

FILED
12-03-15
Court of Appeals
Division I
State of Washington

NO. 72922-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JACOB DALTON JOHANSEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Where evidence of prior violence by the defendant against the victim was necessary to explain the victim's otherwise inexplicable delay in calling the police and refusal to fully cooperate with the investigation, did the trial court properly exercise its discretion in admitting limited generic references to the prior violence?

2. Where defense counsel proposed a later-invalidated jury instruction defining "prolonged period of time" that at the time of trial was a standard WPIC whose validity had never been questioned by the appellate courts, and where there is no reasonable probability that the jurors' finding that four to five years is a "prolonged period of time" would have been different had they been properly instructed, has the defendant failed to establish that his counsel rendered ineffective assistance by proposing the instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Jacob Dalton Johansen, with assault in the second degree by strangulation, with a special allegation that the crime was one of domestic violence and an

aggravating factor that the domestic violence offense was part of an ongoing pattern of psychological, physical, or sexual abuse. CP 8-9. In the first portion of the bifurcated trial, the jury found Johansen guilty as charged and found the domestic violence special allegation proven. CP 47-48. In the second portion of the trial, the jury found the aggravating factor proven. CP 51. The trial court imposed an exceptional sentence of 15 months in prison. CP 53-55. Johansen timely appealed. CP 62.

2. SUBSTANTIVE FACTS.

In December of 2013, 22-year-old Lexi Boring¹ had been dating the defendant, Jacob Johansen, for five years. RP² 292. They lived with their 18-month-old son in a home owned by Lexi's family in Des Moines, Washington. RP 289, 292, 295. Although their relationship had initially been positive, over the years it had deteriorated as Johansen grew violent during their frequent arguments. RP 292-94.

On December 9, 2013, Lexi texted Johansen while he was out target shooting in the woods with a friend. RP 297, 300. Lexi's

¹ Because multiple members of the Boring family testified at trial, this brief will refer to each of them by first name to avoid confusion. No disrespect is intended.

² The five volumes of the verbatim report of proceedings are consecutively paginated, and will be collectively referred to as "RP."

brother's girlfriend, Bre, who was staying with them at the time, had told Lexi that Johansen had recently come on to her, and Lexi texted Johansen to ask if it was true. RP 300. Johansen did not respond. RP 300. After putting their son to bed and watching Netflix, Lexi eventually fell asleep in the bedroom she shared with Johansen. RP 299-301.

Sometime after 10:00 p.m., Johansen returned and woke Lexi up. RP 301. Lexi observed that Johansen appeared very intoxicated and wore a scary expression that signified to her that he wanted to fight. RP 301. He was angry that Lexi had accused him of cheating and was yelling at her and calling her names. RP 302. Lexi got up from the bed as she argued with Johansen. RP 303.

When Johansen got right in Lexi's face as he yelled at her, she pushed him away in an attempt to move around him and leave the room. RP 303. Lexi is 5'1" tall, while Johansen is approximately 5'10". RP 153, 579. Johansen then grabbed her by the neck and pinned her to the sliding glass door in their bedroom, repeatedly asking if she wanted to "get tough." RP 303-04. When Lexi repeatedly said no, Johansen eventually released her and she went outside, crying. RP 304-05.

As she went to retrieve her cigarettes from Johansen's car, Lexi saw that Johansen's friend, Kyle Wilson, was still in their driveway. RP 304. As Lexi continued to cry while she smoked a cigarette, Wilson approached her and asked if she was okay. RP 306. Lexi told him that Johansen was being "crazy" and that she just wanted to sleep and didn't want anything to happen. RP 306. When Lexi went back inside a few minutes later, Wilson, who planned to spend the night there, stated that he was going to wait outside while Lexi spoke to Johansen. RP 307.

