IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62552-7-I
Respondent,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
CLIFTON KELLY BELL,	)	
	)	
Appellant.	)	FILED: December 20, 2010
	)	
	)	
	)	

Appelwick, J. — Bell appeals his fourteen convictions resulting from several acts of domestic violence, witness tampering, and violations of a domestic violence no-contact order. Bell also appeals the jury's special verdict that one count involved a domestic violence pattern of abuse under RCW 9.94A.535(3)(h)(i). Bell raises several arguments in this appeal. Bell argues that he received ineffective assistance of counsel on several grounds, including failure to renew a severance motion, failure to move for a separate proceeding for the pattern of abuse aggravating circumstance, failure to object to the admission of certain evidence, and failure to raise a same criminal conduct

argument at sentencing. Bell also claims that he was denied his right to unanimous jury verdicts on several grounds. Bell alleges that the statute authorizing the pattern of abuse aggravating circumstance is void for vagueness and overbroad. Bell also challenges the language of a verdict form and multiple jury instructions as inaccurate and constituting improper comments on the evidence. Finally, the State concedes that under State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), several witness tampering charges constituted a single unit of prosecution, but the parties dispute whether more than one unit of prosecution remain. We hold that only one unit of prosecution exists for the witness tampering charges and reverse counts V, VI, VII, and VIII. We otherwise affirm the convictions.

FACTS

J.F. moved from Port Townsend to the Seattle area for school when she was 17 years old. She met 18 year old Clifton Bell through a mutual friend soon after arriving in Seattle. J.F. and Bell dated for about two and a half years. Early in their relationship, Bell moved in with J.F. who had rented an apartment in the Shoreline area, located in King County. At first, their relationship was generally good. But, shortly after they moved in together, Bell began physically abusing J.F. At trial, J.F. testified to physical abuse occurring during their relationship.

The first conflict occurred when J.F. and Bell had friends over to their apartment. Bell's friend asked J.F. to hand him something. J.F. testified that Bell replied, "'You don't ask her to hand you anything. You ask me to tell her to

hand it to you.'" After their guests left, J.F. confronted Bell about his disrespectful behavior. Bell "got really mad" and "started yelling at" J.F. He then grabbed J.F.'s nose ring and ripped it partially out, causing it to bleed. He also grabbed her neck, continuing to yell.

On February 17, 2006, another conflict occurred. That night, a friend called Bell and asked if he could drop off his girl friend at J.F.'s apartment. Bell agreed without consulting J.F. After he hung up, J.F. angrily approached him, and Bell grabbed her arm and threw her, dislocating her shoulder.

Bell testified in his own defense. He agreed that on February 17 he and J.F. had a disagreement. He said that J.F. sprinted to answer the phone before Bell and tripped over the coffee table. When she fell, she hit the armrest of the couch, causing the shoulder dislocation.

On July 26, 2006, J.F. was living in her own apartment in Lynnwood, in Snohomish County. The apartment was on the second story and had a private balcony. Bell was visiting and J.F. demanded that he return his key to her apartment. Knowing that Bell had reached a level of anger where he could potentially be violent, J.F. stood outside the front door of the apartment and asked him to toss her the key. Bell told her to come and get the key. When she reached for the key, Bell pulled her into the apartment. Bell then started hitting J.F. When she ran for the front door, he closed and bolted it so she could not escape. Hoping to signal someone, she ran towards the balcony. She grabbed the balcony rail to prevent Bell from pulling her by the waist back into the apartment. Bell let go, and J.F. flipped over the rail and onto her back, hitting

the ground fifteen feet below, causing a fractured hip and internal bleeding.

Bell said that he and J.F. were fighting regarding keys to their respective apartments. He agrees that she demanded her key back. He testified that when he tried to offer her key to her, she turned and sprinted for the balcony, "tackled" the closed screen door, bounced off the screen, and flipped over the balcony.

Around September 30, 2006, J.F. and Bell were dating on and off and not getting along very well. While visiting a friend's house, J.F. and Bell were eating together when J.F. placed her hand on Bell's leg. Bell angrily accused J.F. of wiping ketchup on his pants. When she denied it, Bell stood up and threw a glass plate, hitting her on the head. Blood immediately start flowing from J.F.'s head. Bell apologized and assisted J.F. in stopping the flow of blood.

J.F. and Bell went to his mother's house to get her assistance in tending to the wound. That night they slept in his sister's bed at his mother's house. After apologizing, Bell wanted to have sex. J.F. told Bell, "'No. I don't want to do this.'" Bell forcibly removed her pants and underwear despite her protests. He pinned her down and began having sexual intercourse, telling J.F., "'It will be okay'" while she continued to say no.

Bell disputed the September 30, 2006, incidents entirely. He testified that the only injury J.F. received to her head occurred under different circumstances. He testified that he lived in the bottom apartment of a split level home. He stated that J.F. arrived and became upset when she realized that Bell had been watching a movie with some female friends. He said he cracked open a window to pass her the movie and then closed the window and locked the latch. He

testified that when he turned away, he heard a noise and looked back, seeing blood on J.F.'s hands and forehead. She left immediately, driving away in her car.

J.F. testified that during another incident, she and Bell were having sex when he suggested anal intercourse. When she refused, Bell penetrated her anus while she cried.

Bell testified that he never had sex with J.F. against her will at any time.

Finally, on September 23, 2007, J.F. lived in a small studio apartment in Lake City, located in King County. Bell lived with J.F. on and off, but they did not live together full-time due to the conflict in their relationship. That day, J.F. and Bell had arranged for Bell to come over when he got off work from his job at a restaurant. J.F. let Bell in when he knocked on the door at about 3:00 a.m. At first things were fine, but then J.F. became angry that Bell was mistreating her dog. When she told Bell to stop, they began to argue. J.F. testified that she could tell Bell had been drinking. J.F. walked out the front door of the apartment and tried to call the dog to come outside. Bell restrained the dog so it could not leave. He then threw J.F.'s cell phone, breaking it. He coaxed J.F. back inside and shut the door behind her. Bell then punched J.F. in the eye, and J.F. began to cry. He then grabbed her and pulled her to the ground. He laid her on her back and sat on her chest with his legs on each side of her, pinning her arms. J.F. testified that Bell swore at her and asked her, "'Do you want to see stars?'" He placed his hands around her neck and squeezed so that she could not breathe for between two and 30 seconds.

J.F. testified that after the strangulation, Bell stood up and "got nice" and that he put his arm around J.F. and asked her, "'[W]hy do you have to act like that?'" She said he unlocked the front door, saying "'I'll even keep the door unlocked.'" She testified that he calmed down but then "he went right back into what he was before." She explained that by this she meant that "his demeanor" told her that "he wanted to hurt me."

J.F. testified that Bell grabbed her hair and pulled her towards the floor, tearing the hair out of her scalp. He then locked the front door and removed the key to the deadbolt. Because the deadbolt could not be opened from the inside without having a key, this prevented J.F. from leaving. J.F. testified that every time she tried to walk towards the door of the (very small) apartment, he would get between her and the door and tell her that she was not going anywhere. She testified that when she tried to go to the bathroom to see her face he kept "flinch[ing]" at her to scare her. Bell then located some ice for her swelling eye. He also poured her a shot of rum and forced her to drink it despite her protests, threatening to hit her with the bottle if she did not take the shot.

