Schumacher was angry and knocked the cereal box out of her husband's hand, and that he responded by pushing her, causing her to fall to the floor. 5/28/13RP 126-28, 139-40. These facts do not seem to warrant Ms. Schumacher's fear that her husband was going to kill her. Ms. Schumacher's statement of fear likely influenced the jury to conclude the 2010 episode was more serious than it appeared to be, and that Mr. Schumacher was an inherently violent person.

As stated, whether Ms. Schumacher believed in 2010 that Mr. Schumacher was going to kill her was not relevant to the question whether Mr. Schumacher had the capacity to form an intent to kill on the present occasion. But "the potential for misuse of the testimony or misunderstanding of its application" by the jury was great, "carrying with it a substantial likelihood of prejudice" to Mr. Schumacher's case. Cameron, 100 Wn.2d at 531. The evidence was highly prejudicial and misleading because it encouraged the jury to rely on Ms. Schumacher's perceptions of her husband's potential for violence rather than the

evidence regarding Mr. Schumacher's current mental state. The erroneous admission of the evidence requires reversal of the conviction.

**2. The trial court abused its discretion in admitting evidence of prior disputes between Mr. and Ms. Schumacher because the disputes were too remote in time to be probative of Mr. Schumacher's motive or intent on the present occasion**

The trial court admitted evidence that Mr. Schumacher was arrested and convicted of assault after he pushed Ms. Schumacher and she fell to the floor in November 2010. The court also admitted testimony from the Schumacher children to the effect that they had observed their parents arguing and yelling at each other when they were children. Finally, the court admitted Ms. Schumacher's hearsay statements alleging that her husband had hit her once before and verbally and emotionally abused her for years preceding the 2010 incident. CP 120-21; 5/14/13RP 134, 142-43, 149; 5/15/13RP 63-65; 5/28/13RP 109, 113-14; 122-23; 5/29/13RP 14-15; 52-53. The court abused its discretion in admitting this evidence because it was not probative of Mr. Schumacher's motive or intent on the present occasion.

Evidence of a defendant's other crimes, wrongs or acts is categorically excluded if the only relevance of the evidence is "to prove

the character of a person in order to show action in conformity therewith.” ER 404(b). Evidence of a defendant’s other bad acts is admissible only if it “is logically relevant to prove an essential element of the crime charged, rather than to show the defendant had a propensity to act in a certain manner.” State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). Such evidence may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Evidence of prior quarrels and ill feeling between spouses is generally admissible in spousal murder cases to show motive or intent. State v. Powell, 126 Wn.2d 244, 260-62, 893 P.2d 615 (1995). But because such evidence has a great potential for prejudice, it must be of consequence to the action to justify its admission, such as in a case where only circumstantial evidence exists. Id. at 260. In Powell, evidence of disputes between Powell and his wife and assaults he committed against her which occurred during the several months preceding her murder was admissible to show he had a motive to kill her. Id. at 260-61. The identity of her murderer was the central issue in the case. Id. at 247-48.

Evidence of a defendant's prior bad acts is not relevant or admissible to prove intent or state of mind unless the prior acts are close in time to the current offense. State v. Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004). "[T]he state of mind that will permit the admission of an unrelated crime is the state of mind at the time of the commission of the offense as shown by the acts or words of the defendant so close in time to the alleged offense as to have bearing upon his state of mind at that time." Id. (internal quotation marks and citation omitted). In Acosta, the Court held evidence of the defendant's prior offenses was inadmissible to show his state of mind because they were all at least two years old. Id. at 435.

Here, unlike in Powell and similar to Acosta, the evidence of prior disputes between Mr. and Ms. Schumacher was too remote in time to be relevant to his current motive or state of mind. The most recent incident occurred in November 2010, almost one and one-half years before the current offense. The Schumacher children both testified they were not aware of any serious disputes between their parents occurring after the 2010 incident. James said his parents still argued sometimes but seemed to be getting along and making progress. 5/29/13RP 42-43. Susan testified she did not witness her father calling

her mother names after the 2010 incident and was not aware of any further physical altercations. 5/29/13RP 62-63.

