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Supreme Court No. 100142-8
(COA No. 80869-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEHMET WHICKER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mehmet Whicker, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' June 6, 2021, opinion. RAP 13.4(b)(1)-(4). The court denied reconsideration on July 27, 2021.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals correctly ruled the trial court deprived Mr. Whicker of evidence critical to his self-defense claim when it excluded evidence of the decedent's extreme intoxication. But the Court of Appeals illogically concluded this egregious constitutional error was harmless because short fragments of the incident were depicted on video and the wrongly excluded evidence "only" corroborated Mr. Whicker's testimony. In a self-defense case where the jury did not hear proof of the decedent's extraordinary intoxication, did the Court of Appeals misapply the test requiring reversal due to the deprivation of the right to present a defense and fail to account for the likelihood this evidence would have affected the jurors?[1]

2. Did the court deprive Mr. Whicker of his right to a defense and dilute the State's burden of proof when it refused to give Mr. Whicker's

[1] This Court is considering a similar issue about the right to present a defense and intoxication evidence supporting a self-defense claim in *State v. Jennings*, 14 Wn. App. 2d 779, 474 P.3d 599 (2020), *review granted*, 197 Wn.2d 1010 (2021). Argument is scheduled for September 30, 2021. Mr. Whicker does not object to a stay pending this Court's resolution of *Jennings*.

proposed instructions on self-defense and instead delivered instructions that failed to make the subjective component of self-defense manifestly apparent to the average juror?

3. Over Mr. Whicker's objection, the court told the jury it could not say whether this case involved the death penalty, even though this punishment could not be imposed. The prosecution used this information to mislead and strike a juror. Should this Court grant review because the Court of Appeals decision is contrary to *State v. Pierce*[2] and because the risk the jury panel was required to be death qualified denied Mr. Whicker his right to a fair trial and presents an issue of substantial public interest?

4. In response to a jury question and over Mr. Whicker's objections, the court delivered a supplemental instruction that exceeded the scope of the initial instructions and arguments, then reopened closing arguments. It did not tell the jury it must consider the instructions and arguments as a whole and not give special weight to the separately delivered instruction and arguments. Did these procedures impermissibly invade the fact-finding province of the jury and undermine the fairness of the deliberative process by an impartial jury?

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[2] *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020).

5. Did the court comment on the evidence and resolve a factual dispute for the jury when it responded to a jury note by not only defining "participant" but also informing the jury a victim is not a participant?

6. The Sixth and Fourteenth Amendments and the Sentencing Reform Act (SRA) require the State to prove all facts necessary to establish the sentence, including whether prior offenses with concurrent sentences constitute the same or separate criminal conduct. Here, the trial court relied on unproven and unadmitted facts in a probable cause affidavit to count Mr. Whicker's prior convictions separately. The Court of Appeals ignored this error because it wrongly concluded Mr. Whicker bore the burden to establish the same criminal conduct of prior convictions. Does the sentence merit review when it was imposed contrary to cases, the SRA, and due process of law?

C. STATEMENT OF THE CASE

Mehmet Whicker was at the Tukwila Transit Center, waiting for a bus to take him to the Bread of Life Mission. RP 455-56, 469.[3] Mr. Whicker was homeless and stayed at that shelter because its nightly fee of five dollars provided occupants with a safer environment than the free shelters frequented by active drug and alcohol users. RP 453, 456.

[3] The reports consecutively paginated 1-650 are referred to as "RP." The reports from reporter Chatelain, pages 1-182, are referred to by date. The remaining report covers various dates between 2016 and 2019 in pages 1-303 and is referred to as "1RP."

As Mr. Whicker waited for his bus, Jesse Goncalves, a stranger, walked up to Mr. Whicker and punched him twice in the face. RP 469-70. He said, "I thought I told you niggers to stay away from here." RP 470. The punch knocked Mr. Whicker's glasses off his face. RP 470. Mr. Whicker was unable to see clearly without his glasses and thought Mr. Goncalves might not be alone. RP 470. Mr. Whicker immediately recalled other times he had been attacked for no reason. RP 470, 476, 491-92, 518.

Mr. Whicker pulled out his pocketknife, but while Mr. Goncalves "jumped back," he did not leave. RP 470. Instead, Mr. Goncalves yelled at Mr. Whicker and continued to act aggressively. RP 470. Mr. Goncalves smelled of alcohol. RP 470. He threatened Mr. Whicker to stay away from the area and said something like, "you ain't going to make it too much longer if you keep hanging around here," before walking off. RP 471.

Unsure of what was occurring, Mr. Whicker walked after Mr. Goncalves to find out why he hit him. RP 473-74. Mr. Goncalves responded irrationally by offering Mr. Whicker a beer. RP 473, 496-97. Mr. Whicker smelled alcohol coming from Mr. Goncalves, who was "looking crazy," and thought, "he's either high or he's drunk or he's both." RP 474. Mr. Whicker was afraid to let Mr. Goncalves out of his sight for fear of being attacked while not looking. RP 476-77, 500.

Mr. Goncalves moved forward toward Mr. Whicker. Mr. Whicker thought Mr. Goncalves was going to hit him again, so Mr. Whicker stabbed him to protect himself. RP 474-79. Mr. Goncalves took a couple of steps but then turned back toward Mr. Whicker and hit him again. RP 477. Mr. Whicker again struck Mr. Goncalves with the knife. RP 478.

Mr. Whicker thought, "[H]e knows I have a knife and he's still swinging at me . . . it hasn't been a deterrent." RP 501. Mr. Whicker feared the attack was not over because Mr. Goncalves was "not relenting." RP 502. When Mr. Goncalves came towards him again and told Mr. Whicker, "I'm going to fuck you up," Mr. Whicker believed him and swung the knife again. RP 477-78.