Believing that the argument was over, Lexi returned to the bedroom to go back to sleep. RP 307. She found Johansen still angry and packing up his belongings. RP 208. Because she believed that moving out in the middle of the night was unnecessarily drastic, Lexi encouraged him to sleep in the front room with Wilson and leave in the morning if that was what he still wanted to do. RP 308. When Johansen began yelling at her and getting in her face again, Lexi grew scared and asked him to leave, which Johansen now refused to do. RP 309. When Lexi pushed Johansen back so that she could get around him and leave the room, he threw her to the floor, climbed on top of her, and began strangling her with his hands. RP 311. Lexi could not breathe and

began to black out, believing that she was going to die. RP 311. As her body started to shut down, Lexi lost control of her bladder and urinated on herself. RP 312. Shortly thereafter, Johansen released her, and she immediately vomited on the floor. RP 312. Johansen then kicked her in the side. RP 331.

When Lexi got to her feet, Johansen threw her into a nearby computer desk. RP 312. Lexi crawled onto the bed, at which point Johansen grabbed a picture frame and broke it over her head, causing broken glass to fall onto the bed. RP 313. He then picked up the bag he had packed and walked out to the driveway. RP 322. As Lexi remained on the bed crying, she became concerned that Johansen might use his key to re-enter the house while she was sleeping, so she went outside to where Johansen and Wilson were loading Johansen's belongings into his car and asked for Johansen's house key, which he gave her. RP 323. Johansen and Wilson then drove off as Lexi went back inside and called her mother. RP 323-24.

Unbeknownst to Johansen and Lexi, Johansen's phone had called Lexi's father, Scott Boring, during the assault. RP 405. When Scott answered the call, he could hear a large commotion suggesting that something was going on. RP 405. Concerned,

Scott drove over to their house while Lexi's mother, Rhonda Boring, called 911. RP 405-06. When Lexi called Rhonda after Johansen had left, Rhonda explained about the call they had received from Johansen's phone and told Lexi that the police had already been called, and that Lexi should also call 911 herself. RP 324. Lexi was reluctant to call 911 because she still loved Johansen and did not want him to lose the ability to see his son, and was worried about what Johansen might do if she reported him to the police. RP 325. However, because Rhonda had already notified the police, Lexi followed her mother's instruction after a minute or so and called 911. RP 325.

As Scott was driving to Lexi's house, he connected with Johansen on the phone. RP 406. Johansen reported that he had gotten into a violent fight with Lexi, and that he was now leaving the house. RP 406. When Scott arrived shortly after Lexi called 911, Johansen was just backing his vehicle out of the driveway. RP 407. Scott did not attempt to talk with him further, and instead went into the house to check on Lexi. RP 407. He found her in the living room, crying, with makeup running down her face, her hair in disarray, and red compression marks on her neck. RP 407. Her and Johansen's bedroom was in disarray as well, with items

knocked over, a broken picture frame on the bed, and broken glass all around. RP 408.

Police officers arrived shortly after Scott. RP 409. Des Moines Police Officer Jay West observed that Lexi was crying and very distraught, appeared fearful, and had redness on her neck. RP 436, 441. Lexi was limping, her clothes were disheveled, and her pants were wet from urinating on herself. RP 436. In the bedroom, West observed that the computer monitor on the desk was knocked over, and the bed was covered in broken glass and a broken picture frame. RP 437-38. West also observed evidence of vomit on the floor of the bedroom. RP 438. Although Lexi told West what had happened, when he asked her to provide a formal statement, she cried and said, "I don't want to. He's probably going to kill me." RP 444. Against the advice of the medical personnel who treated her at the scene, Lexi refused to allow them to transport her to the hospital. RP 444.

Lexi's mother soon arrived to stay with her overnight. RP 420, 423. Like others before her, Rhonda observed that Lexi was upset and disheveled, her pants were wet, and she had marks on her neck. RP 421-22. Lexi's knee had also suffered an injury

during the assault, but she refused to go to the hospital until Rhonda took her the next morning. RP 423.

The day after the assault, Johansen spoke to Detective David Shields about the incident. RP 459. Johansen stated that he had been in the mountains with a friend the day before, and had received several text messages from Lexi while he was gone. RP 461. He stated that when he returned home, the argument continued in person, but denied that he had any physical contact with Lexi whatsoever while he was at the house. RP 463.