Admission of the evidence of prior disputes between Mr. and Ms. Schumacher was reversible error because it probably affected the outcome of the trial.<sup>3</sup> Mr. Schumacher's defense was that he lacked the capacity to form an intent to kill his wife due primarily to his dementia and diabetes, which had worsened over time. His defense was, in essence, that the killing of his wife was an action out of character. The evidence that he had assaulted and "abused" his wife in the past and frequently called her derogatory names portrayed him as a person with a potentially violent character. The evidence likely influenced the jury to conclude that Mr. Schumacher acted within character when he killed his wife, despite the fact that the prior disputes were remote in time. Therefore, the erroneous admission of the evidence requires reversal.

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<sup>3</sup> Although the history of prior disputes was relevant to prove the "pattern of abuse" sentencing aggravator, had the trial court not admitted the evidence at trial to prove motive and intent, the court would probably have granted the defense motion to bifurcate the trial on the substantive offense from the trial on the aggravator. See 5/14/13RP 37; CP 29-30.

**3. The trial court abused its discretion in admitting Ms. Schumacher's hearsay statements made to medical providers regarding past "abuse"**

The trial court admitted Ms. Schumacher's hearsay statements regarding alleged past "abuse" made to an emergency room physician and a social worker at the hospital following the November 2010 incident. The physician testified Ms. Schumacher told him her husband had verbally and emotionally "abused" her for years, although she did not specify the nature of the "abuse." 5/28/13RP 109, 113-134. The social worker similarly testified Ms. Schumacher told her there was a history of verbal and emotional "abuse" in the marriage but again did not specify the nature of the "abuse." 5/28/13RP 122. Ms. Schumacher also said her husband had hit and shoved her once before sometime in the past. 5/28/13RP 123. These hearsay statements were inadmissible because they did not properly fall under the medical treatment and diagnosis exception to the hearsay rule.

ER 803(a)(4) provides that the following out-of-court statements are admissible at trial notwithstanding the hearsay rule:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Two factors are critical to the application of ER 803(a)(4). State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997). First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment. Id. Second, the content of the statement must be such as is reasonably relied on by a medical provider in treatment or diagnosis. Id. These two factors reflect the rationale for the medical purpose exception to the hearsay rule: The declarant has a strong motive to speak truthfully and accurately because her successful treatment depends upon it. Id.

The term “medical diagnosis or treatment” includes both physical and psychological treatment. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Thus, statements are admissible when made for the purpose of promoting psychological treatment and reasonably relied upon by the medical provider in providing such treatment. Id.

Although the fact and circumstances of an illness or injury are relevant to diagnosis or treatment, causation and fault are not except in rare cases. “Thus a patient’s statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.” FRE Advisory Committee’s Note. See State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2004) (trial court should

have redacted portions of medical records to exclude the assignation of blame but still admit evidence of injury and treatment); State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001) (defendant's statements made to a treating physician, blaming police for injuring his wrist and shoulder during an arrest for possession of cocaine three days earlier, were not reasonably pertinent to diagnosis or treatment nor to the prevention or recurrence of injury).

The courts have carved out an exception, in cases of domestic violence, to the general rule that statements of fault are not admissible under ER 803(a)(4). That is because "a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic assault cases." State v. Price, 126 Wn. App. 617, 639, 109 P.3d 27 (2005). For example, "the treating physician may recommend special therapy or counseling and instruct the victim to remove him or herself from the dangerous environment by leaving the home and seeking shelter elsewhere." Id. Therefore, the physician frequently must know the identity of the perpetrator in order to render proper treatment. Id.

Although courts now routinely admit hearsay statements made to medical providers identifying the perpetrator in domestic violence cases, courts have not expanded the medical hearsay exception to

encompass statements relating a history of *prior* abuse. Such statements are not reasonably pertinent to the purpose of obtaining treatment for a present injury, especially when the alleged prior abuse occurred in the distant past. Because information regarding prior abuse is only marginally relevant to obtaining successful treatment for a present injury, the declarant has a much weaker motive to be truthful and accurate in relating such information. The rationale for applying the hearsay exception is therefore much less compelling in such cases.

Here, medical providers were permitted to testify about Ms. Schumacher's vague allegations regarding a history of psychological and verbal abuse by her husband, although such information was not reasonably pertinent to obtaining treatment for her present injuries. The medical providers both testified they try to collect social information from victims of domestic violence in order to assess potential safety issues they face. 5/28/13RP 108, 122. But questions by a medical provider aimed solely at ensuring the patient's *safety* are not aimed at treating or diagnosing the patient's physical or psychological needs. People of the Terr. of Guam v. Ignacio, 10 F.3d 608, 611 (9th Cir. 1993). Therefore, a patient's hearsay statements

made in response to such questions are not admissible under ER 803(a)(4). Id.