The two continued moving through the transit center. Mr. Goncalves flipped Mr. Whicker over his shoulder and kicked him in the face. RP 506-08; Ex. 59. Mr. Whicker ultimately stabbed Mr. Goncalves six separate times during the encounter. RP 375. Eventually, Mr. Goncalves left in one direction and Mr. Whicker in the other. RP 173, 512. Mr. Goncalves died shortly after approaching a transit officer. RP 135-36.

Videos from the transit center's surveillance system showed only parts of the interaction. RP 306-08; Ex. 59. No footage showed the entire event from start to finish. Ex. 59.

When Mr. Whicker spoke to the police later that night, he explained Mr. Goncalves "wasn't makin' sense" and was laughing inappropriately. Ex. 62 (p.29-30, 34). He also told the detectives, "I think he's high for real," and said Mr. Goncalves told Mr. Whicker he had a beer with him. Ex. 62 (p.30, 37, 41).

Mr. Whicker also explained Mr. Goncalves' impairment to Dr. Kenneth Muscatel, a clinical psychologist who assessed Mr. Whicker's mental state. Dr. Muscatel testified Mr. Whicker suffered from paranoia, post-traumatic stress disorder (PTSD), and substance abuse disorder. RP 425. Dr. Muscatel described how Mr. Whicker's paranoia and PTSD affected his belief that Mr. Goncalves could harm him, as he continued to hit Mr. Whicker after Mr. Whicker cut him with the knife. RP 426-33, 442-43. His confusion over Mr. Goncalves' erratic behavior and random attack also affected Mr. Whicker's perception. Dr. Muscatel explained how Mr. Whicker's paranoid mental state and being the victim of previous unprovoked attacks exacerbated his fear. RP 427, 430-33, 448-49.

A toxicology report showed Mr. Goncalves' blood alcohol level was .24. Ex. 69. The court refused to permit Mr. Whicker to introduce evidence of this high BAC, and the jury never learned how drunk Mr. Goncalves was. 1RP 67; RP 357, 384-91, 401-02, 547-50, 555; CP 115.

The prosecutor argued Mr. Whicker made up a story after the incident, including concocting his claim that Mr. Goncalves was drunk. RP 630.

Although jury selection began one year after Washington struck the death penalty as unconstitutional, the State insisted on telling inquiring jurors they could not know whether the case involved the death penalty. 1RP 69-72. The prosecutor struck one juror after such misleading questioning. RP 14-18; 10/10/19RP 178.

After it began deliberating, the jury asked if "being a participant" meant "being an accomplice rather than being a participant in the event?" CP 161. Over Mr. Whicker's objection, the court responded by assembling the jury and delivering a supplemental instruction that not only defined "participant" but also instructed the jury a victim is not a participant. CP 163; 1RP 239-265; RP 634. The court then reopened closing arguments directed to the supplemental instruction and the jury's question, again over Mr. Whicker's objection. RP 634-37; 1RP 237-265.

The jury convicted Mr. Whicker of second degree felony murder and a deadly weapon enhancement. CP 159-60. The Court of Appeals affirmed the convictions and sentence. Slip op. at 1.

D. ARGUMENT

1. In a self-defense case where the court refused to let the jury hear evidence documenting the decedent's extreme intoxication, the Court of Appeals misapplied the test requiring reversal due to the deprivation of the right to present a defense.

Mr. Whicker's entire defense was that he acted in self-defense when he stabbed Mr. Goncalves. Corroborating Mr. Whicker's perception of events and description of Mr. Goncalves' inexplicable aggression was evidence demonstrating that Mr. Goncalves was extraordinarily intoxicated. Ex. 69. But the court excluded evidence of Mr. Goncalves' .24 BAC as irrelevant. CP 115; 1RP 67; RP 357, 384-91, 397-403, 545-55.

The Court of Appeals properly found the exclusion of the BAC evidence was both an abuse of discretion under the rules of evidence and a violation of Mr. Whicker's constitutional right to present a defense. Slip op. at 4-6. However, despite recognizing this egregious constitutional error, the Court concluded it was harmless because "the excluded evidence would have served only to bolster [Mr.] Whicker's credibility and testimony" but would not have led a reasonable jury to find his conduct constituted self-defense because the prosecution introduced videos depicting portions of the encounter. Slip op. at 6.

The Court of Appeals misapplied the law on the right to present a defense and the harmless error standard by focusing on only the evidence

admitted, not the evidence improperly excluded. The opinion is part of an alarming trend in which the Court of Appeals excuses constitutional violations without proper consideration of the effect of the wrongly excluded evidence. This Court should accept review. RAP 13.4(b)(1)-(4). Alternatively, this Court should stay consideration of Mr. Whicker's petition until it resolves *Jennings*.

a. The Court of Appeals improperly focused on the existence of incomplete video evidence instead of the effect of the wrongly excluded intoxication evidence that was crucial to the defense.

The right to present a defense is essential to the right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Where a court violates a person's right to present a defense, this constitutional error requires reversal unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). This standard presumes prejudice and requires reviewing courts to reverse unless the prosecution proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* Even cases with seemingly strong evidence of guilt, including video depicting the

purported crime, often require reversal under this test. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

The critical question for the jury was whether Mr. Whicker acted in self-defense when he killed a threatening stranger who appeared to be intoxicated. The court's refusal to admit evidence that Mr. Goncalves was, in fact, intoxicated, as shown by his exceedingly high .24 BAC, prevented the jury from hearing this crucial corroborating evidence and was not harmless. *Jones*, 168 Wn.2d at 724-25. The excluded BAC evidence went to the very heart of Mr. Whicker's self-defense assertion. It was not mere impeachment evidence but direct evidence that corroborated Mr. Whicker's testimony. *Cf. State v. Orn*, 197 Wn.2d 343, 359, 482 P.3d 913 (2021) (improper exclusion of impeachment evidence was harmless).