Johansen stated that his friend had stood outside during the incident and had only come into the house "for just a second." RP 462. Wilson, who had come to the police station with Johansen, told a detective separately that he was in the driveway during the incident and had heard Johansen and Lexi arguing, but had not gone into the house. RP 515.

When Shields met with Lexi two days after the incident, he observed that she had a brace on her right knee, some red marks and scrapes on her neck, scratches on her leg, and bruising near her left eye and on the right side of her neck. RP 466-67. Although she was initially calm, when he asked her to tell him about the incident, tears welled up in her eyes as she began to recount the

incident. RP 466-67. Shields knew from his personal experience as a domestic violence detective that strangulation does not always leave physical signs, but that when it does, the effects can include redness on the neck, bruising, and loss of bladder control, among other things. RP 502.

At trial, Lexi, Scott, Rhonda, Officer West, Detective Shields, and another detective who spoke to Wilson all testified to the facts above. Wilson testified on Johansen's behalf and claimed that Lexi had met Johansen at the front door when he and Wilson arrived around 8:00 or 9:00 p.m. RP 545, 550. Wilson stated that Lexi had immediately started yelling at Johansen and accusing him of cheating on her. RP 550, 563. Wilson claimed that he had entered the house with Johansen and remained in the living room for six to eight minutes before going outside for five minutes, coming back inside for another five minutes, and then going outside again. RP 563-65. Wilson claimed that he only heard Lexi yelling at Johansen in the bedroom, and at no time heard sounds of a struggle or Johansen yelling back at Lexi, though he also admitted that there were times while he was outside that he could not hear what was going on inside the house. RP 563-66.

Wilson claimed that shortly after he went outside the final time, Lexi and Johansen emerged from the house together, and although Lexi was crying, she did not appear injured and denied that anything was wrong other than not wanting Johansen to leave. RP 566-68. Although the events of Wilson's account appeared to span less than thirty minutes, Wilson stated that it was midnight by the time he and Johansen both left and went their separate ways. RP 569.

On cross-examination, Wilson acknowledged that Johansen was his best friend and that his testimony differed from his prior statement to police in numerous ways. RP 572, 577, 585, 595-96. Wilson acknowledged that he had not told police about going in and out of the house. RP 585. Additionally, in his statement to police he had reported hearing Johansen and Lexi arguing rather than only Lexi yelling, had reported hearing what sounded like shoving going on in the bedroom, and had not mentioned anything about Lexi yelling at Johansen about cheating. RP 577, 585, 595-96. On the stand, Wilson claimed that the noise he'd previously described as "shoving" actually sounded like shuffling or something being grabbed off a shelf; however, he was unable to explain why, if that were true, he had previously described the noise as "shoving."

RP 577-78. He confidently asserted that his memory of the incident was better at trial than when he gave his statement just a few days after the incident. RP 586. When Wilson was asked if the differences between his statement to police and his testimony at trial came "after you've had months of talking about this with [Johansen]," he responded, "Correct." RP 596.

Shelley Kelly, the mother of another of Johansen's best friends, testified briefly that she recalled a prior discussion with Johansen and Lexi in which Lexi had mentioned in a laughing tone that someone had once told her that if someone was in a car accident and urinated on themselves, they could automatically receive an extra \$10,000 in compensation for public humiliation. RP 534. However, Kelly acknowledged that Lexi and everyone else was laughing, and Lexi did not indicate that she had ever done something like that, despite previously being in a car accident, or had any plans to do something similar in the future. RP 534, 540.

Johansen testified last. RP 599. He did not remember the statement that Kelly attributed to Lexi. RP 643. Like Wilson, Johansen claimed that Lexi had immediately started accusing him of cheating when he arrived home. RP 613-15. He denied touching Lexi at all during the incident, and claimed that the

disarray in the bedroom was the result of Lexi throwing objects around the room as he packed a bag. RP 617-18, 627. He stated that he was unsure whether the picture frame had been broken while he was in the room. RP 629-30. Contrary to Wilson's account, Johansen corroborated Lexi's statement that she initially remained in the bedroom when he went out to the driveway at the end of the incident. RP 620.