Mr. Schumacher never had an opportunity to cross-examine Ms. Schumacher about her vague allegations of past “abuse,” or inquire about their reliability and her possible motive for making them. This Court should hold that the medical hearsay exception is not broad enough to encompass Ms. Schumacher’s incriminating hearsay statements conveying allegations of prior, unrelated acts of abuse. The trial court abused its discretion in admitting the hearsay statements.

**4. The ongoing pattern of abuse aggravator is unconstitutionally vague to the extent it references “psychological abuse”**

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

The vagueness doctrine of the Due Process Clause<sup>4</sup> rests on two related principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and

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<sup>4</sup> The Due Process Clause of the Fourteenth Amendment provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” In addition, article I, section 3 of the Washington Constitution provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09. A statute fails to adequately guard against arbitrary enforcement if it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); O’Day v. King County, 109 Wn.2d 796, 811-12, 749 P.2d 142 (1988).

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), the Washington Supreme Court overturned its prior decision in State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that statutory aggravating factors were not subject to a vagueness challenge. The court’s holding in Baldwin is untenable in light of the United

States Supreme Court’s later decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).<sup>5,6</sup>

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

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<sup>5</sup> In Blakely, the Supreme Court held “‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’” Blakely, 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

<sup>6</sup> In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013), the petitioner similarly argued that Baldwin did not survive Blakely. The Washington Supreme Court did not decide the issue and instead assumed without deciding that the vagueness doctrine applied to the petitioner’s challenge to the aggravating factor. Id. at 296-97. The court concluded that even if the vagueness doctrine applied, the aggravating factor at issue was not impermissibly vague. Id.

Baldwin's conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" is indisputably incorrect following Blakely. There, the United States Supreme Court held statutory aggravating factors *do* alter the statutory maximum of the offense. Blakely, 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." Baldwin, 150 Wn.2d at 458. The vast majority of aggravating factors may no longer be considered by a sentencing judge at all, unless they are first found by a jury beyond a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-Blakely scheme, aggravating factors are not matters that merely direct judicial discretion.

Baldwin also concluded there was no liberty interest at stake in the determination of an aggravating factor, stating "before a state law can create a liberty interest, it must contain substantive predicates to the exercise of discretion and specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." Baldwin, 150 Wn.2d at 460 (internal quotation marks and citation omitted). This conclusion is also contrary to the United States Supreme Court's opinions in Blakely and Appendi.

Those cases concluded the Due Process Clause *does* apply to aggravating factors.

Blakely concluded that the Sixth Amendment right to a jury trial applies to statutory aggravating factors. Blakely, 542 U.S. at 305. It is by virtue of the Fourteenth Amendment Due Process Clause that the Sixth Amendment jury trial right is incorporated against the states. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In concluding that the Sixth Amendment jury trial right applies in state criminal trials, the Court first determined that the right is “among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, . . . is basic in our system of jurisprudence, and . . . is a fundamental right, essential to a fair trial.” Id. at 148-49 (internal quotation marks and citations omitted). The Court reasoned that “the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” Id. at 156. Thus, the Sixth Amendment right to a jury applies to state court proceedings as a component of the Due Process Clause because

of the liberty interest at stake. Because it applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

In Apprendi, the Court stated:

As we made clear in [In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)], the “reasonable doubt” requirement “has [a] vital role in our criminal procedure for cogent reasons.” 397 U.S. at 363, 90 S. Ct. 1068. Prosecution subjects the criminal defendant both to “the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.” Id. We thus require this, among other, procedural protections in order to “provid[e] concrete substance for the presumption of innocence,” and to reduce the risk of imposing such deprivations erroneously. Id.

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

Apprendi and Blakely clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as Apprendi expressly noted, sentencing enhancements impact the most basic of liberty interests—the right to be free from confinement. 530 U.S. at 484. It is because they affect the most basic liberty interest that enhancements and aggravating factors, just like traditional elements, must be proved beyond a reasonable doubt. With the recognition that this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of Baldwin's underpinnings is lost.