J.F. testified that Bell then started to get "nicer," putting on a movie and helping her make the bed. Suddenly, Bell turned and kicked her into the wall. Finally, the two got in bed and Bell fell asleep. J.F. testified that the time from when Bell arrived at J.F.'s apartment until he fell asleep was about two hours.

Once Bell was asleep, J.F. got out of bed, used a separate key on her car keys to open the deadbolt, and left. She drove to the nearby Safeway and used a pay phone to call 911. The fire department responded, as well as the police.

J.F. explained to the first responders, including Seattle Police Officer Derek Norton and Seattle Fire Department Lieutenant Raymond Hammer, that she had been assaulted by her boyfriend. J.F. was transported to Northwest Hospital, where medical staff checked her injuries. She also gave a statement to Norton at the hospital, who met her there after arresting Bell.

Bell testified that J.F. had smoked hash laced with methamphetamine before he arrived that night, impacting her behavior. He testified that he was tired and wanted to go to bed. Bell agreed that after a dispute about their cell phones, he threw J.F.'s phone against the wall. He claimed that J.F. then took her dog for a walk while he tried to go to sleep. She woke him by slicing his hand with a kitchen knife. He testified that she was trying to pick a fight. He stated that he grabbed her wrist to secure the knife, and when she pulled backwards she tripped over some shoes in the hallway. He testified that he stood over her, pleading with her to drop the knife and trying to pry it out of her hands, finally knocking the knife loose. He testified that he grabbed her by the collar and told her to "cool it," and she kicked him in the groin and reclaimed the knife. He explained that when she started toward him with the knife, he punched her in the face.

Bell said that he then packed his things to leave, but felt bad when he saw her eye start to swell, so he stopped and got some ice to place on her eye. He testified that J.F. suggested that they smoke hash, and he proposed that they do a shot instead. He explained that when she hesitated, he urged her to take the shot in order to relax. He said that he returned to the bed while J.F. brushed her

teeth and smoked more hash. He testified that they put on a movie and had sex. He fell asleep and woke up surrounded by police. He testified that at no time did he lock the front door or otherwise prevent J.F. from leaving the apartment.

After the September 23 incident, the State charged Bell with two counts of domestic violence based on those events, including assault by strangulation (count I) and unlawful imprisonment (count II).

The day he arrived at jail, Bell began calling J.F. During the first phone calls he attempted to apologize and convince J.F. that they could repair their relationship. The next day, he began to attempt to persuade her to retract her statements and not testify. On October 3, the jail imposed an administrative block, preventing Bell from dialing J.F.'s number from jail. On October 4, the court issued a domestic violence no-contact order for the protection of J.F. Bell continued to attempt to contact J.F. He also contacted friends and family to seek their assistance in his campaign to stop J.F. from testifying.

The State eventually amended the original information to add twelve more counts, including one count of assault in the third degree for punching J.F. in the face (count III); and five counts of domestic violence witness tampering (counts IV-VIII) and three counts of violation of a domestic violence no-contact order (counts IX-XI) for the phone calls from jail. The State also added one count of assault in the second degree for the shoulder dislocation incident (count XII); one count of assault in the third degree for the dinner plate incident (count XIII); and one count of rape in the third degree, for the forced intercourse after the dinner plate incident (count XIV). The State also charged an aggravating

circumstance under RCW 9.94A.535(3)(h)(i), alleging that count I occurred during a pattern of psychological, physical, or sexual abuse.

The State did not file any charges related to the alleged anal rape, the alleged partial tearing of J.F.'s nose when he ripped out her nose ring, or the balcony incident. The court admitted evidence of uncharged incidents to support the pattern of abuse aggravator and also under ER 404(b), to explain the context of the relationship and the state of mind of and credibility of the victim. Bell does not appeal this ruling.

Pretrial, Bell moved to sever all counts. The court denied the motion. Bell did not renew his motion after the close of the evidence.

The jury found Bell guilty as charged on all counts. The jury also found by special verdict that count I involved domestic violence and a pattern of abuse. The trial court sentenced Bell with a standard range sentence totaling 144 months.

Bell appeals.

DISCUSSION

I. Ineffective Assistance

Bell seeks reversal of all of his convictions because he received ineffective assistance of counsel when his counsel failed to renew a motion to sever counts, failed to make a motion for a separate proceeding on the pattern of abuse aggravating circumstance, and failed to object to the admission of certain evidence.

To prevail on a claim of ineffective assistance of counsel, a defendant

must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). A claim of ineffective assistance of counsel presents a mixed question of fact and law, reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

A. Failure to Renew Motion to Sever

CrR 4.4(a) requires a defendant to make a pretrial motion to sever and, if overruled, to renew the motion before the close of the evidence. Bell's counsel made a pretrial motion to sever all the counts.[1] The court denied the motion.

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[1] Immediately before trial, Bell's counsel stated the following:

> I feel obligated to bring a motion on behalf of my client. And it's his motion. And I think it should be coming from me, and I think - - what his motion is is that he believes, because of the nature of these charges . . . .
>
> . . . .

Bell's counsel did not renew the motion as to any counts. Bell argues that this failure rendered his counsel ineffective, because the court would have granted the motion to sever counts XII, XIII, and XIV for a separate trial. He alleges that the failure to sever prejudiced all the counts and asks this court to reverse every conviction on these grounds.

The State argues that Bell's counsel was not deficient because he acted strategically, choosing not to renew the motion in order to use the evidence on the 2007 assaults to undercut J.F.'s credibility. Counsel alleged that J.F. answered a question as to her use of recreational drugs and alcohol falsely at Northwest Hospital after the incidents on September 23, 2007. Bell's counsel pursued the theme "*falsum in unum, falsum in omnibus*" (false in one thing, false in everything) in his opening statement, during examination, and in closing. The pretrial motion to sever was initiated by Bell, not counsel, which reinforces the State's argument that the decision not to renew the motion was strategic. Bell argues that it is implausible to believe that failure to renew the motion to sever was a legitimate defense tactic, because the evidence corroborating counts I-XIII undoubtedly bolstered J.F.'s credibility. We need not resolve whether the decision to renew was strategic because, even assuming it was not and counsel

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> . . . that each of the charges should be split up because none of them stand on their own and that - - and therefore he thinks that there should be a severance as to each individual count for that reason.
>
> Is that what it is?

Bell responded, "Yeah. That's exactly what it is." The defense did not submit a written memorandum or any relevant legal authority on the issue.

was deficient in this regard, Bell cannot show prejudice.

Bell must demonstrate prejudice, first by showing that a severance motion would likely have been granted had counsel properly renewed the motion. See Pirtle, 136 Wn.2d at 487. And second, he must show that, had a severance been granted, there is a reasonable probability that the outcome of the trial would have been different. State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987).

A trial court may sever offenses if doing so will promote a fair determination of the defendant's guilt or innocence in each offense, considering any resulting prejudice to the defendant.[2] CrR 4.49(b); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Washington law disfavors separate trials. State v. Medina, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. Sutherby, 165 Wn.2d at 883. The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. See State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). This danger of prejudice exists even if the jury is properly instructed to consider the crimes separately. See State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). But, a defendant seeking severance must show that a trial on multiple counts

[2] A court must grant severance if the court determines that it will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b). The denial of a motion to sever is reviewed for manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

To determine whether to sever charges to avoid prejudice to a defendant, a court considers the strength of the State's evidence on each count; the clarity of defenses as to each count; court instructions to the jury to consider each count separately; and the admissibility of the evidence of the other charges even if not joined for trial. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994).