On cross-examination, Johansen admitted that he was already very angry at Lexi when he walked in the front door. RP 636. He acknowledged that when he gave his statement to police, he told them that Lexi had been in the bedroom when he came home and that he had entered the bedroom rather than her coming to the front door. RP 639. He also acknowledged that although he had testified on direct examination to being in the house for 15 to 30 minutes, consistent with Wilson's trial testimony of having gone in and out of the house several times for five minutes or more each time, when he spoke to police the day after the incident Johansen told them that he had been in the house for less than five minutes. RP 645. Johansen denied having admitted to Lexi's father that a violent fight had occurred. RP 652.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING LIMITED EVIDENCE OF PRIOR DOMESTIC VIOLENCE UNDER ER 404(b).

Johansen contends that the trial court committed reversible error when it admitted evidence of his prior bad acts under ER 404(b) because there was no proper purpose for admission and the prejudice outweighed the probative value. This claim should be rejected. The evidence of Johansen's prior violence against Lexi was admissible to explain why she did not immediately report the incident to the police and was reluctant to fully participate in the investigation, and the trial court admitted only vague references to prior violence rather than evidence of specific prior incidents to ensure that the probative value was not substantially outweighed by the danger of unfair prejudice. The trial court thus properly exercised its discretion in admitting the limited evidence of prior domestic violence in the relationship.

- a. Relevant Facts.

During pretrial motions, the State sought a finding of admissibility under ER 404(b) as to testimony by Lexi and her parents regarding prior violence by Johansen against Lexi. CP 78-83; RP 23-34. When the trial court expressed uncertainty

regarding whether live testimony was required to prove by a preponderance of the evidence that the prior acts had occurred, Lexi came in and testified at the ER 404(b) hearing. RP 87-89, 140-228. She described a history of violence that began about a year in to their five-year relationship and subsequently worsened with time, with Johansen eventually becoming violent on an almost-daily basis. RP 143-48. In the beginning, Johansen would push her during arguments, and then over time began regularly slapping her in the face and pinning her to the wall by her neck, sometimes choking her, whenever they would argue. RP 144-47, 152, 167, 216.

Lexi described several of the more severe prior incidents, including multiple incidents where Johansen knocked a hole in the wall using Lexi's head, an incident where he pushed her onto some stairs while she was pregnant, and an incident where he attempted to tear her tongue out of her mouth. RP 148, 155-57. The most severe incident occurred when Johansen head-butted Lexi in the face during a camping trip, knocking her unconscious, and then drove away before she woke up, leaving her bleeding in the dirt and stranded. RP 148, 155-60.

The State offered numerous purposes for admission of the prior bad acts, including to explain why Lexi had not called 911 promptly when the assault ended, as evidence of Johansen's motive and intent, and as evidence of a common scheme or plan. CP 78-79. The State noted that these purposes were not the same as using the prior bad acts for propensity purposes.³ CP 79. Johansen argued that Lexi's credibility was not an element of the crime and that for the jury to use prior acts in determining whether the charged crime occurred would necessarily be to use the prior acts as evidence of Johansen's propensity for violence. RP 252.

The trial court stated that it was aware of the need to avoid the danger of prior bad acts being misused as propensity evidence, and that a limiting instruction would be necessary if any prior acts were admitted. RP 98. Citing State v. Baker,⁴ the court found that evidence of prior violence by Johansen was necessary to explain Lexi's delay in calling the police so that the jury could accurately

³ Contrary to Johansen's assertion in the Brief of Appellant, the State did not argue that the prior bad acts were admissible simply because they were necessary to show that "this is how Mr. Johansen acts." Brief of Appellant at 3 (quoting RP 32). The quoted comment instead occurred in the context of the State's argument that the prior bad acts were admissible to show Johansen's motive and intent. RP 32.

⁴ 162 Wn. App. 468, 259 P.3d 270 (2011). The Washington Supreme Court decision in State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014), had not yet been issued at the time of trial in this case.

assess her credibility. RP 97, 258. The court also found that the prior violence demonstrated the hostile relationship between Johansen and Lexi and was thus relevant to show motive. RP 97.