Baldwin's reasoning is analytically unsound. Under Baldwin, a defendant may only raise a vagueness challenge to elements that require a particular result. Baldwin, 150 Wn.2d at 460. By that logic, no such challenge could ever be raised to the elements of an offense in jurisdictions that do not employ determinate sentencing, such as the federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is always free to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would

be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, and, for that matter, does not require the court to impose any sentence at all. Nor would Baldwin's reasoning permit vagueness challenges to conditions of community custody, as a violation of such conditions does not dictate an outcome. Yet, not only do Washington courts permit such challenges, they have struck several conditions as unconstitutionally vague. See, e.g., State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

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

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

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-

97, 300 P.3d 352 (2013) (internal quotation marks and citation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *Id.* at 297. The Court considers whether the statute is vague as applied to the particular facts at issue in the case. *Id.* The Court reviews a vagueness challenge *de novo*. State v. Williams, 159 Wn. App. 298, 319, 244 P.3d 1018 (2011).

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

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

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

In Williams, the court considered the constitutionality of the criminal harassment statute. The statute provided that a person was guilty of harassment if, without lawful authority, he or she knowingly threatened “[t]o cause bodily injury in the future to the person

threatened or to any other person,” or “[m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or *mental health* or safety,” and “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” *Id.* at 203 (quoting former RCW 9A.46.020(1)(a)(i), (1)(a)(iv), (b) (1992)) (emphasis in Williams). The court concluded the term “mental health,” which was not defined in the statute, was impermissibly vague. *Id.* at 205-06.

First, the court concluded the term “mental health” was vague because a person of reasonable understanding must guess at what conduct was prohibited by the term. *Id.* at 204. For example, the statute did not make clear whether a person was prohibited from making threats that cause others mere irritation or emotional discomfort, or whether it prohibited only those threats causing others to suffer a diagnosable mental condition. *Id.* The court explained, “[w]ithout knowing what is meant by mental health, the requirement that one intentionally commit an act designed to substantially harm the mental health of another does not tell us what that act might be.” *Id.*

Second, the court concluded the term “mental health” was unconstitutionally vague because it was inherently subjective. *Id.* at

205-06. “[T]he average citizen has no way of knowing what conduct is prohibited by the statute because each person’s perception of what constitutes the mental health of another will differ based on each person’s subjective impressions.” Id. at 206. Similarly, the statute offered law enforcement no guide beyond the subjective impressions of the person responding to a citizen complaint. Id.

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

The statutory term “psychological abuse” is no less vague than the term “mental health,” and for similar reasons. A person of reasonable understanding must necessarily guess at what conduct the term encompasses. Does it encompass behavior that merely causes ongoing irritation or emotional discomfort, or does it require that the behavior cause a substantial, diagnosable psychological condition? The answer is not clear. A person of reasonable understanding is left to guess at what is meant by “psychological abuse.”

Similarly, as with the term “mental health,” the term “psychological abuse” is inherently subjective. Each person’s perception of what constitutes “psychological abuse” differs based on

each person's subjective impressions. The statute offers the jury no guide beyond the subjective impressions of each juror in determining whether an ongoing pattern of "psychological abuse" occurred.

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

**c. The exceptional sentence must be reversed**

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

Here, the jury was instructed to find whether the charged offense was “part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time.” CP 76. The jury was not provided a special verdict form requiring it to indicate whether it found the offenses were part of an ongoing pattern of *psychological* abuse or an ongoing pattern of *physical* abuse. Therefore, it is impossible to discern whether the jury found an ongoing pattern of psychological abuse, an ongoing pattern of physical abuse, or both.

Most of the evidence presented to prove the aggravator suggested a pattern of “psychological” rather than physical abuse. The State presented the testimonies of Susan and James Schumacher, who said their parents often argued and yelled at each other while they were growing up, and Mr. Schumacher often called their mother derogatory names. 5/29/13RP 14-15, 52-53. But neither of them said they ever witnessed *physical* abuse. The State also presented Ms. Schumacher’s hearsay statements to medical providers to the effect that her husband had verbally and emotionally abused her for years. 5/28/13RP 109, 113-14, 122. The only evidence presented of prior physical abuse was evidence regarding the 2010 incident in which Mr. Schumacher pushed

his wife and she fell to the floor, and Ms. Schumacher's vague statement to the hospital social worker that Mr. Schumacher had hit and shoved her once before on an unspecified prior occasion. 5/28/13RP 123. The limited evidence of prior *physical* abuse did not suggest that it was frequent enough to amount to a "pattern."