The Court of Appeals deemed the error harmless by focusing on the existence of admitted evidence, not the potential effect of the wrongly excluded evidence on the jurors. Slip op. at 6-7. The different video clips captured only snippets of the encounter and showed only parts of the interaction. RP 306-08; Ex. 59. While the video showed part of the incident where Mr. Whicker followed Mr. Goncalves, it did not show the entire incident, did not show any words spoken, and was not clear enough to view all gestures and expressions.

The Court of Appeals refused to assess the nature of the omitted evidence and its impact on the jury's view of Mr. Whicker's testimony by myopically focusing on the video. Mr. Whicker explained Mr. Goncalves persisted in the encounter, turning back toward Mr. Whicker and hitting him again, even after he saw Mr. Whicker had a knife. RP 477. Mr. Whicker continued to defend himself because the knife was not "a deterrent" and Mr. Goncalves was "not relenting" in the encounter. RP 501-02. Mr. Goncalves also flipped Mr. Whicker over his shoulder and kicked him in the face, verifying he continued to pose a threat to Mr. Whicker. RP 506-08; Ex. 59. Had the jury heard the evidence proving Mr. Goncalves' exceptional intoxication, it is far more likely to have credited Mr. Whicker's description of events.

The opinion is part of an alarming recent trend in the Court of Appeals excusing admitted constitutional violations out of hand by mere reference to video evidence.[4] In doing so, the Court of Appeals improperly

[4] *See, e.g., State v. Herrera*, No. 81129-1-I, 2021 WL 2420168, at *1 (Wash. Ct. App. 2021) (unpublished) (holding improper opinion on guilt and prosecutorial misconduct were harmless "because there was video evidence of the incident"); *State v. Tapaka*, No. 80690-4-I, 2021 WL 2313528, at *5 (Wash. Ct. App. 2021) (unpublished) (excusing confrontation clause violation because videos depicted robbery); *State v. Hatfield*, No. 77512-0-I, 2019 WL 6492483, at *11-13 (Wash. Ct. App. 2019) (unpublished) (same); *State v. Estavillo*, No. 51629-2-II, 2019 WL 5188618, at *4 (Wash Ct. App. 2019) (unpublished) (holding potential *Miranda* violation harmless because video supported statements); *State v. Pointec*, No. 50345-0-II, 2019 WL 366249 (Wash. Ct. App. 2019) (unpublished) (holding any unanimity violation was harmless based on video). These cases are cited pursuant to GR 14.1 as nonbinding authority.

uses a sufficiency of the evidence approach, viewing the evidence in the light most favorable to the prosecution, rather than considering the improperly excluded evidence in the light most favorable to the defense and considering its potential effect on the jurors.

In these cases, as in Mr. Whicker's case, the courts forgave various constitutional violations as harmless error because video evidence depicted part or all of the events. These cases demonstrate the Court of Appeals focuses on the admitted evidence, as opposed to the effect of the improperly excluded evidence, in assessing the impact of a constitutional violation. The Court of Appeals' consistent misapplication of the harmless error analysis merits review.

b. <u>The Court of Appeals mistakenly excused the recognized constitutional violation because it believed the erroneously excluded evidence "served only to bolster" Mr. Whicker's credibility and testimony.</u>

The Court of Appeals also excused the constitutional violation because it found "the excluded evidence would have served only to bolster [Mr.] Whicker's credibility and testimony." Slip op. at 6. But evidence that supports the credibility of the accused in a self-defense case is far from cumulative, as the Court of Appeals mistakenly treated it. Toxicology evidence corroborating self-defense testimony is crucial.

The BAC evidence confirming Mr. Goncalves' extreme intoxication was a key piece of evidence supporting Mr. Whicker's

testimony. An individual under the influence of alcohol or substances "may look and act in a strange manner." *Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004). Toxicology results verifying intoxication permit a jury to credit an accused person's claim that the decedent engaged in "hostile and erratic behavior." *Id.* An assertion of "self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold sober victim," and the absence of the toxicology report prejudices a person and entitles him to a new trial. *Id.*

Here, like in *Harris*, the decedent's BAC corroborated Mr. Whicker's self-defense claim. It would have provided "common sense" support for Mr. Whicker's assertion and given the jurors a reason to credit his explanation of Mr. Goncalves' "hostile and erratic behavior." *Id.* Without it, Mr. Whicker had only his own account of the events, which the prosecutor actively discredited. RP 491-502, 506-08, 478, 585-90, 630. The improperly excluded evidence supported Mr. Whicker's version of events, corroborated his innocent explanation and his belief of Mr. Goncalves' intoxication, and was not harmless merely because it also bolstered his credibility and testimony. *State v. Cox*, 17 Wn. App. 2d 178, 190-91, 484 P.3d 529 (2021).

The State took advantage of the court's exclusion of evidence proving Mr. Goncalves' intoxication when it argued in closing that Mr.

Whicker made up the story about Mr. Goncalves being drunk to fit his defense. RP 630. This improper argument shows the harmful effect of the trial court's ruling and proves the importance of the BAC evidence on the jury's assessment of Mr. Whicker's credibility in this self-defense case. The prosecution failed to meet its burden proving the error is harmless.

c. <u>The violation of Mr. Whicker's constitutional right to present a defense and the Court of Appeals' misapplication of the harmless error analysis merit this Court's review.</u>

The excluded evidence shows the reasonableness of Mr. Whicker's belief Mr. Goncalves intended to inflict great personal injury and that there was an imminent danger of such being accomplished. The Court of Appeals misapplied the constitutional harmless error test. Mr. Whicker was prejudiced from the exclusion of the evidence supporting his sole defense because it left Mr. Whicker without unbiased evidence showing his perceptions were accurate. This Court should accept review.

2. The court relieved the State of its burden to disprove self-defense and deprived Mr. Whicker of his right to present a defense when it did not provide the jury with instructions that made the subjective belief component of self-defense manifestly apparent.