In weighing the probative value of the evidence against the danger of unfair prejudice, the trial court found that evidence of the prior violence was necessary because the jury could not fairly assess Lexi's credibility without it. RP 98-99. However, to ensure that the probative value was not outweighed by the danger of unfair prejudice, the court excluded evidence of the most severe prior assaults, as well as any testimony regarding the specifics of any of the prior incidents, and instead only permitted general testimony that there had been violence in the relationship and that Johansen had grabbed Lexi's neck or choked her on a number of occasions in the past. RP 275.

Consistent with the trial court's ruling, Lexi's testimony only briefly touched on prior violence by Johansen. RP 293-94. She testified that as the relationship deteriorated, Johansen had at times become violent with her, and that the violence had escalated over time, with the worst years being 2010 or 2011. RP 293. When asked if Johansen had ever put his hand around her throat to choke her during the "times of violence," Lexi simply responded,

"Yeah." RP 294. When asked how often that would happen, she simply said, "very often." Scott and Rhonda Boring also testified that they became aware during the relationship that Johansen had been violent toward Lexi. RP 404, 415.

The trial court gave the jury a limiting instruction proposed by Johansen, which stated that the testimony regarding alleged prior acts of domestic violence could be considered only for the purpose of evaluating Lexi's credibility with respect to the charged offense, and for no other purpose. CP 20, 125.

b. The Trial Court Properly Exercised Its Discretion In Admitting Limited Evidence Of Johansen's Prior Violence Against Lexi.

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, such evidence may be admissible for other purposes. ER 404(b); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is relevant to that purpose, and (4) determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. Kilgore, 147 Wn.2d 288,

292, 5 P.3d 974 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion, and may be upheld on any grounds supported by the record. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); see In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Where the victim of a domestic violence offense has behaved in a way that would otherwise be inexplicable to the jury, such as by recanting, giving inconsistent statements, or delaying reporting the offense, evidence of prior bad acts by the defendant has overriding probative value and is admissible despite the risk of unfair prejudice. Gunderson, 181 Wn.2d at 924 n.2, 925; State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270 (2011). Here, although Lexi did not make inconsistent statements about the assault, she failed to call 911 at the first opportunity. RP 322. Instead, after Johansen left the room Lexi took steps to get her key back and then called her mother. RP 323-24. Lexi did not disclose

the details of what had occurred, but only answered affirmatively when her mother asked if Johansen had hurt her. RP 324, 418. Even after her mother instructed her to call 911, Lexi resisted and thought about it for another minute or so before actually reporting the strangulation to police. RP 324-25, 418. Once the police arrived, Lexi was unwilling to make a formal statement. RP 329.

Had evidence of the prior violence in the relationship not been admitted, the jury would likely have found Lexi's delay and hesitation in calling 911, and her refusal to give a formal statement, inexplicable and inconsistent with her claim that Johansen had just strangled her, and as a result would have reached an inaccurate assessment of her credibility. Furthermore, the trial court minimized the risk of unfair prejudice by admitting only limited generic references to Johansen's prior violence. The admitted evidence of prior violence thus had a high probative value that was not substantially outweighed by the risk of unfair prejudice—therefore having the “overriding probative value” required by Gunderson—and the trial court properly exercised its discretion in admitting it. Gunderson, 181 Wn.2d at 924 n.2, 925; Baker, 162 Wn. App. at 475.

Johansen's arguments to the contrary are based on numerous misreadings of Gunderson. Contrary to Johansen's citation to that case for the proposition that there was no proper purpose for the admission of his prior bad acts, Gunderson did not address or restrict the purposes for which evidence of prior domestic violence could be offered under the second step of the ER 404(b) analysis; instead, it addressed only the fourth step, the circumstances in which evidence of prior domestic violence would have sufficient probative value to outweigh the danger of unfair prejudice. Brief of Appellant at 7; Gunderson, 181 Wn.2d at 923.