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

In addition, the exceptional sentence must be reversed. A reviewing court must reverse an exceptional sentence if the trial court record does not support the sentencing court's articulated reasons or those articulated reasons do not justify a sentence outside the standard range. State v. Hayes, 177 Wn. App. 801, 806-07, 312 P.3d 784 (2013); RCW 9.94A.585(4). Here, the sentencing court found the jury's finding on the "pattern of abuse" aggravator justified an exceptional sentence. CP 107,118. Because that aggravator was unconstitutionally vague in violation of due process, the exceptional sentence must be reversed and Mr. Schumacher must be resentenced.

**5. The evidence was insufficient to prove an ongoing pattern of psychological or physical abuse beyond a reasonable doubt**

In regard to the aggravating factor, the jury was instructed the State had to prove beyond a reasonable doubt that

the offense was part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

CP 76. The evidence was insufficient to prove the allegation beyond a reasonable doubt.

A jury must find any facts supporting aggravating circumstances beyond a reasonable doubt. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). The jury’s finding is reviewed under the sufficiency of the evidence standard. Id. Applying that standard, the Court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstance beyond a reasonable doubt. State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625, review denied, 174 Wn.2d 1014, 281 P.3d 688 (2012).

The Court reviews the evidence in light of the Legislature's intent in enacting the aggravator. State v. Sweat, \_\_ Wn.2d \_\_, 2014 WL 1321012, at \*2 (No. 88663-6, April 3, 2014). The purpose of interpreting the aggravator is to carry out the intent of the Legislature. Id. If the words of the statute are clear, the inquiry is ended. Id. But if the statute is susceptible to more than one reasonable interpretation, it is ambiguous, and absent legislative intent to the contrary, the rule of lenity requires the Court to interpret the statute in favor of the defendant. Id.

The statute provides an exceptional sentence may be warranted if the jury finds “the current offense involved domestic violence, as defined in RCW 10.99.020, . . . and . . . [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i).

First, the evidence was not sufficient to prove a “pattern” of abuse beyond a reasonable doubt. The ordinary meaning of “pattern” is ““a regular, mainly unvarying way of acting or doing [behavior patterns].”” State v. Madarash, 116 Wn. App. 500, 514, 66 P.3d 682 (2003) (quoting Webster's New World Dictionary 1042 (1976)); State

v. Russell, 69 Wn. App. 237, 247, 848 P.2d 743 (1993). In Madarash, the Court held that, for purposes of the homicide by abuse statute,<sup>7</sup> regular, repeated and habitual acts of assault over a three-year period constituted a “pattern” of abuse. 116 Wn. App. at 514-15. In Russell, four or five assaults over an eight- to nine-month period were sufficient to establish a “pattern” of abuse. 69 Wn. App. at 247.

When applying the exceptional sentence statute, courts similarly require that the evidence establish several, repeated acts of abuse in order for the “ongoing pattern of abuse” aggravator to apply. See State v. Harris, 123 Wn. App. 906, 915, 99 P.3d 902 (2004), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (at least four incidents of abuse over six-month period); State v. Atkinson, 113 Wn. App. 661, 671-72, 54 P.3d 702 (2002) (at least three incidents of domestic violence over seven- to ten-month period); State v. Zatkovich, 113 Wn. App. 70, 52 P.3d 36 (2002) (several, repeated

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<sup>7</sup> The homicide by abuse statute provides:  
A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in *a pattern or practice of assault or torture of said child, person under sixteen years of age, developmentally disabled person, or dependent person.*  
RCW 9A.32.055(1) (emphasis added).

acts of abuse); State v. Quigg, 72 Wn. App. 828, 840-41, 866 P.2d 655 (1994) (“chronic, repeated” acts of abuse over several-year period); State v. Overvold, 64 Wn. App. 440, 442, 444, 825 P.2d 729 (1992) (repeated acts of abuse over several-year period).