A person's right to act in self-defense rests on the subjective perception of the person, as well as the objective reasonableness of the conduct. Mr. Whicker's entire defense was he reasonably believed he needed to use force to defeat imminent great injury when he responded to

Mr. Goncalves' unprovoked racial attack on him. Mr. Whicker's proof of his reasonable belief included his history as a random victim of other attacks and his well-founded belief Mr. Goncalves was intoxicated. Mr. Whicker proposed instructions that told the jury it could consider his subjective perspective to determine whether his beliefs were reasonable. CP 121, 123, 127, 129. They also informed the jury it could consider relevant facts and circumstances not only at the time of but also prior to the incident. CP 123. The court's refusal to give Mr. Whicker's requested self-defense instructions relieved the State of its burden and prevented Mr. Whicker from meaningfully presenting his self-defense claim. RP 528-45.

The trial court refused Mr. Whicker's instructions because it believed it must adhere to the WPICs. RP 544 ("[Y]our beef is with the pattern instructions"). The Court of Appeals rejected Mr. Whicker's challenge because the court delivered instructions of which this Court approved in another case and that "mirrored the WPICs." Slip op. at 8-9. But a court's approval of instructions in a different case does not demonstrate the instructions appropriately conveyed the necessary standard in this case. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Instructions may improperly relieve the State of its burden and violate due process even when a court follows the pattern instructions. *State v. Kyllo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009); *State v.*

Bergstrom, 15 Wn. App. 2d 92, 99, 474 P.3d 578 (2020), *review granted*, 197 Wn.2d 1001 (2021); Const. art. I, § 3; U.S. Const. amend. XIV.

Mr. Whicker was entitled to instructions that made the correct law on self-defense manifestly clear to the jury. *LeFaber*, 128 Wn.2d at 902-03. The court's refusal to consider instructions that were not contained in the pattern instructions is a matter of substantial public interest. Its refusal to accurately instruct the jury on the law as it applied in the circumstances of this case is also a constitutional violation meriting this Court's review.

3. The court's refusal to instruct the jury Mr. Whicker's case did not involve the death penalty and the impermissible questioning about the death penalty tainted jury selection.

Informing prospective jurors they cannot know whether a case involves the death penalty undermines confidence in the integrity of the judiciary, puts unnecessary pressure on potential jurors, and distorts the selection process and ultimate makeup of the jury. In *State v. Pierce*, all nine justices of this Court agreed it would be error to follow the procedures established in *Townsend*[5] and to inform a jury it could not know whether a person faced the death penalty or to question jurors about the death penalty after *Gregory*[6] invalidated the death penalty. 195 Wn.2d 230, 240-44, 455 P.3d 647 (2020) (three justice lead), *id.* at 244-45 (two

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[5] *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001).
[6] *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

justice concurrence), *id.* at 247-49 & n.2 (four justice dissent). That is precisely what occurred here. 1RP 69-72, 231-32; RP 14-18; 10/10/19RP 178; CP 402.

The court's refusal to grant Mr. Whicker's motion to instruct the entire venire the case did not involve the death penalty and the impermissible questioning of Juror 26 distorted the selection process, affected the ultimate makeup of the jury, and undermined the integrity of Mr. Whicker's trial. CP 57-58, 115. The Court of Appeals agreed this was error but wrongly found it harmless. Slip op. at 12-13.

The specter of the death penalty raises well-founded fears of racial bias and unfair application. *Gregory*, 192 Wn.2d at 18-24. Here, the prosecution questioned Juror 26 in a manner that affirmatively misrepresented the state of the law. RP 14-18. The prosecution struck this otherwise qualified juror after it pursued this juror's disqualification for reasons that are irrelevant and align with a racially discriminatory jury selection process. CP 402, 547; 10/10/19RP 178. This denied Juror 26 an opportunity to serve and denied Mr. Whicker his right to a fundamentally fair trial by fairly selected jury. This issue of substantial public interest merits this Court's review.

4. **The court violated Mr. Whicker's right to a fair trial by an impartial jury, invaded the province of the jury, and commented on the evidence when it gave a supplemental instruction and reopened closing arguments.**

The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to a fair trial by an impartial jury. *Wainwright v. Witt*, 469 U.S. 412, 429-30, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). Issues regarding jury instructions should be resolved before deliberations begin so that the defense is not prejudiced. *State v. Hobbs*, 71 Wn. App. 419, 422-25, 859 P.2d 73 (1993).

"[J]ury deliberation is a crucial phase of trial during which the jurors discuss the case and arrive at a verdict." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 817, 425 P.3d 807 (2018). Once the jurors have begun deliberating, they no longer have the open minds required to hear the court's instructions and the parties' arguments. Providing arguments in direct response to a question may impermissibly interfered with the jury's role to impartially determine the facts based on the evidence.

In the rare case where the court gives additional instructions to a deliberating jury, it must remind jurors that all prior instructions control. *See State v. Blancaflor*, 183 Wn. App. 215, 218-19, 334 P.3d 46 (2014); WPIC 4.68; WPIC 151.00 comment. This requirement protects the accused's rights to a fair trial before an impartial jury, as well as to a

unanimous verdict. *State v. Ashcraft*, 71 Wn. App. 444, 460-62, 859 P.2d 60 (1993).

Here, "to convict" instruction told the jury the State must prove Mr. Goncalves "was not a participant in the crime of assault in the second degree" to convict Mr. Whicker of felony murder. CP 150. Neither party requested the court define "participant" to the jury, and the court did not give this instruction. 1RP 239-40.

After deliberations began, the jury asked if "being a participant" meant "being an accomplice rather than being a participant in the event?" CP 161. The question reflected the jury's focus on the roles of Mr. Goncalves and Mr. Whicker and Mr. Goncalves' aggressive acts instigating and perpetuating the events.

Over Mr. Whicker's objections, the court reassembled the jury, gave a new instructions neither requested nor discussed before closing arguments, and had the parties deliver "supplemental argument." CP 161-63; 1RP 239-65; RP 634-37. The court did not advise the jury it must consider all instructions and arguments collectively or inform the jury it should not give the supplemental instruction and arguments any special weight. RP 634-37. This permitted the jury to give the supplemental instruction and arguments undue weight. *See State v. Gonzalez*, 1 Wn. App. 2d 809, 818, 408 P.3d 376 (2017).