First, Bell concedes the State's evidence on counts I through XI—the 2007 incidents, witness tampering, and violation of the no-contact order charges—was strong. Most of J.F.'s testimony about each of the 2007 incidents was corroborated by evidence of visible injuries witnessed by third parties, including medical personnel and the police. J.F.'s statements on the 911 call, to the police, and in the recordings of phone calls from Bell to J.F. while he was in jail corroborated her story. Medical records and photographs provided additional evidence. The evidence supporting the pattern of abuse aggravator relating to count I was also strong. At sentencing, the judge described the evidence as "overwhelming with regard to his abuse of her." Also, Bell did not challenge the evidence, consisting of recorded phone calls, supporting the charges for witness tampering and violations of a no-contact order (counts IV-XI).

But, the evidence proving the 2006 assault and rape charges was weaker. Testimony by the doctor who treated J.F. on February 17, 2006, supported the

shoulder dislocation, although it did not necessarily disprove Bell's version of the facts. As to the dinner plate incident, J.F.'s coworker testified that she had an injury on her head, although Bell's testimony that J.F. had injured her head on a window equally accounted for that injury. Bell also apologized for putting "a plate through [her] head" on the calls recorded while he was in jail, although he later said that he only apologized to placate J.F. and claimed he did not admit to causing the injury.

For the rape charge, the evidence consisted of J.F.'s trial testimony and evidence that J.F. told a nurse at the hospital on September 23 that she had previously been forced to have sex against her will. The State presented no other evidence regarding the rape. J.F. did not mention the rape in the recorded phone calls where she listed the injuries she had received over the years. Although all the charges depended to some extent on J.F.'s credibility, the rape charge depended entirely on the jury finding her testimony reliable.

Bell alleges that the prosecutor relied on the other charges to build J.F.'s credibility, "intoning count by count that the jury could find the elements proven because [J.F.] 'told us so.'" In closing, the prosecutor reminded the jury of J.F.'s credibility and referred to the uncharged anal rape allegation. The prosecutor stated, "Well, if you believe [J.F.], that's enough." Bell alleges that the prosecutor's proof of the Count XIV rape consisted of counts I through XIII.

Second, Bell offered separate defenses for the charges. With respect to the September 23, 2007 charges, Bell claimed that he had punched J.F. in self-defense when she threatened him with a kitchen knife. He denied the

strangulation and unlawful imprisonment. He denied J.F.'s version of events for the 2006 assault charges, alleging that she dislocated her shoulder when she tripped and fell against the couch and that she injured her head when she broke a window.

With respect to the charges for witness tampering and violation of the no-contact order, Bell did not contest the evidence of the charges. But, the State used the recorded phone calls as evidence to support counts I through III, the September 23 assaults.[3] Bell testified at trial that he lied when he apologized to J.F. in order to persuade her to drop the charges. He alleges on appeal that his defense to those charges damaged his credibility and in that way infected all of his defenses. But, it is likely that the phone calls would have been admissible in a separate trial for the September 23 assaults even if the counts were severed and Bell would have had to similarly account for his statements.

Third, though the court instructed the jury to decide each count separately,[4] Bell alleges that the jury instructions were overwhelmed by the

[3] For example, the day he arrived in jail, Bell called J.F. and attempted to apologize while J.F. recounted the events of that day as well as throughout their relationship. At one point, J.F. stated: "[T]hen tell me why then if you . . . if you're so sorry after you hurt my eye then why did you kick me down, and why did you keep on pushing me and why do you keep on stabbing my neck." (Second alteration in original.) He replied that he behaved that way, because he was drunk. He apologized and pleaded that he needed her in his life.

[4] The trial court, in instruction 45, instructed the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Instruction 43 instructed the jury that

> [e]vidence has been introduced in this case on the subject of prior assaults against [J.F.] and should be consider[ed] only insofar as it assists you in understanding her state of mind at the time of her

State's use of evidence admitted for another purpose to support separate crimes and the lack of a jury instruction that evidence of one crime could not be used to decide guilt for a separate crime. The State alleges that the instructions were sufficient.

In closing, after detailing the evidentiary support for the count XIV rape charge, the prosecutor stated, "In fact, he did it again. The next time, he raped her anally and she still stayed with him and she never told anybody." Bell contends that with this statement, the prosecutor urged the jury to convict Bell of rape on the basis of evidence admitted for the aggravating circumstance. Bell also argues that jury instruction 43 encouraged the jury to rely on counts XII-XIV to convict Bell on counts I and III. Bell contends that the comment and the instruction invalidated instruction 45, that evidence of one crime could not be used to decide guilt for a separate crime.

Finally, we must consider whether the evidence was cross-admissible on each count. Russell, 125 Wn.2d at 63. ER 404(b) prohibits using evidence of other acts to prove the character of a person in order to show that he acted in conformity with that character. State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Evidence that is otherwise relevant can be excluded if it is highly prejudicial. Id. at 776. The Supreme Court has previously cautioned about the admissibility of other sex crimes, warning that "[c]areful consideration and

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> inconsistent acts, to evaluate a claim of self defense and to show an ongoing pattern of psychological, physical or sexual abuse against [J.F.] by the defendant. You must not consider this evidence for any other purpose.

weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence. Smith, 106 Wn.2d at 776.

We agree that the evidence of the rape alleged in count XIV would be cross-admissible to the other charges. The trial court admitted evidence of other uncharged incidents, such as the allegation of rape and the balcony incident, as both relevant to the pattern of abuse aggravator and under ER 404(b). The trial court explicitly ruled that "prior acts of misconduct are admitted to explain the context of the relationship, the state of mind and credibility of the victim, the defendant's motive, opportunity, intent, lack of accident, [and] lack of self defense." At oral argument, Bell contended that the trial court would have changed its ruling regarding the cross-admissibility of the various incidents once it heard the evidence. But, he did not support this assertion or explain why the evidence heard at trial was different than that contained in the State's offer of proof pretrial. Therefore, Bell gives no reason why the trial court would have changed its ruling regarding the admissibility of the prior domestic violence evidence under ER 404(b) had he renewed the motion to sever after the close of the State's case. We agree with the State that the ruling addressed only the uncharged incidents and not the cross-admissibility of the charged crimes against each other. But, if the trial court found one alleged sexual assault admissible to show the context of the relationship and state of mind of the victim,

there would be no reason to prohibit admission of the other alleged sexual assault. Given this ruling, the trial court likely would have found that evidence of the rape would have been cross-admissible to the other charges even if it was tried separately. Thus, even if the rape charge had been severed from the remaining charges, the same evidence would have been admitted in the trial for counts I-XIII.