Additionally, Gunderson did not, as Johansen contends, abrogate Baker's holding that evidence of prior domestic violence is admissible to explain a victim's delay in reporting. Brief of Appellant at 7-8; Gunderson, 181 Wn.2d at 924 n.2. Although the Gunderson court cited a situation where the State needs to "explain a witness's otherwise inexplicable recantation or conflicting account of events" as its primary example of when the required overriding probative value would be established, the court explicitly stated that it was not "confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness." Id. at 925 n.4. Far from rejecting Baker, the

Gunderson court approved of Baker's holding but found it inapplicable to the facts of Gunderson's case, stating that "the evidence in [Baker] was clearly admissible to explain why the victim did not report prior times⁵ the defendant attempted to strangle her" Gunderson, 181 Wn.2d at 924 n.2.

Finally, Gunderson did not hold, as Johansen contends, that the State must first establish that a victim's testimony is "unreliable" before evidence of prior domestic violence may be admitted as relevant to her credibility. Brief of Appellant at 7-8. Gunderson did not overrule the many cases in which evidence of prior domestic violence has been found admissible to explain why the victim's prior statement or conduct is unreliable, rather than her testimony at trial. E.g., Baker, 162 Wn. App. at 475 (discussed with approval in Gunderson, 181 Wn.2d at 924 n.2); State v. Grant, 83 Wn. App. 98, 106-09, 920 P.2d 609 (1996) (cited with approval in Gunderson, 181 Wn.2d at 924 n.2).

When the Gunderson court stated that "the mere fact that a witness has been the victim of domestic violence does not relieve

⁵ In Baker, the victim did not timely report one of the two charged strangulations, as well as both of the prior uncharged strangulations. Baker, 162 Wn. App. at 472. The State does not contend that evidence of prior acts of domestic violence would be admissible solely to explain why a victim failed to timely report uncharged incidents of domestic violence.

the State of the burden of establishing why or how the witness's testimony is unreliable," it was referring to the fact that the State in Gunderson's case had needed to show that the victim's testimony was unreliable because she had testified that no assault occurred. Gunderson, 181 Wn.2d at 924-25. The Gunderson court was simply observing that evidence of prior domestic violence was insufficiently probative of the victim's credibility under the circumstances of that case. Id.

Because Gunderson preserved Baker's holding that prior acts of domestic violence are admissible when necessary to explain a victim's failure to timely report the charged crimes, the evidence of Johansen's prior violence was admitted for a proper purpose. Id. at 924 n.2, 925 n.4. Because the evidence of prior violence in this case was critical to explain why Lexi did not immediately call 911 following the charged assault, and because the risk of unfair prejudice was minimized by admitting only very limited evidence of prior violence, the evidence admitted by the trial court had "overriding probative value" as required by Gunderson and the trial court properly exercised its discretion in admitting the evidence.

c. Any Error Was Harmless.

Even if this Court determines that the trial court abused its discretion in admitting the limited evidence of Johansen's prior violence against Lexi, any such error was harmless in light of the overwhelming evidence of Johansen's guilt. The erroneous admission of ER 404(b) evidence is a non-constitutional error and is therefore harmless if there is no reasonable probability that the result of the trial would have been different had the error not occurred. Gunderson, 181 Wn.2d at 926; State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Even if the trial court had not admitted any evidence of prior domestic violence by Johansen, the remaining evidence would still have led the jury to find Johansen guilty beyond a reasonable doubt of strangling Lexi. Lexi's account of the assault was corroborated by everything from the observations of other witnesses to the physical evidence at the scene to statements by Johansen himself. Multiple witnesses observed that immediately after the incident Lexi was fearful and crying, with her hair and clothes in disarray, and had red marks on her neck, an injury to her knee, and urine on her pants. RP 407, 421-23, 436, 441. Several days later, a detective observed the same injuries plus scratches on her legs and bruises

that were now appearing on her face and neck. RP 466-67.

Testimony by a domestic violence detective established that marks on the neck, loss of bladder control, and vomiting are among the potential effects of strangulation. RP 502.