The court also unconstitutionally commented on the evidence when it not only defined "participant" but also informed the jury, "A victim of a crime is not a 'participant' in that crime." CP 163; RP 634; 1RP 239-65. Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court's personal opinion on the evidence. Const. art. IV, § 16; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). By its instruction, the court signaled it viewed Mr. Goncalves as the victim. It was for the jury, not the court, to decide who the "victim" of the assault was. The court commented on the evidence by sua sponte answering a different question than the one the jury asked.

The court improperly intervened during jury deliberations. It signaled to the jury that Mr. Goncalves was the victim. It gave additional instructions and argument without reminding the jury that all instructions and argument matter. This Court should review this extraordinary interruption of the jury's deliberative process to insert factual information about the deceased being a victim, which likely effected the outcome.

5. The Court of Appeals misinterpreted the relevant law and this Court's precedent when it affirmed Mr. Whicker's sentence based on a miscalculated offender score.

To determine whether prior convictions count in an offender score, courts may consider only facts related to elements of the offense that were

admitted, stipulated, or proven beyond a reasonable doubt in the prior proceedings. *Descamps v. United States*, 570 U.S. 254, 276-78, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *State v. Lavery*, 154 Wn.2d 249, 257-58, 111 P.3d 837 (2005); U.S. Const. amends. VI, XIV; Const. art. I, § 22.

Here, Mr. Whicker disputed his offender score and argued his three Lewis County prior convictions constituted the same criminal conduct and could not count separately. 1RP 272-74, 287-90; CP 169. The court disagreed by relying on unadmitted and unproven facts in a probable cause affidavit. CP 221-23; 1RP 270-71, 288-89, 290-92. However, Mr. Whicker did not agree to the facts in the probable cause affidavit in his prior pleas. CP 258-65. The court erroneously relied on facts not admitted, stipulated, or proven beyond a reasonable doubt in violation of RCW 9.94A.530(2).

The Court of Appeals ignored this error and affirmed Mr. Whicker's sentencing by improperly extending this Court's holding in *State v. Aldana Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013). Slip op. at 14-16. *Aldana Graciano* interprets how a sentencing court determines same criminal conduct with regard to other *current* offenses. 176 Wn.2d at 538-40. But *Aldana Graciano* does not dictate how a court determines same criminal conduct for purposes of *prior* convictions.

For prior convictions, RCW 9.94A.525(5)(a)(i) explicitly requires a "current sentencing court" to "determine" whether prior convictions with concurrent sentences shall count as the same criminal conduct. The statute does not permit the instant sentencing court to simply defer to a prior court's determination of same criminal conduct. *State v. Johnson*, 180 Wn. App. 92, 101, 320 P.3d 197 (2014).

A determination of criminal history under RCW 9.94A.525(5)(a)(i) is different from a determination of other current offenses under RCW 9.94A.589(1)(a). *Johnson*, 180 Wn. App. at 102-03. The prosecution bears the burden under RCW 9.94A.525. *State v. Cate*, 194 Wn.2d 909, 912-13, 453 P.3d 990 (2019); *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012). Contrary to the Court of Appeals' conclusion, *Aldana Graciano* does not shift the burden of proving one's criminal history and offender score to the defense.

The prosecution and the court relied on impermissible documents containing unproven and unadmitted assertions to conclude Mr. Whicker's prior offenses were not the same criminal conduct. CP 340, 345. Mr. Whicker's Guilty Plea, Judgment and Sentence, and Information establish he committed all the prior offenses on the same date, at the same location, with the same intent. CP 231, 242-44, 264-65. Even if Mr. Whicker bore

the burden of establishing the prior offenses were the same criminal conduct, his prior guilty plea satisfied that burden here.

This Court should accept review of this sentence imposed in violation of the constitution, the SRA, and case law.

E. CONCLUSION

This Court should accept review under RAP 13.4(b).

DATED this 26th day of August, 2021.

Respectfully submitted,

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APPENDIX A

June 7, 2021, Opinion

FILED
6/7/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MEHMET ALI WHICKER, Appellant.	No. 80869-9-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Mehmet Whicker appeals his conviction for second degree murder. He claims the court's exclusion of the victim's BAC (blood alcohol content) violated his right to present a defense. He also challenges the sufficiency of the self-defense jury instructions, the court's decision to offer supplemental jury instructions in response to a juror question, and the court's refusal to inform the jury that the death penalty was not available. Finally, he challenges the calculation of his offender score. We conclude that the court erred by excluding the victim's BAC and by telling a juror that they could not know if the death penalty was at issue. However, because these errors were harmless and we find no other errors in the court's decisions, we affirm.

FACTS

In the evening of October 2, 2016, Whicker was at the Tukwila International Boulevard Station waiting for a bus to take him to a homeless shelter in downtown Seattle. Jesse Goncalves, a stranger, walked up to Whicker

and punched him in the face. According to Whicker's testimony, Goncalves called Whicker a racial slur and punched Whicker's glasses off his face. Whicker had previously been attacked by strangers and was concerned that Goncalves might be there with other people. Goncalves yelled at Whicker to the effect of "'you ain't going to make it too much longer if you keep hanging around here.'" Whicker pulled out a knife, and Goncalves jumped back and began to walk away.

Surveillance videos from the transit station show Goncalves begin to walk away, then turn back before the two confront each other again. At one point, Goncalves steps quickly toward Whicker, and Whicker stabs him. Goncalves leaves the frame, and a few seconds later, other cameras show Whicker chasing Goncalves through the transit station and stabbing Goncalves again. In a third area, the camera shows Whicker continuing to chase Goncalves. Goncalves then flips Whicker over his shoulder and kicks him before running away. Whicker walks away shortly thereafter. A minute later, Goncalves returns with a security guard and lies down. Goncalves died shortly after as a result of multiple stab wounds.