The evidence of the other 13 charges would also be admissible in a separate trial for the rape charge. In State v. Grant, 83 Wn. App. 98, 106, 920 P.2d 609 (1996), the court held that evidence of Grant's prior assaults against his wife were admissible to assist the jury in assessing the wife's credibility as a witness in a trial for assault. The court explained, "The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Id. at 108; see also State v. Magers, 164 Wn.2d 174, 184-85, 189 P.3d 126 (2008) (agreeing with the reasoning in Grant that evidence of prior domestic violence is admissible to enable to jury to assess the witness's credibility); State v. Wilson, 60 Wn. App. 887, 890, 808 P.2d 754 (1991) ("The evidence of the physical assaults was relevant to rebut the evidence presented by [the defendant] and other witnesses that the sexual abuse did not occur."). Bell asserts that the evidence of prior assaults may be admitted only where the victim delayed reporting or recanted her statements. We disagree. The evidence of domestic violence was admitted in both Grant and Magers to explain statements and conduct which might have appeared inconsistent with the charges. But,

neither case stands for the general rule that delay or recanting are required for evidence of prior assaults to be admissible.[5] Also, here, J.F. in fact delayed reporting the rape, revealing it only after specific questions by medical personnel over a year later. Therefore, the trial court would not have abused its discretion in permitting the evidence of prior assaults to explain why J.F. did not report the rape immediately. Bell argues that the rule in Grant and Magers applies only to cases where the victim delays reporting out of fear and that the rule cannot be applied here because J.F. delayed reporting out of love, not fear. But, the complicated reasons for a victim of domestic violence to report or not report her abuse are exactly the complicated "dynamics" contemplated by the court in Grant. 83 Wn. App. at 108. The jury is entitled to understand exactly those varied concerns a victim of domestic violence may be subject to in order to truly assess the victim's credibility. We decline to limit the rule of those cases as advocated by Bell.

Similar to the situation in Grant, here, it would not be an abuse of discretion for the trial court to admit evidence of domestic violence in Bell and J.F.'s relationship in order to provide the full context for the rape and allow the jury to assess J.F.'s credibility. Bell fails to show why the evidence of the other charges would not be admissible in a separate trial for count XIV only.

[5] Bell also cites State v. Fisher for the proposition that prior assaults may be admitted only to explain a victim's delayed reporting of a crime. 165 Wn.2d 727, 746, 202 P.3d 397 (2009). Fisher does not limit the admissibility of such evidence. It merely approved of the trial court's method of requiring, in the facts of that case, defense counsel to raise the issue of the victim's delay in reporting before allowing the State to introduce evidence of prior assaults. Id.

Bell has therefore not established that the trial court would have granted severance of the rape charge had counsel renewed the motion. Although his counsel may have been deficient in not renewing the motion, Bell has failed to prove that prejudice resulted from the deficiency as to the rape charge.

Bell also claims that severance of counts XII and XIII, the 2006 assault charges, would have been granted. He argues that the 2007 charges would not be cross-admissible in a separate trial for the 2006 assaults and that the disproportionately lower amount of corroborating evidence rendered joinder prejudicial. But, judicial economy would weigh in favor of trying counts I-XIII together if the aggravating factor was properly joined. As all charged and uncharged assaults went to the aggravating factor for count I, to show a pattern of abuse, a separate trial for the 2006 charges would only be duplicative and wasteful. The charges were sufficiently compartmentalized that the jury could fairly evaluate the facts of each assault without undue prejudice resulting from the joined trial. The trial court would not have granted severance of counts XII and XIII. Bell was not prejudiced by the lack of severance on these counts.

Bell fails to prove that he was prejudiced by his counsel's failure to renew the motion to sever. His ineffective assistance of counsel claim on these grounds fails.

B. Failure to Request Separate Aggravating Circumstance Proceeding

RCW 9.94A.535(3)(h)(i) allows a court to impose an exceptional sentence if the jury finds that the current offense involved domestic violence and the 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. If the domestic violence pattern of abuse aggravator is charged,

> the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in [the] trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(4). Bell alleges his counsel was ineffective for failing to request a separate proceeding to consider the aggravating circumstance. Again, we must determine whether counsel was deficient and whether that deficiency prejudiced Bell. Strickland, 466 U.S. at 687.

Assuming without deciding that Bell's counsel was deficient in not requesting a separate proceeding, Bell must demonstrate prejudice by showing that the motion for a separate proceeding would have been granted and that there is a reasonable probability that the outcome of the trial would have been different had the aggravating circumstance been considered separately. Pirtle, 136 Wn.2d at 487; Standifer, 48 Wn. App. at 125-26. Bell alleges that the charged and uncharged rape allegations would not be admissible in a trial on counts I and III (assault by strangulation and assault by punching) without the pattern of abuse aggravating circumstance. The State responds that the evidence would be admissible to show the res gestae of the crimes charged in counts I and III. Under the res gestae exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story by proving the crime's

immediate context of happenings near in time and place. State v. Warren, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Like other ER 404(b) evidence, such evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

We agree that, under the res gestae exception, the trial court would not have abused its discretion in admitting previous acts of domestic violence to show the full context of the assault by strangulation charged in count I. Also, the trial court could have admitted the evidence of the previous violence to allow the jury to fully assess J.F.'s credibility. See Grant, 83 Wn. App. at 106. Therefore, Bell has failed to prove that a request for a separate proceeding on the aggravating circumstance would be granted. He does not establish prejudice. Bell's counsel's failure to request a separate proceeding on the aggravating factor did not result in ineffective assistance of counsel.

C. Failure to Object to Nurse's Notes

Bell argues the admission of the triage notes made by an emergency room nurse violated his right of confrontation under the Sixth Amendment and ER 802[6] and that the failure to object to these notes constituted ineffective assistance of counsel. He also contests the admission of Dr. Abel Tewodros's testimony regarding the notes. The State argues that, because Bell had the

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[6] ER 802 provides that "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute."

opportunity to cross-examine J.F. at trial, there was no violation of his right to confront witnesses.

A defendant has a right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The federal confrontation right applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). We review a claim of a denial of Sixth Amendment rights de novo. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

At trial, Dr. Tewodros, the emergency room doctor who treated J.F. on September 23, testified regarding notes taken by a nurse who screened J.F. during triage. The nurse did not testify. The notes and testimony were admitted without objection.

The notes indicated that J.F. reported pain in her left eye, right ear, neck, and tailbone. Dr. Tewodros testified that J.F. had reported to the triage nurse that she "had been punched in the head, [and] kicked in the abdomen by her boyfriend." The notes indicated that J.F. denied using recreational drugs. Dr. Tewodros also testified that J.F. had answered, "'[Y]es'" when asked, "'Does anyone hurt you or threaten you?'" and "'[Y]es'" when asked, "'Have you ever been forced by someone to have sex when you did not want to?'" The State used the notes in direct examination of J.F. regarding her statement that she had been forced to have sex. Defense counsel used the notes on cross-examination to impeach J.F.'s credibility.

The admission of the triage notes may very well have violated either the

confrontation clause or the rules of evidence. See, e.g., State v. Hopkins, 134 Wn. App. 780, 789-91, 142 P.3d 1104 (2006) (holding that a supervisor's testimony regarding a nurse's report when the nurse was not available for cross-examination violated Hopkins's right to confrontation).

But, Bell must show the absence of legitimate strategic or tactical reasons for the failure to object to the admission of the evidence. McFarland, 127 Wn.2d at 336. Without showing such an absence, Bell cannot prove that his counsel's performance fell below an objective standard of reasonableness. Id. Here, there was a legitimate tactical reason not to object to the admission of the evidence. Bell's trial strategy relied on challenging J.F.'s credibility. Counsel alleged that J.F. lied about the September 23 incidents, and pursued the theme "*falsum in unum, falsum in omnibus*" at trial. He argued that "in each one of these incidences, [J.F.] lied" and that "she lied to the doctors or probably lied to the doctors about the use of drugs." The triage notes bolstered defense counsel's argument that J.F. lacked credibility, because she was not truthful with the medical staff regarding her use of recreational drugs.