Here, the evidence was not sufficient to establish a “pattern” of physical abuse beyond a reasonable doubt. The only concrete evidence of any prior physical abuse was the evidence from the November 2010 incident in which Mr. Schumacher pushed his wife and she fell to the floor. 5/28/13RP 108, 112, 128-30. In addition, the hospital social worker who spoke to Ms. Schumacher following the 2010 incident testified that Ms. Schumacher said her husband had hit her and shoved her once before, causing a black eye. 5/28/13RP 123. There was no testimony regarding when this alleged prior incident occurred, or the circumstances surrounding it. This evidence, in total, was not sufficient to prove a regular pattern of ongoing physical abuse.

Likewise, the evidence was not sufficient to establish a pattern of psychological abuse. The only evidence to support the allegation of “psychological abuse” was the Schumacher children’s testimonies that they often observed their parents yelling and screaming at each other while they were growing up, and observed their father call their mother

derogatory names, 5/29/13RP 14-15, 52-53, and Ms. Schumacher's hearsay statements to the medical providers alleging she had suffered years of verbal and emotional abuse from her husband, 5/28/13RP 109, 113-14, 122.

First, Ms. Schumacher's hearsay statements to the medical providers alleging prior verbal and emotional abuse were not sufficient to establish the aggravator. The medical providers did not explain what Ms. Schumacher meant by "verbal" or "emotional" abuse. It is likely she did not elaborate on what she meant. There was no further testimony about what this alleged emotional or emotional abuse consisted of. Ms. Schumacher's conclusory hearsay allegations regarding verbal and emotional abuse are not sufficient to survive a sufficiency challenge.

In addition, the testimonies of the Schumacher children regarding the yelling and arguments between their parents, and Mr. Schumacher's habit of calling his wife derogatory names, are likewise not sufficient to establish a pattern of psychological abuse. In cases in which the courts have held that the evidence was sufficient to establish a pattern of psychological abuse, the defendants' alleged actions were much more serious and harmful. In State v. Osalde, 109 Wn. App. 94,

95, 34 P.3d 258 (2001), for example, Osalde repeatedly telephoned his former girlfriend, threatening to kill her and vividly describing the various forms of violence he threatened to inflict on her and her family members. The victim said Osalde had “tortured [her] over the past four years with verbal, emotional, and physical abuse,” causing her to “liv[e] a nightmare.” *Id.* at 96-97. She said, “I have been spit on, slapped, punched, and kicked. I have been harassed and humiliated in the presence of family, friends, co-worker, and complete strangers. I have had my tires slashed. I was finally forced to move out of my own home to seek a safe haven for my child and myself.” *Id.*

In other cases upholding a pattern of psychological abuse aggravator, the facts were similarly much more egregious than in the present case. In State v. Zatkovich, 113 Wn. App. 70, 74, 52 P.3d 36 (2002), the defendant created fear and mental torment in the victim’s life: he appeared at her home at 3 a.m., cut the power lines, turned off the heating, menaced her at work, forced her off the road, hit her, extorted her, pulled wires off her car engine, threatened to cut her throat and watch her bleed to death, and told her son she was dead. Likewise, in State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), the defendant repeatedly threatened to kill the victim and threatened to

kill her parents, friends and family as she watched; threw their cat headfirst into a brick wall, stating that he could bash her head in the same way at any time; came to the bank where she worked and threatened her and forced her to cash checks; and burned down her home, killing her dog in the fire. Id. at 357-58, 362.

In contrast to the facts in those cases, Mr. Schumacher's habit of yelling at his wife and calling her derogatory names does not rise to the level of actual psychological abuse, particularly where the evidence shows Ms. Schumacher participated in the fights and yelled back at him. See 5/21/13RP 36, 133; 5/28/13RP 128, 140; 5/29/13RP 14, 52-53. In sum, the evidence was insufficient to prove the aggravator beyond a reasonable doubt and the exceptional sentence must be reversed.

#### E. CONCLUSION

The trial court abused its discretion in admitting Ms. Schumacher's out-of-court statements expressing fear of Mr. Schumacher and alleging past abuse, and in admitting evidence of prior disputes between the couple. Because the erroneously admitted evidence was unfairly prejudicial, the conviction must be reversed. In addition, the statutory aggravating factor was impermissibly vague in

violation of the Due Process Clause, and the State failed to prove the  
aggravator beyond a reasonable doubt. The exceptional sentence must  
therefore be reversed.

Respectfully submitted this 30th day of April, 2014.

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

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70807-4-I
v.	)	
	)	
JAMES SCHUMACHER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS, DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JAMES SCHUMACHER 368717 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF APRIL, 2014.

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