Whicker was arrested later that night after police found him a few blocks away and a witness positively identified him. Whicker had visible injuries, including blood on his hands and lip. Whicker told police he had been injured in an earlier fall but later admitted he had been lying. He also stated that he thought Goncalves was high and said Goncalves told Whicker he had a beer with him. A toxicology report showed that Goncalves had a BAC of .24.

The State charged Whicker with second degree felony murder while

armed with a deadly weapon. During voir dire, a potential juror indicated that he was averse to the death penalty. Over Whicker's objection, the court granted the State's motion to tell the juror that they could not know whether the death penalty was involved. The juror was told this outside the presence of the remainder of the jury pool. The State later used one of its peremptory challenges to remove the juror.

At trial, Whicker contended he had acted in self-defense and claimed that he could smell alcohol on Goncalves, which made him think Goncalves would continue to be aggressive. The State moved to exclude the evidence of Goncalves's BAC on the basis that it was irrelevant. The court granted the motion, permitting Whicker only to introduce evidence that some amount of alcohol was found in Goncalves's system.

The court gave the jury Washington Pattern Instructions: Criminal (WPICs) on the law of self-defense and rejected Whicker's proposed instructions. After deliberations began, the jury asked the court about the definition of "participant," and the court gave the jury an additional instruction defining the term over Whicker's objection. The jury found Whicker guilty as charged.

At sentencing, the State introduced evidence of several of Whicker's previous offenses. In particular, it introduced a certified felony judgment and sentence for second degree burglary, residential burglary, second degree robbery, and second degree possession of stolen property, all from the same date in 2007. It also introduced an affidavit of probable cause describing the facts of these crimes to show that they did not constitute the same criminal

conduct for purposes of Whicker's offender score. Over Whicker's objection, the court found that the offenses were not the same criminal conduct and sentenced Whicker to 331 months.

Whicker appeals.

ANALYSIS

Whicker contends that the court erred by excluding evidence of Goncalves's BAC, by giving jury instructions that failed to adequately explain the law of self-defense, by giving supplemental jury instructions after deliberations had begun, by refusing to instruct the jury that the case did not involve the death penalty, and by concluding that several of Whicker's prior convictions did not constitute the "same criminal conduct." We agree that the court erred by excluding evidence of Goncalves's BAC and in its discussion of the death penalty but conclude that the errors were harmless. Finding no other errors, we affirm.

Exclusion of BAC

Whicker first contends that the court erred by excluding Goncalves's .24 BAC result. We agree that the court's ruling violated Whicker's right to present a defense but conclude that the error was harmless beyond a reasonable doubt.

When a defendant claims that the exclusion of evidence violated their right to present a defense, we first review the court's evidentiary ruling for abuse of discretion. State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019); State v. Rivers, 129 Wn.2d 697, 709, 921 P.2d 495 (1996). Then, "[i]f the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense." State v. Clark,

187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

The court's exclusion of Goncalves's BAC was an abuse of discretion. Generally, "relevant evidence is admissible." ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. The "threshold for relevance is extremely low." City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). Here, the sizable amount of alcohol in Goncalves's blood corroborated Whicker's testimony, thereby increasing his credibility and supporting his self-defense theory. Whicker testified that he thought Goncalves was going to continue attacking him because: "He's being verbally aggressive, like working himself up. I can smell alcohol. So I'm thinking between alcohol and the yelling, he might be trying to work himself up to hit me again." While the State correctly noted that different people react to alcohol differently, the relatively high BAC of .24 does make the validity of Whicker's theory more likely than the bare evidence that some alcohol was present in Goncalves's blood. The lack of information about how Goncalves would react to that amount of alcohol therefore goes to the evidence's weight, not its relevance. Accordingly, the court's ruling that the BAC was "simply not relevant" was an abuse of discretion.

Furthermore, the exclusion of this evidence violated Whicker's constitutional right to present a defense. Due process ensures that a defendant has "'the right to a fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v.

Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This includes the right to introduce evidence of at least minimal relevance. Jones, 168 Wn.2d at 720. Because the evidence was material to Whicker's defense, "it was a denial of due process to exclude it." State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).[1]

Finally, we consider whether the exclusion of Goncalves's BAC was harmless error. Error is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Jones, 168 Wn.2d at 724. Here, the excluded evidence would have served only to bolster Whicker's credibility and testimony, but even giving great weight to Whicker's testimony, no reasonable jury would find that Whicker's conduct constituted self-defense. A defendant can only act in self-defense to the extent that they use a degree of force that "a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Here, even if the evidence supports a finding that Whicker acted in reasonable fear of imminent harm, the surveillance videos show that after Whicker first stabbed Goncalves, Goncalves attempted to run away and Whicker continued to chase him, ultimately stabbing

[1] The State disagrees and contends that the probative value of Goncalves's BAC was outweighed by the prejudicial evidence. ER 403 permits the court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." While we would generally defer to the court's determination of unfair prejudice, see Gerlach v. Cove Apartments, LLC, 196 Wn.2d 111, 124, 471 P.3d 181 (2020) (deferring to court's discretion to exclude BAC as unfairly prejudicial to plaintiff in tort's case), here neither the State nor the trial court discussed a prejudicial impact below.

him several more times. A jury could not find that this was a degree of force that would reasonably appear necessary to prevent imminent harm. We therefore conclude that the error was harmless.

Jury Instructions on Self-Defense

Next, Whicker claims that the jury instructions given by the court failed to make the law of self-defense clear to the jury. We disagree.