Bell's counsel reasonably could have determined that allowing the evidence to be admitted in order to use J.F.'s statements about her recreational drug use best furthered Bell's trial strategy. The report merely repeats allegations already well supported with other evidence, including the 911 phone call, statements by police and medical professionals, and J.F.'s own testimony. Counsel could have reasonably determined that the document's benefit to the overall defense strategy was worth the trade off of minimally supporting J.F.'s

credibility, which was already supported by other evidence. Although this strategy proved unsuccessful, it does not show deficient performance.

Bell does not otherwise show that the failure to object was not tactical. Bell's defense counsel's performance did not fall below an objective standard of reasonableness on these grounds. Because Bell does not show deficient performance, we need not address the prejudice prong.

II. Evidentiary Ruling Regarding Officer Testimony

Bell argues that the trial court erred in allowing Officer Derek Norton to testify, reporting J.F.'s account of the events on September 23. We review the admission of evidence for abuse of discretion. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Magers, 164 Wn.2d at 181.

Norton testified that he responded to J.F.'s 911 call, finding J.F. at the Safeway with responders from the Seattle Fire Department. While the fire department examined J.F. for injuries, Norton questioned her about her complaint. He described her emotional state at that time. When the prosecutor asked him what she had said, he replied that he could not recall without reviewing her statement from the police report. He testified that J.F. wrote the statement at the hospital about an hour after she had first called 911. After refreshing his recollection by looking at the statement, Norton testified to the following:

> [W]hen I stood by and was taking -- watching her write the

> statement, she told me that she had been dating Mr. Bell for about two and [a] half years; that they had had an argument, and that during the course of the argument -- it was over their dog. She had a puppy at the time. And after -- during the argument, Mr. Bell -- he started to strike her, and he pushed her down on the ground and started strangling her. And then when she got up and tried to leave, he hit her again and wouldn't let her leave the apartment. And then she tried to leave, and he kicked her into a wall.

Defense counsel objected. The trial court overruled the objection. Norton did not testify as to her state of mind or whether she was still under the stress of Bell's assault while she was at the hospital.

The hearsay rule generally excludes an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c); ER 802. The State contends that Norton's testimony was admissible as an excited utterance.[7] Although Norton may have intended to testify to the statements J.F. made at the Safeway, he in fact testified regarding only the statement she made at the hospital. The State did not lay the proper foundation to admit her statement at the hospital as an excited utterance. Her statement, made after the fact at the hospital, did not constitute an excited utterance. There was no basis for the statement to be admitted.

But, we hold that admission of the testimony was harmless error. Additional evidence, including the 911 tape, J.F.'s own testimony, and the recorded jail calls was consistent with Norton's testimony. For example, Fire

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[7] A hearsay statement may be admitted if it is an excited utterance, a statement relating to a startling event, or condition made while the declarant was under the stress of excitement caused by the event or condition. ER 803(a)(2); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). A trial court's evidentiary ruling may be upheld on any proper grounds that the record supports. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012, 227 P.3d 852 (2010).

Department Lieutenant Raymond Hammer, who also responded to the 911 call, also testified that J.F. was "upset," "had obviously been assaulted," and "had been crying." He also testified, without defense objection, that J.F. had recounted how Bell had assaulted and strangled her and refused to allow her to leave. He testified that she explained that Bell had pulled out some of her hair and threw it on the ground. Even without Norton's testimony, all evidence presented by the State showed that J.F. consistently reported her story starting with the call to 911. Norton's testimony did not improperly support J.F.'s credibility so as to prejudice the defendant. In light of the other uncontroverted evidence consistent with Norton's testimony, any error in the admission of Norton's testimony was harmless.

III. Unit of Prosecution

Bell argued in his opening brief that his five convictions for witness tampering constituted a single unit of prosecution and, therefore, four of his convictions violated double jeopardy. After Bell submitted his brief, our Supreme Court clarified the unit of prosecution for witness tampering in Hall. There, the court held that the unit of prosecution for witness tampering is generally per witness per proceeding. Hall, 168 Wn.2d at 737. After Hall, the State conceded that some of Bell's convictions violated double jeopardy and required vacation. But, the State contends that two units of prosecution for witness tampering remain.

At trial, the State played tapes of several conversations recorded between Bell and J.F. and between Bell and his friends and family. These phone calls

gave rise to Bell's charges for witness tampering (counts IV-VIII) and violations of a domestic no-contact order (counts IX-XI).

The brief facts relating to the recorded phone calls are the following: Bell repeatedly attempted to contact J.F., as well as friends and family members, to try to convince her to tell the prosecutor nothing happened or not to testify. Several of Bell's phone calls involved calling someone and asking that person to dial another phone number via three-way calling.[8] Count IV related to a September 24 call to Bell's younger brother at his parent's restaurant, who then attempted a three-way call to J.F. several times. Unsuccessful, Bell finally left J.F. a message asking her to "give the prosecutor a call and just tell him that nothing happened." On October 1, Bell had his brother attempt a three-way call to J.F. twice. When the three-way calls to J.F. failed, he had his brother dial his friend Delano. Bell discussed with Delano how to convince J.F. to "retract" her statement or "not to show up to court." On October 3, Bell again had his brother dial J.F. unsuccessfully. They then called Delano and Bell told him, "You need to fucking talk to her tonight" and tell her "[she] needs to either not show up or she needs to show up tomorrow and say that she was lying. If she shows up tomorrow and says she was lying, I get out, feel me?"

On October 3, the jail established an administrative jail phone block, preventing Bell from calling J.F. directly. A no-contact order was also approved prohibiting Bell from having contact with J.F. Despite the phone block and no-

[8] The jail phone system is designed to prevent three-way calls. If the system detects an attempt at a three-way call, it disconnects the call. To disguise the sound of the three-way function, Bell would blow into the phone.

contact order, Bell tried to call J.F. directly 61 more times, all of which were blocked.

After the phone block and protection order, Bell continued to call J.F. directly and via friends and family. On October 4, (count V) Bell called his mother and asked, “Can you like offer her some money to get her to drop it?” On October 12 (count VI), Bell had Delano attempt to call J.F. via three-way calling and then discussed with Delano tactics to persuade J.F. “[t]o just take all this shit, and fuck off.” On November 11 (count VII), Bell called J.F. several times via three-way calling to discuss their relationship, then called Delano via three-way calling to discuss how to convince J.F. not to appear.

Getting more desperate, Bell called Delano on November 20 (count VIII) and told him “someone gotta talk to that fucking idiot.” He called Delano and another friend Anthony on November 28 (count VIII) to discuss taking more drastic action if J.F. did not agree. He called Delano on December 3 (count VIII) asking, “Did you talk to the bitch or what?”

The witness tampering statute states in relevant part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120(1).

In Hall, Hall was convicted of three counts of witness tampering based on 1,200 phone calls made to his girl friend attempting to convince her not to testify or to testify falsely. 168 Wn.2d at 729. The trial judge treated each count of witness tampering separately at sentencing. Id. The Supreme Court reversed his convictions, holding that Hall's tampering with a single witness for a single trial constituted a single unit of prosecution. Id. at 737-38. But, the court acknowledged that different facts could create additional units of prosecution:

> [W]e recognize that the facts of a different case may reveal more than one unit of prosecution. We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.

Id. The court also clarified that:

> Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

Id. at 737. This court must consider whether under the facts of this particular case more than one unit of prosecution is present.

The State contends that the imposition of the phone block and the no-contact order constitute a clear break, dividing Bell's tampering attempts into two separate courses of conduct. The State argues that the phone block and the no-contact order interrupted Bell's efforts to tamper with the witness, forcing him to resume his attempts in a separate course of conduct and creating a second unit

of prosecution. Therefore, the State argues that counts IV and VI may be affirmed while counts V, VII, and VIII must be vacated.