Witnesses at the scene also observed that the bedroom was in disarray consistent with Lexi's account of the incident, with items knocked over on the desk into which Johansen had thrown her, a broken picture frame and broken glass on the bed where Johansen had broken it over her head, and vomit on the floor where she vomited immediately after the strangulation. RP 408, 437-38. Furthermore, the sounds of a commotion heard when Johansen's phone accidentally called Scott Boring during the assault were consistent with Lexi's account of a physical struggle, and Johansen admitted to Scott Boring immediately after the incident that he had just gotten into a violent fight with Lexi. RP 405-06.

Contrastingly, the testimony of Johansen and Wilson was inconsistent with their prior statements and was contradicted by the other evidence. Wilson's testimony that he had been inside the house for much of the altercation and had only heard Lexi yelling at Johansen, with no sounds of a struggle, was inconsistent with his prior statement to police that he had been outside the whole time

and had heard shoving and Johansen and Lexi arguing, with Johansen's prior statement that Wilson had come into the house only momentarily, and with Lexi's testimony that Wilson had been outside the whole time. RP 305-07, 506, 515, 563, 577, 595-96. Wilson admitted on the stand that Johansen was his best friend and that his statements about the incident had changed after months of talking about the case with Johansen. RP 596.

Johansen's testimony was similarly inconsistent with his prior statement to police and with the other evidence. Although he claimed at trial that Lexi had met him at the front door, his prior statement corroborated Lexi's testimony that she was in the bedroom when Johansen arrived home. RP 301, 613, 639. Although he claimed at trial that he was in the house between 15 and 30 minutes, roughly the amount of time to which Wilson had already testified, Johansen's statement to police indicated that he was in the house for less than 5 minutes. RP 645. Neither timeline was consistent with Wilson's testimony that they had arrived at the house around 8:00 or 9:00 p.m. and had left around midnight. RP 545, 569.

Johansen confirmed that he spoke to Scott Boring immediately after the incident, but denied having told Scott that he

had been in a violent fight with Lexi. RP 622, 652. However, Johansen admitted that he respected Scott a lot and that Scott was a reasonable person who cared about Johansen. RP 652, 654. Most importantly, Johansen's denial of any physical contact with Lexi was inconsistent with the injuries to her body and the signs of urination and vomiting, and Johansen's argument that Lexi had fabricated the allegations to get him in trouble was inconsistent with Lexi's refusal at the scene to give a formal statement or go to the hospital. RP 436-38, 444, 627, 718-27.

Given all of the evidence corroborating Lexi's testimony and discrediting Johansen's and Wilson's testimony, there is no reasonable probability that the result of the trial would have been different had the ER 404(b) evidence not been admitted. Any error in admitting the evidence was therefore harmless, and Johansen's conviction should be affirmed.

2. JOHANSEN HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN PROPOSING A THEN-UNQUESTIONED PATTERN INSTRUCTION.

Johansen contends that he was denied his constitutional right to the effective assistance of counsel when his trial counsel proposed what was at the time the standard WPIC instruction

defining “prolonged period of time,” which has since been invalidated by our supreme court as a comment on the evidence. This claim should be rejected. Johansen has failed to establish that it was unreasonable for his counsel to offer the then-unquestioned instruction and that the jury’s verdict would have been different had defense counsel proposed a proper instruction.

a. Relevant Facts.

At trial in October 2014, defense counsel and the State both proposed the standard WPIC jury instruction, WPIC 300.17, regarding the charged aggravating factor.⁶ CP 41, 108; WPIC 300.17. The instruction stated that the crime was an aggravated domestic violence offense if victim and defendant were family or household members and “the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents of abuse over a prolonged period of time.” CP 41, 108; WPIC 300.17. The instruction then stated, “The term ‘prolonged period of time’ means more than a few weeks.” CP 41; WPIC 300.17. The trial court gave the instruction proposed by the parties. CP 50.

⁶ The last paragraph of the State’s proposed instruction deviated slightly from former WPIC 300.17 in ways that are not relevant to this appeal. CP 108; WPIC 300.17.

During the aggravator phase of the bifurcated trial, Lexi testified about Johansen's prior violence against her in more detail than had been permitted during the guilt phase. RP 764-843. As in the guilt phase, Lexi testified that the physical violence had begun in 2009, about one year into her five-year relationship with Johansen, and had grown worse over time. RP 765-69. In closing argument for the aggravator phase, defense counsel argued solely that the prior incidents of violence had been entirely fabricated by Lexi. RP 891-95. The jury found the aggravating factor proved beyond a reasonable doubt, and the trial court imposed an exceptional sentence of 15 months in prison on that basis. CP 51, 53-55.

In July 2015, the Washington Supreme Court held that WPIC 300.17's statement that "[t]he term 'prolonged period of time' means more than a few weeks" was inaccurate and an improper judicial comment on the evidence, because it was not true that any period of time that was "more than a few weeks" was necessarily "a prolonged period of time" as a matter of law. State v. Brush, 183 Wn.2d 550, 558-59, 353 P.3d 213 (2015).

b. Johansen's Ineffective Assistance Of Counsel Claim Fails.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. CONST. amend. VI; Wash. CONST. art I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of showing that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

i. Johansen has failed to establish that his counsel's performance was deficient.

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. Grier, 171 Wn.2d at 35.

The Washington Supreme Court has held that where defense counsel proposes a then-unquestioned WPIC prior to the

issuance of a decision making clear that the instruction is erroneous, counsel's performance is not deficient. State v. Kylo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009) (citing State v. Studd, 137 Wn.2d 533, 550-51, 973 P.2d 1049 (1999)). This holding forecloses Johansen's claim. Johansen has not identified any decisions questioning WPIC 300.17 prior to his trial, and the supreme court did not issue its decision in Brush until months later. Brief of Appellant at 16-18; Brush, 183 Wn.2d 550. Johansen has thus failed to meet his burden to establish that defense counsel's use of WPIC 300.17 fell below an objective standard of reasonableness at the relevant time.

- ii. Johansen has failed to establish that the allegedly deficient performance prejudiced him.

Even if this Court were to decide that defense counsel rendered deficient performance in proposing the later-invalidated WPIC, Johansen has failed to establish that he was prejudiced. In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229.

Johansen does not even attempt to make such a showing. His only claim of prejudice is based on the assertion that the proposed instruction "required the jury to find the aggravating factor applied" to Johansen, and that counsel thus essentially urged the jury to find the State had proved its case, which Johansen contends "is plainly prejudicial." Brief of Appellant at 18. However, the proposed instruction in no way required the jury to find that the aggravating factor applied, because the key point of dispute between the parties was whether the alleged prior incidents of abuse had actually occurred, with defense counsel vigorously arguing in closing argument that Lexi had fabricated all of the prior incidents of violence. RP 891-95; CP 50.

Moreover, as Johansen concedes in his brief, "the State's evidence established that the acts spanned several years." Brief of Appellant at 18. Testimony by Lexi and her parents established that the violence began in 2009 and continued through 2013, a span of more than four years. RP 293-94. Johansen did not dispute the timing of the incidents of prior violence; he disputed that they had ever occurred. RP 652.

Thus, if the jury found Lexi credible and determined that there was in fact a history of domestic violence in the relationship, any reasonable jury would also necessarily have found that the prior incidents occurred over “a prolonged period of time.” See State v. Bell, 116 Wn. App. 678, 684, 67 P.3d 527 (2003) (holding that whether abuse prior to July 2001 charged offense started in September 2000, Christmas 2000, or Spring 2001, it occurred over a “prolonged period of time”); State v. Schmeck, 98 Wn. App. 647, 651, 990 P.2d 472 (1999) (threats over a period of three years sufficient to constitute a “prolonged period of time”). Johansen has thus failed to establish a reasonable probability that the result of the aggravator phase would have been different had defense counsel not proposed the later-invalidated definition of “prolonged period of time.”

Because Johansen has failed to establish that his counsel’s performance was both deficient and prejudicial, his claim of ineffective assistance of counsel fails, and this Court should affirm his exceptional sentence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Johansen's conviction and sentence.

DATED this 3rd day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Gregory Link, the attorney for the appellant, at Greg@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Jacob Dalton Johansen, Cause No. 72922-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of December, 2015.

W Brame

Name:

Done in Seattle, Washington