Jury instructions are generally sufficient if "they are supported by substantial evidence, properly state the law, and allow the parties an opportunity to satisfactorily argue their theories of the case." State v. Espinosa, 8 Wn. App. 2d 353, 360-61, 438 P.3d 582 (2019). Jury instructions on self-defense must also "'make the relevant legal standard manifestly apparent to the average juror.'" State v. Ackerman, 11 Wn. App. 2d 304, 312, 453 P.3d 749 (2019) (quoting State v. Corn, 95 Wn. App. 41, 53, 975 P.2d 520 (1999)). We review the adequacy of jury instructions de novo. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Self-defense is a defense to homicide "when there is reasonable ground to apprehend a design on the part of the person slain to . . . do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished." RCW 9A.16.050(1). This standard "incorporates both subjective and objective characteristics," requiring jurors to assess the evidence of self-defense "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

The jury instructions in this case correctly stated the law and made the legal standard manifestly apparent. The court's instructions mirrored the WPICs on self-defense, whereas Whicker's proposed instructions added extra emphasis to the subjective component of self-defense at several points. His proposed instructions differed from the WPICs as indicated by italics:

> It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable *if* [(1)] the slayer reasonably believed (*from his subjective perspective*) that the person slain intended to inflict death or great personal injury; (2) the slayer reasonably believed (*from his subjective perspective*) that there was imminent danger of such harm being accomplished; and (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer (*from his subjective perspective*), taking into consideration all the facts and circumstances as they appeared to him, at the time of [*and prior to*] the incident.[2]
>
> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds (*from his subjective perspective*) that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary for a homicide to be justifiable.[3]
>
> Great personal injury means an injury that the slayer reasonably believed (*from his subjective perspective*), in light of all the facts and circumstances known (*to him*) at the time, would produce severe pain and suffering if it were inflicted upon either

---

[2] Based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.02 (4th ed. 2016) (WPIC). This proposed instruction also omitted the following language after "Homicide is justifiable": "when committed in the lawful defense of the slayer when . . . ." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.02.

[3] Based on WPIC 16.07.

> the slayer or another person.[4]
>
> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds (*from his subjective perspective*) [f]or believing (*from his subjective perspective*) that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.[5]

The subjective component of self-defense was manifestly apparent without Whicker's requested changes. The instructions correctly instructed the jury to make its decision based on the facts and circumstances as they appeared to Whicker, and not to rely on whether actual danger was imminent. See Janes, 121 Wn.2d at 238 (subjective component of self-defense requires jurors to view incident from perspective of the defendant given all facts and circumstances known to him). Moreover, the instructions as given more accurately portray the objective component of self-defense than Whicker's requested instructions. The objective component requires the jury to use the facts and circumstances as they appear to Whicker to determine what a reasonable person in his position would do. Janes, 121 Wn.2d at 238. This portion of the inquiry "serves the crucial function of providing an external standard. Without it, . . . self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs." Janes, 121 Wn.2d at 239. Because the instructions as given appropriately balance the two aspects of self-defense, we conclude that they are sufficient.

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[4] Based on WPIC 2.04.01. This instruction has been specifically approved by our Supreme Court. Walden, 131 Wn.2d at 477-78.

[5] Based on WPIC 16.08.

Supplemental Jury Instructions and Closing Argument

Whicker contends that the court erred by giving a supplemental instruction and reopening closing argument in response to a juror question. We disagree.

The trial court may use its discretion to give supplemental instructions in response to a request from a deliberating jury. State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). "[S]upplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury." State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

One of the elements that the State was required to prove was that "Jesse Goncalves was not a participant in the crime of assault in the second degree." After the jury began deliberations, they sent a question to the judge asking for the definition of participant. The State noted that it had forgotten to include a jury instruction defining participant in the jury instruction packet. Over Whicker's objection, the court gave the jury a supplemental instruction which read: "A 'participant' in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a 'participant' in that crime."

This instruction correctly explained the law under RCW 9A.08.020. The instruction did not introduce a new theory or claim but merely explained an element that had already been introduced. The State had already argued during its closing argument that Goncalves was not a participant in the crime because he was instead a victim. Whicker then had an opportunity to respond to this argument during his closing argument. For these reasons, he cannot show that

the instruction exceeded matters that were argued to the jury or that he was prejudiced by the supplemental instruction. See State v. Gonzales, 1 Wn. App. 2d 809, 818, 408 P.3d 376 (2017) (defendant was not prejudiced by supplemental instruction where he could not "show that his cross examination or closing argument would have changed if the instruction had been offered before deliberations began").

Whicker contends that the instruction was improper because it inappropriately commented on the evidence by signaling that the court viewed Goncalves as a victim. However, the jury's question, asking whether a participant was "an accomplice rather than . . . a participant in the event," indicated a confusion that the instruction appropriately answered. The instruction merely stated the law and properly left the issue of whether or not Goncalves was a victim for the jury to determine. Accordingly, we conclude that the court did not abuse its discretion by offering the supplemental instruction.[6]

Discussion of Death Penalty

Whicker next claims that the court erred by granting the State's motion

[6] Whicker also claims that the court erred by allowing the parties to give additional closing arguments about the supplemental instruction. However, the record shows that after Whicker protested the decision to give the supplemental instruction on the basis that he had not presented argument about it, the court asked Whicker if he wanted to give more closing argument and he accepted. We have implicitly approved of allowing supplemental closing argument in cases where supplemental instructions are appropriately given. State v. Hobbs, 71 Wn. App. 419, 425, 859 P.2d 73 (1993) (holding that despite defense's opportunity to give additional closing argument, supplemental instructions were still not appropriate where defense was not able to rethink its cross-examination strategy based on original instructions). Whicker shows no prejudice resulting from the court's decision, and we find no abuse of discretion.

regarding discussion of the death penalty. In light of State v. Pierce, 195 Wn.2d 230, 455 P.3d 647 (2020) (plurality opinion), the State concedes that the court erred by declining to inform a prospective juror that the death penalty was not at issue. We agree that this was error but conclude that it was harmless.