As pointed out by Bell, the above statements from Hall limiting its holding are dicta and not binding on this court. But, assuming without deciding that a break in time or change in method would be enough to create a second unit of prosecution, the facts here do not support the State's argument. There was no "break" at the point where the State implemented the phone block and the no-contact order. Bell placed calls before the phone block and the no-contact order, the day of the no-contact order, and after the phone block and no-contact order. Bell used the three-way calling method to contact J.F. before and after the phone block was placed. Bell attempted to call J.F. directly 61 times after the imposition of the phone block, though all of his calls were blocked. Yet, there is no evidence that this prevented him from trying to contact JF or that he otherwise changed his strategy regarding contacting her. Bell argues that his conduct was not affected by the phone block and no-contact order. We agree.

We hold that Bell's actions constitute a single unit of prosecution, reverse four of the five witness tampering convictions, counts V-VIII, and remand for resentencing.[9]

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[9] There may be facts in this case to support a separate unit of prosecution based on Bell's direct contact to J.F. versus his use of third party intermediaries to contact J.F. on his behalf, if such a distinction is available under Hall. But, the State chose not to pursue this argument on appeal due to the manner in which the case was charged. Therefore, we do not resolve whether, under Hall, the use of a third-party intermediary could create a new unit of prosecution or whether the facts of this case would support a separate unit of prosecution on those grounds.

IV. Unanimous Jury Verdict on Witness Tampering Charges

Bell challenges his conviction for tampering with a witness, arguing that the verdict lacked unanimity with regard to the means of commission. When an offense may be committed by more than one means, the jury need not be unanimous as to which means was proved so long as substantial evidence supports a finding under each means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Bell concedes that substantial evidence exists to support the alternative means for count IV. Because we vacate Bell's other witness tampering convictions under Hall, we need not consider this issue further.

V. Vagueness of RCW 9.94A.535(3)(h)(i)

A court may impose an exceptional sentence if the jury determines that the offense involved domestic violence 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). Bell argues that RCW 9.94A.535(3)(h)(i) is unconstitutionally vague, because it fails to clearly define the prohibited conduct.[10]

A statute is void for vagueness if it either fails to define the offense with sufficient definiteness that ordinary people can understand it or it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). Our Supreme Court

[10] Bell raises this issue for the first time on appeal. A vagueness challenge to a criminal statute may be raised for the first time on appeal. City of Bellevue v. Lorang, 140 Wn.2d 19, 30 n.6, 992 P.2d 496 (2000); RAP 2.5(a)(3).

held in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), that the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines. See also State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008), rev'd on other grounds, ___ Wn.2d ___, 240 P.3d 143 (2010). Bell urges this court to disregard both Baldwin and Stubbs, alleging inconsistencies with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Because we are bound by the decisions of our state Supreme Court, we decline his invitation to disregard Baldwin. State v. Williams, 93 Wn. App. 340, 344, 969 P.2d 106 (1998).

VI. Overbreadth of RCW 9.94A.535(3)(h)(i)

Bell argues that RCW 9.94A.535(3)(h)(i) is facially unconstitutional, because it criminalizes speech that is protected under the First Amendment.[11] A statute is overbroad if it chills or sweeps within its prohibition constitutionally protected free speech activities. City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000); State v. Halstien, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). A statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep. City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990); see also Virginia v. Hicks, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). Criminal statutes require particular scrutiny and may be facially invalid if they

[11] Bell may raise an overbreadth challenge for the first time on appeal. State v. Regan, 97 Wn.2d 47, 50, 640 P.2d 725 (1982).

make unlawful a substantial amount of constitutionally protected conduct. Lorang, 140 Wn.2d at 27. This standard is very high and speech will be protected unless shown likely to produce a clear and present danger of a serious substantive evil that rises far and above public inconvenience, annoyance, or unrest. Id.

The first inquiry in the overbreadth analysis is whether the statute prohibits a substantial amount of constitutionally protected speech. City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). RCW 9.94A.535(3)(h)(i) provides for an exceptional sentence based on a pattern of "psychological, physical, or sexual abuse." Bell argues that the term "psychological abuse" encompasses only speech. Bell also notes that the State urged the jury to find that Bell psychologically abused J.F. based only on words (Bell's phone calls from jail telling J.F. that he loved her).

Here, the statute does not criminalize speech. It merely provides for an exceptional sentence if another criminal act is completed within the context of a pattern of abuse, which may or may not involve speech. Contrary to the assertions of the defendant, psychological abuse need not be undertaken merely through words. Fear created through physical abuse, abuse of another, certain behaviors, etc., can be used to achieve psychological abuse. In fact, the aggravator could be applied to a course of conduct which involved no speech whatsoever. Even if some speech fell within the sweep of the aggravator, it would not be a substantial amount. Accordingly, we reject Bell's claim that RCW 9.94A.535(3)(h)(i) is overbroad.

VII. Unanimous Jury Verdict on Aggravating Circumstance

Bell argues he was deprived of his right to a unanimous jury verdict, because the State did not elect nor did the court provide a unanimity instruction as to which acts formed the basis of the pattern of abuse aggravating circumstance.[12] Generally, to protect unanimity, the State must elect the act it relies upon for conviction or the court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Gooden, 51 Wn. App. 615, 618, 754 P.2d 1000 (1988). This rule applies to a jury's finding regarding an aggravating circumstance. See State v. Price, 126 Wn. App. 617, 646-47, 109 P.3d 27 (2005). But, an election is not required when a continuing course of conduct forms the basis of the charge. State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 406 n.1, 756 P.2d 105 (1988).

This is not a "multiple acts case," in which one of several acts could form the basis for the aggravating circumstance. Cf. Price, 126 Wn. App. at 646-47 (several acts could constitute the aggravating circumstance elevating the crime to aggravated first degree murder). Instead, the statute at issue refers to a pattern of psychological, physical, or sexual abuse. RCW 9.94A.535(3)(h)(i). This phrase contemplates an ongoing course of conduct rather than a single action. A "pattern" requires more than one act occurring in an ongoing scenario.

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[12] The court instructed the jury that they must find the special verdict by unanimous agreement.

See Black's Law Dictionary 1242 (9th Ed. 2009). As explained in Petrich, "'one continuing offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." 101 Wn.2d at 571; see also, Gooden, 51 Wn. App. at 620. Therefore, requiring unanimity on a single act to form the basis of the jury's verdict on the aggravating circumstance here would be inappropriate. Unanimity was only required as to Bell's course of conduct, not a particular action.[13] No error occurred here.

VIII. Special Verdict Form

Bell also contends that the special verdict form for count I was incorrect. We review alleged errors of law in jury instructions and verdict forms de novo. See Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.3d 682 (1995).

The special verdict form stated:

> QUESTION: Did the State prove, beyond a reasonable doubt, that *prior to* the commission of the offense of Assault in the Second Degree charged in count one, there was an ongoing pattern of psychological, physical, or sexual abuse of the victim by the defendant, manifested by multiple incidents over a prolonged period of time?

(Emphasis added.) The phrase "prior to" fails to adequately instruct the jury, as RCW 9.94A.535(3)(h)(i) requires that the jury find that the underlying crime is "part of" a pattern of abuse. Bell did not object to the special verdict form at

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[13] RCW 9.94A.535(3)(h)(i) permits a court to impose an exceptional sentence if the jury determines that the offense involved domestic violence 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."

[14] The State asserts that Bell may not raise this argument for the first time on appeal. Since Bell fails to prove prejudice on the merits of the claim and the error was harmless, we need not resolve this issue.

trial.[14]

The State asserts that the error is harmless beyond a reasonable doubt. Bell asserts that he was prejudiced, because the State would not have been able to prove that the assault was "part of" a pattern of abuse. He argues that there was a break in the State's evidence of abuse and therefore the evidence only proves, if anything, a pattern of abuse in 2006, a year before the assault that is the subject of count I. He contends that the jury may not have agreed that the 2007 incidents were "part of" the 2006 pattern.

We agree with the State that the error was harmless. If the error impacted the trial at all, the erroneous instruction benefited Bell, because it prevented the jury from considering the September 2007 actions in establishing the pattern of abuse.

Additionally, a reasonable juror could have found that the abuse was ongoing throughout the relationship based on the evidence presented at trial. During a series of recorded phone calls from jail played at trial, J.F. and Bell discussed the violence in their relationship. She told him that when he first moved in, "you fucking mooch off me for a whole fucking year while I get my ass kicked every night." When Bell asked J.F. whether she missed him, J.F. responded:

> What would I miss (inaudible) my ass kicked, being bruised every day, hav[ing] to make up a different fucking lie for the bruises on my arms and the bruises on my face? Or do I miss you sitting on

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[14] The State asserts that Bell may not raise this argument for the first time on appeal. Since Bell fails to prove prejudice on the merits of the claim and the error was harmless, we need not resolve this issue.

me or do I miss you kicking at me or do I miss my shoulder dislocating every time I, fucking, try to wash my hair (inaudible) by my arm. Is that what I miss?

She continued, "[O]r do I miss seeing my, fucking (inaudible) fucked up every day, because you fucking threw a temper tantrum and hit it?" Bell responded, "I'm telling you that I've changed." She told him, "[F]or every bad month we had, we had, like, two good days. We'd be cool for, like, three weeks at a time before you, fucking, went nuts again." She finally told him, "This is the first time in, like, the whole time I ever moved out here that I'm actually happy. And I don't need to, fucking, be scared of shit, and I don't need to worry about if my door is locked or not." It is clear from these phone calls that the abuse in the relationship was ongoing prior to and up until September 23.

We hold that the error in the special verdict form was harmless beyond a reasonable doubt.

IX. Comment on the Evidence

Bell next alleges that jury instructions 43 and 6 impermissibly commented on the evidence.[15]

A judge is prohibited by article IV, section 16 of the Washington Constitution from conveying to the jury his or her personal attitudes toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A judge need not expressly convey his or her personal beliefs on an element of the offense; merely implying those beliefs is enough. Id. An instruction

[15] Bell did not object to the instructions at trial. But, a claim alleging a judicial comment on the evidence may be raised for the first time appeal. State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006); RAP 2.5(a)(3).

improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). Judicial comments in jury instructions are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 723. A challenged jury instruction is reviewed de novo, within the context of the jury instructions as a whole. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

Bell first challenges jury instruction 43, which stated:

> Evidence has been introduced in this case on the subject of *prior assaults* against [J.F.] and should be consider[ed] only insofar as it assists you in understanding her state of mind at the time of her inconsistent acts, to evaluate a claim of self defense and to show an ongoing pattern of psychological, physical or sexual abuse against [J.F.] by the defendant. You must not consider this evidence for any other purpose.

(Emphasis added.) Bell did not object. The State introduced evidence including the charged 2006 assaults (the shoulder dislocation and the forehead injury). The State also presented evidence of several uncharged assaults, including the incident where Bell partially tore out J.F.'s nose ring and the balcony incident.

Bell claims that the trial court improperly commented on the evidence by instructing the jury that the charged incidents (providing the basis for counts XII-XIV) and uncharged incidents were in fact assaults. Bell also argues that jury instruction 43 impacted the special verdict on the count I assault charge by assuring the jury that prior assaults had been admitted to show a pattern of abuse.

The State responds that the statement is neutral and that jury instruction 1, which defined evidence as "testimony that you have heard from witnesses, stipulations and the exhibits" admitted at trial, negated any confusion. The State also claims that arguments at trial and the jury instructions as a whole provided a context clarifying that whether assaults occurred is a question for the jury to decide.

In Becker, the disputed factual issue was whether a "Youth Education Program" was a school. 132 Wn.2d at 56. The special verdict form asked:

> Was the defendant, Donald Becker, within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime.

Id. at 75 (Talmadge, J., dissenting). The Becker court noted that "[b]y effectively removing a disputed issue of fact from the jury's consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute." Id. at 65. The court vacated the sentence enhancements. Id. at 66.

In comparison, here, the jury instructions did not remove a disputed issue of fact. The statement was neutral in that it only confirmed that evidence had been introduced, not that those assaults had been proved. The jury's task of determining whether that evidence proved the charges still remained. We hold that jury instruction 43 did not constitute a comment on the evidence.

Bell also challenges the language of jury instruction 6, which stated:

> Evidence that the defendant has *previously been convicted of a* crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other

purpose.

(Emphasis added.) Because the State did not introduce evidence of prior convictions, Bell contends that the instruction invited the jury to conclude that Bell had been convicted for some of the acts described by J.F. that had not been charged in this case. Bell contends that this misconception was further supported by the prosecutor's reference to the anal rape allegation and the balcony incident as "counts . . . that occurred in Snohomish County."

Both Bell and J.F. testified that Bell had previously been in jail and on house arrest. J.F. stated during her testimony:

> Well, in August he was in - - he went to jail again. He was in jail for - - that was the first that I was with him that he went to jail. And when he got out in October, we had been - - when I'd go visit him and stuff, we'd kind of talk about, like, where's he's going to stay when he gets out, because he was still living at his parents.

Defense counsel also cross-examined J.F. on her testimony that Bell sporadically attended anger management classes and as to whether his attendance may have been court ordered.

Bell similarly testified to the following:

> Q. Did there come a time when you started living with her?
>
> A. Yeah. I got locked up on, like, a month after I had known her. And then when I got out of jail, I did house arrest at her house.

After testifying regarding the balcony incident, he also stated:

> Q. Did you call her family and let them know what had happened?
>
> A. From jail?

Jury instruction 6 was proper in response to J.F. and Bell's testimony regarding Bell's previous jail time and did not constitute a comment on the evidence.

X. Posttrial Ineffective Assistance

Bell contends that his counsel was ineffective for not arguing at sentencing that his convictions for second degree assault, third degree assault, and unlawful imprisonment were the same criminal conduct. Assuming without deciding that Bell's counsel was deficient for not making a same criminal conduct argument, we must consider whether Bell was prejudiced by counsel's failure.[16] Nichols, 161 Wn.2d at 8.

When two or more crimes require the same criminal intent, are committed at the same time and place, and involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing the defendant's criminal history at sentencing. RCW 9.94A.589(1)(a). Courts narrowly construe the statutory language to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000); State v. Palmer, 95 Wn. App. 187, 191 n.3, 975 P.2d 1038 (1999). If any one of these elements is missing, multiple offenses cannot encompass the same criminal conduct and must be counted separately in calculating the offender score.[17,]

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[16] Normally we will disturb the sentencing court's determination as to whether current offenses encompass the same criminal conduct only in the event of a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). But, when the claim is ineffective assistance of counsel, we must determine the likelihood that the crimes would have been found to be the same criminal conduct had the issue been argued.