In State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), overruled by Pierce, 195 Wn.2d 230, our Supreme Court created a "strict prohibition against informing the jury" in a noncapital case of whether the death penalty was available for the charged crime. Two years after the court abolished the death penalty in State v. Gregory, 192 Wn.2d 1, 19, 427 P.3d 621 (2018), it overturned Townsend in Pierce, 195 Wn.2d at 244 ("We hold that Townsend is incorrect and harmful because it artificially prohibits informing potential jurors whether they are being asked to sit on a death penalty case."). While all the justices in Pierce agreed that Townsend need no longer apply after Gregory, only two justices would have held that death-qualification discussions during voir dire required reversal of a conviction.[7] Pierce, 195 Wn.2d at 245 (Stephens, J. concurring). The lead opinion's decision turned on the State's peremptory dismissal of a prospective juror who did not "qualify" under death-qualification questioning, in violation of GR 37, which prohibits the use of peremptory challenges in which race or ethnicity could be a factor. Pierce, 195 Wn.2d 243-44.

Here, juror 26 wrote on their juror questionnaire that they were "averse to

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[7] Death qualification is "'the process whereby prospective jurors are asked about the death penalty and excluded from the final panel if they oppose it.'" Pierce, 195 Wn.2d at 236 n.3 (quoting State v. Hughes, 106 Wn.2d 176, 180, 721 P.2d 902 (1986)).

[the] death penalty." Juror 26 was then questioned outside the presence of the venire, where the State informed them that they could not know whether the death penalty was in play. They replied, "That makes me really uneasy. Part of me says I would be really adverse if there was any doubt to conviction." When asked if they could "look at the evidence" and, if the State met its burden, "be able to return a verdict of guilty," they replied, "I hope so. It's a hypothetical on a very weighty issue." Juror 26 later agreed that their religious convictions made it difficult to sit in judgment on another person, and when asked whether they could keep an open mind in deliberating on the case, they said, "I've never been confronted with this question. I would hope so. If I say yes, then I fail. We'll say yes, a provisional yes." The State used a peremptory challenge on juror 26, and Whicker declined to object to the challenge.

Whicker's trial was held after Gregory but before Pierce. In light of Pierce, the court erred by declining to state that the death penalty was not at issue. However, the impacts of this error were minimized. Juror 26 volunteered the information that they were averse to the death penalty without prompting, and only juror 26 was present for the ensuing discussion. Under these circumstances, the court's decision to comply with Townsend was harmless.[8]

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[8] While the lead opinion in Pierce suggests that Whicker may have had grounds to object to juror 26's dismissal under GR 37, Whicker failed to make a GR 37 objection at trial and does not raise this issue on appeal. GR 37 provides that if a party or the court objects to the use of a peremptory challenge on the basis of improper bias, the party who made the peremptory challenge must articulate its reasons for the challenge and the court must then evaluate the reasons to allow or deny the challenge. GR 37(c)-(e). Here, because Whicker did not object to the peremptory challenge, a record was never developed concerning the challenge.

Offender Score Calculation

Whicker contends that the court erroneously calculated his offender score at sentencing by failing to find that some of his prior offenses encompassed the same criminal conduct. We disagree.

In its calculation of an offender score, the sentencing court must determine whether prior adult offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). Two crimes constitute the "same criminal conduct" only if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). While the State has the burden to establish the existence of prior convictions, the defendant has the burden of production and persuasion to establish that convictions constitute the same criminal conduct. State v. Aldana Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). We review the trial court's determination of same criminal conduct for abuse of discretion. Aldana Graciano, 176 Wn.2d at 537.

Here, Whicker did not establish that his 2007 convictions were the same criminal conduct. Indeed, his counsel acknowledged as much to the court: "Technically, I think the State is correct and you have separate victims and may argue that it constitutes separate crimes, but the—it's all part of the same crime that was occurring at the time." Crimes can only constitute the same criminal conduct if they involve the same victims, so these convictions were not the same criminal conduct. RCW 9.94A.589(1)(a).

Whicker disagrees and contends that the State had the burden to disprove

same criminal conduct and that the State failed to do so.[9] Whicker contends that Aldana Graciano only established the burden of proof for proving that *current* offenses are the same criminal conduct under RCW 9.94A.589(1)(a) and did not establish the burden for *prior* offenses under RCW 9.94A.525(5)(a)(i). However, the court determines whether prior offenses should be counted separately or not "using the 'same criminal conduct' analysis" applied to current offenses under RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i). Accordingly, we have previously applied the burden for proving same criminal conduct under Aldana Graciano to prior offenses in addition to current offenses. See State v. Williams, 176 Wn. App. 138, 142, 307 P.3d 819 (2013), aff'd, 181 Wn.2d 795, 336 P.3d 1152 (2014).[10] Aldana Graciano's reasoning further supports this conclusion. There, the court reasoned that the State has the burden to prove the existence of prior convictions because their existence favors the State, whereas the defendant has the burden to prove same criminal conduct because such a determination favors the defendant by lowering their offender score below the presumed score. Aldana Graciano, 176 Wn.2d at 539. This reasoning applies with equal force to the determination that prior convictions constitute the same criminal conduct. Because Whicker did not meet his burden to show the offenses were the same conduct, we conclude that the court did not abuse its

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[9] Whicker notes that the only evidence the State introduced which tended to disprove same criminal conduct was a probable cause affidavit that Whicker never stipulated to. Whicker does not dispute that the State properly met its burden through other documents to establish the existence of these convictions.

[10] In affirming, the Supreme Court explicitly declined to address whether the Aldana Graciano burden of proof rule applies to prior offenses. State v. Williams, 181 Wn.2d 795, 798, 336 P.3d 1152 (2014).

discretion by counting the offenses separately.

We affirm.

WE CONCUR:

APPENDIX B

July 27, 2021, Order Denying Motion for Reconsideration

FILED
7/27/2021
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. MEHMET ALI WHICKER, Appellant.	No. 80869-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Mehmet Whicker has filed a motion for reconsideration of the opinion filed on June 7, 2021. Respondent State of Washington has filed an answer to appellant's motion. The panel has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80869-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 26, 2021
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