[17] If the facts clearly demonstrate either the same objective intent or a change in objective intent, the issues will be resolved as a question of law. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). If the facts are sufficient to support either finding, then the matter lies within the trial court's

[18] State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The parties here dispute only the intent and time prongs.

The standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next. Id. at 411. The fact that one crime furthered commission of the other may indicate the presence of the same intent. Id.; State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

On September 23, Bell arrived around 3:00 a.m. J.F. and Bell began to argue. J.F. walked outside the front door of the apartment. Bell coaxed J.F. back inside and shut the door behind her. Bell then punched J.F. in the eye, pulled her to the ground, and strangled her.

J.F. testified that after the strangulation, Bell stood up and “got nice.” He put his arm around J.F. and asked her, “‘[W]hy do you have to act like that?’” He unlocked the front door, saying, “‘I’ll even keep the door unlocked.’” She testified that he calmed down but then “he went right back into what he was before.” She explained that by this she meant that “his demeanor” indicated to her that “he wanted to hurt me.” He then pulled her to the floor by her hair and locked the front door. Every time J.F. went in the direction of the door, Bell

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discretion, and an appellate court will defer to the trial court’s determination of what constitutes the same criminal conduct when assessing the appropriate offender score. Id.

[18] The State urges this court to find that the sentencing judge made an implicit determination that the convictions did not constitute the same criminal conduct. Here, we are only determining the likelihood that the crimes would have been found to be the same criminal conduct had the issue been argued in order to determine whether Bell received ineffective assistance of counsel. We need not resolve whether the trial court made an implicit determination.

would tell her that she was not going anywhere. J.F. waited until Bell fell asleep and escaped, almost two hours after he had first arrived.

The State argues that Bell's criminal intent varied. When Bell hit J.F., he intended to hurt her. When he strangled her, he intended to scare her. When he restrained her, he intended to prevent her from reporting the incident to police. The State does not cite any parts of the record which support its inferences regarding Bell's intent.

A break in violence, permitting the actor to complete one action and form a new intent to begin a new action, will prevent a finding of same criminal conduct. See Price, 103 Wn. App. at 854-59; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Cf. State v. Tili, 139 Wn.2d 107, 119-20, 985 P.2d 365 (1999). In Grantham, the defendant's criminal conduct ended with the first rape, then he stood over the victim and told her not to tell before beginning an argument and forcing the victim to perform oral sex. 84 Wn. App. at 859. In contrast in Tili, the defendant's three penetrations of the victim were continuous, uninterrupted, and committed within approximately two minutes. 139 Wn.2d at 124. The Supreme Court distinguished Grantham and held that the defendant's three separate penetrations of the same victim was the same criminal conduct. Tili, 139 Wn.2d at 123-24. Applying both cases, the Court of Appeals held in Price that separate and distinct acts occurred where the defendant stopped and exited his stolen vehicle to shoot at the victims, then climbed back in the vehicle to again pursue and shoot at the victims again. 103 Wn. App. at 858-59; see also In re Pers. Restraint of Rangel, 99 Wn. App. 596, 600, 996 P.2d 620 (2000)

(holding that the defendant's sequential acts of firing at the victim's vehicle, which crashed, then turning and approaching again to fire a second time, afforded Price sufficient time to form two different intents).

Applying Price, Grantham, and Tili here, the record shows that the assault by punching and the assault by strangulation occurred in quick succession. The State contends that Bell's question to J.F., "Do you want to see stars?" indicated a break in the action in which he formed a new intent to harm her based on J.F.'s response. This is not evidence of a distinct break. But, we agree with the State that Bell's first assault was primarily physical, and his intent, objectively viewed, was to assault J.F. by punching her. His second assault, the strangulation, was primarily psychological, and his intent, objectively viewed, was to frighten and humiliate J.F. by threatening her to "see stars." Although counts I and III occurred at approximately the same time, Bell had different objective intents. Therefore, the crimes did not constitute the same criminal conduct.

Additionally, the facts indicate that Bell stopped his violence towards J.F. and "got nice," including unlocking the door. He then began a new period of violence, where he locked the door and hid the key. The record proves that there was a sufficient break in time to allow Bell to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App. at 859. These actions were separate and distinct.

Bell cannot demonstrate the reasonable probability of a different outcome, and therefore fails to meet the prejudice prong of the Strickland test. We reject Bell's ineffective assistance argument on the same criminal conduct issue.

XI. Statement of Additional Grounds

In his statement of additional grounds, Bell first argues that he received ineffective assistance of counsel when his counsel failed to introduce evidence and call witnesses regarding J.F.'s past violence toward Bell and her quick temper. But, "[t]he decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). The presumption of competence can be overcome by showing counsel failed to subpoena necessary witnesses. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). To any extent that Bell is raising this claim, it would involve matters outside the record that we cannot address in a direct appeal. McFarland, 127 Wn.2d at 338 n.5.

Bell next argues that defense counsel failed to impeach J.F. regarding inconsistencies in her testimony. Bell's counsel did in fact raise inconsistencies in closing argument. Also, defense counsel raised the issue of whether J.F. responded truthfully to a question about her drug use.

Bell next argues that defense counsel generally failed to pursue Bell's preferred defense strategy. But, Bell fails to show that he was prejudiced by some specific failure. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). A mere difference of opinion does not render counsel ineffective.

Bell argues that the prosecutor committed misconduct when he elicited false testimony from J.F. In support of his claim, Bell submits a transcript from J.F.'s pretrial interview. This document is not part of the record on review.

Although RAP 9.11 allows additional evidence to be entered into the record on appeal under very limited circumstances, Bell does not meet the requirements. Bell has not argued that the failure to enter this evidence created prejudice or otherwise affected the verdict. This court may not consider additional evidence on this issue. Therefore, we have no basis in the record to review whether the prosecutor elicited false testimony.

Bell also alleges that his counsel refused to divulge the contents of a conversation between counsel and the judge in chambers during J.F.'s testimony. Bell does not indicate where in the record this conversation occurred. We assume he is referring to a conversation in chambers during J.F.'s testimony. While J.F. testified, Bell interrupted with statements such as, "She lied," "Liar," and "Psycho bitch." The prosecutor requested a side bar and the judge agreed to see counsel in chambers. There is nothing inappropriate about this procedure. "A defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008).

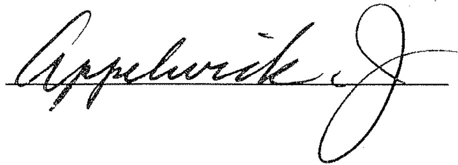
Bell finally argues that his charge in count I for assault by strangulation was invalid. Count I charged Bell with assault in the second degree by strangulation contrary to RCW 9A.36.021(1), which states,

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> . . . .
>
> (g) Assaults another by strangulation.

The legislature added assault by strangulation to the assault in the second

degree statute in 2007. Laws of 2007, ch. 79, § 2. That legislation became effective July 22, 2007. Laws of 2007 at ii (see (5)(a) setting out the effective date). Bell committed the assault on September 23, 2007. Bell alleges no cognizable deficiency in the publication of the amendment. The charge based on RCW 9A.36.021(1)(g) was valid. No other deficiencies have been alleged that would render the charging document invalid. Bell failed to present any meritorious issues in his statement of additional grounds.

We vacate counts V, VI, VII, and VIII relating to witness tampering and remand for resentencing. We otherwise affirm the convictions.



WE CONCUR: