

No. 39744-7-II  
Consolidated with No. 40080-4-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY *hnc*

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

STATE OF WASHINGTON

Respondent

vs.

JAY CLIFFORD RUSSELL

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY  
The Honorable Diane Woolard  
Superior Court No. 08-1-01961-6

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APPELLANT'S OPENING BRIEF

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*pm 1-8-10*

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in giving an “aggressor” instruction.
2. The prosecutor violated appellant’s constitutional right to remain silent before arrest by commenting on his failure to call the police himself, and by comments regarding the inability of the police to contact appellant after they were investigating the incident.
3. Appellant did not received effective assistance of counsel when his lawyer did not request an instruction on the lesser-included offense of fourth degree assault.
4. Appellant did not receive effective assistance of counsel when his lawyer did not ask for a limiting instructions regarding impeachment of Christina Russell by a prior inconsistent statement to the police.
5. Appellant did not receive effective assistance of counsel when his attorney failed to object to police testimony regarding “defensive” injuries and whether the marks on Higgins’ neck were consistent with a chokehold.
6. The trial court erred in allowing testimony from Matt Higgins that on some earlier occasion, appellant had allegedly threatened to “snap him like a twig.”
7. The trial court erred by excluding evidence of Matt Higgins’ conviction for second-degree theft.
8. The prosecutor violated appellant’s rights under Art. I §22 by arguing that his attendance at trial allowed him to falsify his testimony.
9. Appellant was convicted of first-degree burglary upon insufficient evidence.
10. Appellant was convicted of second-degree assault upon insufficient evidence.
11. The trial court miscalculated the offender score by not considering the statute defining “same criminal conduct”.
12. The trial court abused its discretion at sentencing by not ordering a sentence below the standard range.
13. Appellant assigns error to the denial of his motion for a new trial.

14. Appellant assigns error to the denial of his motion in arrest of judgment.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where there was no evidence that Mr. Russell had attempted to provoke a fight with Mr. Higgins, did the court err in giving an “aggressor” instruction? (Assignment of Error 1)
2. Was appellant denied a fair trial by the prosecutor’s elicitation of evidence of pre-arrest silence? (Assignment of Error 2, 13)
3. Did the prosecutor commit misconduct during closing argument by arguing a “reasonable person” in appellant’s position would have contacted the police to make a statement? (Assignment of Error 2, 13)
4. Can the “pre-arrest silence” issues be raised for the first time on appeal, pursuant to RAP 2.5 (a)? (Assignment of Error 2, 13)
5. Was the failure to request an instruction on the lesser-included offense of fourth degree assault ineffective assistance of counsel which resulted in prejudice to appellant? (Assignment of Error 3)
6. Was the failure to request a limiting instruction on impeachment evidence regarding Mr. Russell’s permission to enter his wife’s apartment ineffective assistance of counsel which resulted in prejudice? (Assignment of Error 4)
7. Was the failure to object to “expert” testimony regarding the nature of Mr. Higgins’ injuries ineffective assistance of counsel which resulted in prejudice to appellant? (Assignment of Error 5)
8. Did the trial court err in allowing testimony that appellant had allegedly threatened Matt Higgins on an unspecified prior occasion? (Assignment of Error 6)
9. Did the trial court make a finding that the alleged threat had been made by a preponderance of the evidence? (Assignment of Error 6)
10. Did the trial court err in failing to rule on appellant’s motion *in limine* to exclude the prior threat evidence? (Assignment of Error 6)

11. Did the trial court err in excluding evidence of star witness Matt Higgins conviction for felony theft because of its age alone? (Assignment of Error 7)
12. Should Art. I §22 be interpreted to forbid prosecutors from arguing that a defendant can falsify his testimony by virtue of hearing testimony from other witnesses at trial? (Assignment of Error 8)
13. Can this constitutional error be raised on appeal without a contemporaneous objection at trial, when the issue was raised in Mr. Russell's motion for a new trial? (Assignment of Error 8, 13)
14. Should this court forbid prosecutors from arguing that a defendant can falsify his testimony after sitting through trial under the court's supervisory authority? (Assignment of Error 8)
15. Where there was no direct testimony that Mr. Russell was not licensed or privileged to enter his wife's apartment was the evidence sufficient to support his conviction for first-degree burglary? (Assignment of Error 9, 14)
16. Where there was no evidence that Mr. Russell assaulted Mr. Higgins with any specific intent was the evidence sufficient to support his conviction for second-degree assault? (Assignment of Error 10, 14)
17. Did the court err in calculating the offender score by failing to determine that the three counts constituted "same criminal conduct"? (Assignment of Error 11)
18. Did the trial court abuse its discretion in sentencing by failing to consider and rule on several different grounds for an exceptional sentence below the standard range? (Assignment of Error 12)

### III. STATEMENT OF THE CASE

#### A. Procedural History

Appellant Jay Clifford Russell was charged by a fourth amended information with burglary in the first degree (RCW 9A.52.020), assault in the second degree, RCW 9A.36.021 (1)(e), harassment, RCW 9A.46.020 (1)(a)(i) and (2)(b)(ii) and malicious mischief in the third degree, RCW 9A.48.090 (b). The final version of the information, filed August 17, 2009,

alleged that counts I and IV (burglary and malicious mischief) were crimes involving domestic violence as defined by RCW 10.99.020. CP 1, 8, 26, 42, 46. The second-degree assault was alleged to have been committed with the intent to commit another felony, either burglary or harassment.

The court held hearings on motions in limine filed by the defense on the first day of trial, August 17. CP 37, 38, 39, 41. Trial was held before the Honorable Diane Woolard and a jury on August 17-19. The jury returned verdicts of guilty on counts I-III (burglary, assault and harassment) and a verdict of not guilty on Count IV (malicious mischief). CP 57-59. The jury returned a special verdict that Jay Russell and Christina Russell were members of the same family or household.

The sentencing was held on August 28, 2009. The state requested a sentence of 36 months, which was within the standard range. RP 396.<sup>1</sup> The state also requested a lifetime no-contact order between Mr. Russell and his wife, Christina Russell. RP 398. Ms. Russell spoke at the sentencing and vehemently opposed the imposition of a no contact order, telling the court flatly that she was not a victim in the case and had been trying for some time to convince the prosecution of that fact. RP 400-403. She had previously filed a motion *pro se* to rescind the pretrial no-contact order. CP 7.

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<sup>1</sup> RP will refer to the report of proceedings for trial, which is in three volumes, but is numbered sequentially throughout. RP II will refer to the transcript of the post trial motions hearing, held Sept. 11, 2009 and presentation of findings on November 18, 2009.

The defense argued that the interlocking nature<sup>2</sup> of the three offenses required a lower sentence, either by utilization of the merger doctrine, the doctrine of “same criminal conduct” or double jeopardy. RP 403-405. Defense counsel also noted that he would be filing a motion for a new trial and a motion in arrest of judgment.<sup>3</sup> RP 399-400. The defense requested a downward departure from the guidelines based on the mitigating circumstances of the case. RP 406-411.

The court declined to enter a no-contact order between Mr. Russell and his wife, indicating that it was not needed. RP 413. The court also declined to grant a downward departure, and instead imposed a sentence at the bottom of the sentencing range, which was 31 months. RP 413-414; CP 68. The court set bail on appeal in the amount of \$25,000, indicating that Mr. Russell was not a flight risk and not a risk to the community. RP 416-17. Mr. Russell filed a timely notice of appeal, and is in the community while the appeal is pending. CP 72.

On September 11, 2009 the court held a hearing on post-trial motions to arrest judgment and for a new trial, which were filed shortly after the sentencing hearing. Supp. CP \_\_\_\_\_. Defense counsel argued that the prosecutor’s comments on Mr. Russell’s failure to contact the

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<sup>2</sup> The burglary was elevated to first-degree status by virtue of the assault allegation. The assault allegation was elevated to second degree by virtue of the allegation that it was committed with intent to commit another felony, either the burglary or the harassment. The alleged threat constituting the harassment occurred during the midst of the conduct constituting the assault.

<sup>3</sup> A separate notice of appeal has been filed with respect to the denial of these motions, and this court has consolidated the two appeals.

police after the incident was a violation of his state constitutional right to remain silent. RP II 1-7. The court denied the motion. RP II 16. In the motion in arrest of judgment, defense counsel argued there was insufficient evidence to support the burglary conviction since Ms. Russell had testified that her husband had her permission to enter her apartment on a standing basis. This motion was also denied by the trial court. RP II 23. At a subsequent hearing, the court signed Findings and Conclusions related to the motions, which, as defense counsel indicated, merely reflect which witness gave testimony on a topic, and did not represent credibility determinations by the court that the testimony was accurate. RP II 25-27.

B. Hearing on Motions in Limine

The state moved in limine to exclude evidence of a second-degree theft conviction for complaining witness Matt Higgins. Higgins was sentenced in January of 1999, so it appeared by the time of the trial that the conviction was more than 10 years old. The court excluded evidence of the conviction under ER 609 (b). RP 22-24.

The defense also sought to introduce evidence of Higgins' misdemeanor criminal history, which his daughter had discovered while surfing the Internet, CP 28-29, RP 219, and also evidence that he had been convicted of a sex offense and had for a time been required to register as a sex offender. The court excluded the misdemeanor criminal history, but allowed the defense to offer evidence that Higgins had been convicted of a sex offense, since it was primarily the discovery of this history that

prompted Mr. Russell to want to meet with his wife on the day of the incident. RP 24-33.

The court also heard an offer of proof from Higgins about threats that he had allegedly heard through Ms. Russell, and also one that he said Mr. Russell had made directly to him. RP 51-59. The court excluded the evidence of alleged threats, except the one made directly by Mr. Russell. RP 74-75.

### C. Trial Testimony

Christina Russell was married to Jay Russell in 1993. They are still married but agreed to separate 2 ½ years ago. The decision to separate was mutual. She and Jay Russell have two daughters, ages 13 and 11. Jay is a great father to their children, and his kids mean the world to him. Christina is not financially dependant on Jay, as the Evergreen and Washougal School districts employ her as a substitute teacher. RP 122-24, 156.

She moved into an apartment in Vancouver about a year and half ago. Before that she lived with Mr. Russell in Skamania County. She began dating a man named Matt Higgins about two and half years ago. She testified that Jay Russell was concerned she was not ready to start dating, and about the possible effect that another man around the house might have on their two daughters. RP 119, 120, 125-26.

Christina's apartment and Matt Higgins' apartment were fairly close together, so that it was often convenient for him to stay over since on

the days she was substitute teaching, she would leave early in the morning. He had some of his belongings at her house. RP 127-28.

Christina and Jay had no set schedule for the exchange of their girls. She saw Jay several times a week and they communicated on a regular basis. When dropping the girls off at her apartment, he would sometimes just let them out of the car, and sometimes he would come up to the door of the apartment. RP 129-30, 158.

Jay and Matt Higgins had first met at a school event for the kids, but did not have a social relationship themselves. RP 134. Jay was aware that she was dating Mr. Higgins. RP 160. Jay was not jealous or angry about their relationship. RP 160-61. Since Matt Higgins was a cigarette smoker, he and Jay Russell had contact outside Christina's apartment at the times when Jay would pick up or drop off the girls. RP 159-60.

A day or two before September 5, 2008 she received a call from Jay. He was concerned because he had found out that Mr. Higgins was a convicted sex offender. He asked Christina if she was aware of this. He was concerned about whether their daughters were safe. They made a tentative plan to discuss this but had not set up a specific time. She told Jay she would be off work the next day. RP 163-66.

On September 5, she received a call offering some substitute teaching time. She called Matt Higgins and asked if she could borrow his car because hers was not working. RP 134-35, 166-67. She left her own

car in the driveway. If Matt Higgins' car had been in her driveway, Jay Russell would have seen it when he came over. RP 167-69.

Matt Higgins, the convicted sex offender<sup>4</sup> who was dating Christina Russell, was at her house on September 5, 2008. RP 93. Christina had borrowed his car to go to work that day. RP 94. He could not recall if he had driven over to her apartment that morning or had stayed the night. RP 113.

Higgins was awakened from a nap because the family dog was barking. He looked through the peephole in the front door and did not see anyone. He got a cigarette and opened the front door to go out to smoke. RP 94- 96. He saw Mr. Russell. He tried to close the door, but Jay Russell pushed his way in after a 5-7 second struggle and threw him against a wall. He did not invite Jay in, and Jay did not ask if he could come in. RP 97-98, 115. According to Mr. Higgins, Jay Russell grabbed him by the throat, pushed him against the wall, cocked his fist and said if he ever found Matt Higgins there again he would kill him. RP 99.

The state introduced photos showing a damaged section of sheet rock in the apartment. RP 99-100. Higgins claimed he was held against the wall for 10-15 seconds with Jay's hand around his neck. He could not breathe. RP 101. Jay made the threat while his hand was around Higgins'

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<sup>4</sup> Higgins was convicted of indecent liberties. He testified that he had had to register as a sex offender until about 2 years before the date of the trial. RP 109.

neck. RP 102. The state introduced photos taken by the police of marks on Higgins' neck and arms. RP 102-103.

While he was trying to push the door shut, Higgins testified that he told Jay he could not come into the house. Higgins also testified he did not touch Jay before Jay grabbed him. He did not try to free himself from Jay's grip. Once Jay let go of him, he told Jay he would leave the house. RP 104-05. Jay left the house and Higgins shut the door and locked it behind him. RP 105.

Higgins called Christina to let her know what had happened and then called the police. They arrived about 15 minutes later. RP 107. He did not suffer any significant injury and did not get any medical attention as a result of the incident. RP 116.

Officer Tim Thomson came to Christina Russell's apartment after Higgins' 911 call. He took the photos of the sheet rock damage and also took photos of Higgins. RP 190, 191. He offered his opinion that Higgins' injuries were "defensive" and not self-inflicted. RP 190.

As he was going to leave, Christina Russell arrived. The officer testified<sup>5</sup> that she told him that Jay Russell had not been given specific permission to enter her apartment when she was not at home. RP 195. He never asked why her husband had been over at the house. RP 213-214.

The officer said he tried to get in contact with Mr. Russell that day or the

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<sup>5</sup> Defense counsel objected to this hearsay testimony. After a colloquy, the court allowed this as impeachment of Ms. Russell's earlier testimony. However, the jury was not given a limiting instruction concerning the proper use of this testimony. RP 192-93.

next, but was unable to do so. The prosecutor then asked if he was ever able to do so, and the officer answered, "No." RP 195-96.

The officer did not notice any indication from the condition of the exterior of the house that there had been a forced entry. RP 206, 207. The photos he had taken of Mr. Higgins showed a fresh abrasion but had no deep bruising, swelling or indications of a hand print. RP 209. Mr. Higgins exhibited no signs of respiratory distress. RP 210.

Christina Russell found out from Higgins' phone call that Jay Russell had been to the apartment that day. She was not surprised at this since they had discussed getting together to talk about Mr. Higgins' background as a sex offender. RP 138-39. She did not recall that they were going to meet that day, however. RP 140. She had not given Jay express permission to come over that day since they had not talked on the 5<sup>th</sup>. RP 141-42. However, he did have access both to the apartment and the auxiliary key to the apartment which was hidden outside. Also, she had never told Jay Russell that he could *not* come to the apartment. She would not have denied him permission to enter the apartment that day. RP 162-63. Jay had sent her a text message that morning, but she did not get it until after she was done with work. He had suggested that they get together and talk about Higgins while the girls were at school. RP 171-72.

She saw a red mark on Higgins' neck on the date of the incident. There was also damage to the wall behind the front door, which was

repaired at no cost to her. RP 153-54, 175-76. Nothing else in the house was out of place or damaged. RP 230-32.

Both men eventually talked with her about what had happened. She could not remember exactly what each had told her. The prosecutor reminded her that during her interview, she had said both men told her that Higgins had tried to shut the door on Jay Russell. RP 143. Mr. Russell told her that Higgins had come at him and told him he had to get out of the house because she was not there at the time. RP 179-80. Mr. Russell also told her that he did not threaten or choke Mr. Higgins. RP 145.

Jeanne Russell, appellant's mother, had her granddaughter Madison at her house on September 1. Madison was on the computer, and discovered some disturbing information about Mr. Higgins. Jeanne discovered that Higgins had been required to register as a sex offender and had filed a petition to be relieved of the duty to register. RP 218-220. This discovery seriously alarmed her. She told her husband, who ultimately told their son Jay. RP 220. Joe Russell, appellant's father, told Jay about the information they had found on the Internet regarding Mr. Higgins. Joe Russell wanted Jay to talk to his wife about this. RP 221.

Jay Russell has been married to Christina for 16 years. Since their separation, they talk almost every other day, and have remained friends. RP 234- 235. After their separation they had been co-parenting for about 2 ½ years. The times that he came over to her apartment to visit with or drop off his children varied because of the nature of his shift work at

Georgia Pacific. He would come into the house to take care of the dog, and his children would invite him in to see new things in their rooms. Christina had told him the location of their spare key. RP 235, 239-240. He would come by as often as five times a week, depending on his schedule. RP 236.

Mr. Russell was aware that his wife was dating Mr. Higgins. This was not an issue for him. He was not jealous of Higgins. He would see Higgins off and on while dropping off or picking up the kids. RP 237-238, 257.

Jay's father told him the information about Mr. Higgins being a sex offender. Jay called Christina to tell her about it, and suggested they talk further about it. He thought they were going to talk about it the next day because she was not scheduled to work. RP 241-42. He had not confirmed with her that day that he planned to come over to her apartment. RP 258.

The next day he had errands to run in Vancouver, so he sent a text message to his wife to let her know when he would stop by. When he arrived, her car was in the driveway, and there was no other vehicle to suggest that someone other than Christina Russell was there. He knew what Mr. Higgins' car looked like, and it was not at the house. RP 242-245.

Jay knocked on the door, and the family dog, Porter, started to bark. Mr. Higgins opened the door, and walked back into the house.

Higgins greeted him with, “Hey Bro!” when Jay entered and was standing in the entryway near the front door. Jay shut the door behind him so that the dog would not get out. RP 245, 248, 269. He told Matt that he wanted to talk with Chris. Matt told him Chris was at work and had borrowed his car because hers was not working. Jay told Matt he had printed out his criminal history and wanted to talk to Chris and Matt to find out the facts, since Higgins had regular contact with his kids. RP 248-49.

Higgins became angry and hostile and came at him like a football tackle. Jay grabbed Higgins’ arms. They came into the door, and Jay was able to turn Higgins sideways and push him up against the wall. RP 250-251. There was a small scuffle and both men tried to get control over the other. Jay was able to get one arm on Higgins’ biceps and pinned him against the wall with the other. He was just trying to restrain Higgins. RP 251-52. He did not punch Higgins and did not choke him. He released him slowly, picked up his paperwork, and left the house. RP 253. It took about 8-10 seconds to restrain Higgins and get him to calm down. RP 281.

On cross-examination, Mr. Russell admitted he had the opportunity to review the police reports, Higgins’ statement and transcripts of interviews conducted by his lawyer, so he had a good idea of what evidence to expect at trial. RP 254-55. He acknowledged he was the only witness at trial who got to hear what everyone else had said before

testifying.<sup>6</sup> He admitted that *on that day* he had not yet gotten verbal permission from his wife to enter her apartment when he came over. RP 255.

Mr. Russell had spoken with his wife about what happened at the apartment, albeit several weeks later. RP 269. He did not tell her that Higgins asked him to leave. He told her that Higgins had attacked him. RP 270.

He could not think of any other provocation for Higgins' charge at him other than the fact he told Higgins he knew Higgins was a sex offender. When Higgins charged, his momentum took Jay into the front door. He was not frightened of Higgins but defended himself. RP 274, 275, 277, 279. He reiterated that he had not held Higgins by the neck. RP 282, 284. He did not call 911 to report Higgins' attack on him, because in his view no one had been hurt. RP 285, 289.

After the defense rested, the state called Tim Thomson, the police officer who had taken the photographs as a rebuttal witness. Thomson gave his opinion that the red mark on Higgins neck was not consistent with having a forearm across the neck, as Mr. Russell had testified, but was more consistent with having a hand around his neck. RP 290. He acknowledged that there no hand prints or marks on Higgins' neck, and there were no petechia, or broken blood vessels in his eyes. Nor had

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<sup>6</sup> The question which elicited this answer drew an objection, but the witness had already answered, and the jury was not instructed to disregard the answer. RP 255.

Higgins reported difficulty with swallowing or breathing, or with dizziness. RP 292.

D. Closing argument

In closing argument, the prosecutor commented at length on the fact that Mr. Russell had not contacted the police himself, and that the police had not been able to contact him:

Defendant was nowhere to be found. Law enforcement said they attempted to contact him, nowhere to be found. Defendant never contacted 9-1-1. He claims he was came at, attacked, and in fear for his safety at a point that he had to throw someone through a wall. He never picked up the phone to call 9-1-1 or report that. Never went to law enforcement. That's what a reasonable person would do in those circumstances.  
RP 327.

The prosecutor also commented on the fact that Mr. Russell had sat through the entire trial, which gave him the opportunity to tailor or falsify his testimony to confirm to the evidence he had heard:

And he was, again, the only witness who got to sit through and see all the other witnesses testify before him. Our officer got to sit through two witnesses beforehand. Defendant got to sit through everyone, including the officer. And so the Defendant had an opportunity to observe – observe all the witnesses. Observe all the evidence against him, look through all that and try and fit his story into there and make it sound reasonable. RP 335.

IV. ARGUMENT AND AUTHORITIES

A. The trial court erred by giving an aggressor instruction.

The court gave an aggressor instruction over defense counsel's objection. The instruction read as follows:

No person may by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense and

thereupon use or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the Defendant was the aggressor and that Defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. CP 69 and following.

Defense counsel took exception to the court's giving this instruction. RP 298, and argued that the prosecutor could argue his theory of the case, that Mr. Russell was not entitled to use self-defense, through the other instructions given by the court.

Although Washington courts have allowed aggressor instructions in past cases, their use has often been criticized and they are not favored:

Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction. *State v. Arthur*, 42 Wn. App. 120, 125, fn 1, 708 P.2d 1230 (1985).

Citing *Arthur* with approval, the court in *State v. Riley* added:

While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction. *State v. Riley*, 137 Wn.2d 904, 910 (fn 2), 976 P.2d 624 (1999).

See also *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039 (1989)(citing *Arthur* with approval); *State v. Kidd*, 57 Wn. App. 95, 786 P.2d 847 (1990). A court errs when it submits an aggressor instruction and the evidence shows that the defendant used words alone to provoke the fight. *Riley, supra.* at 911.

In the present case, the use of an aggressor instruction was error. Even according to the state's evidence from Mr. Higgins, Mr. Russell did

not do anything to provoke a fight, but he immediately instigated one without any action on Higgins' part. Thus according to the state's theory of the case, no self-defense was involved at all.

Mr. Russell testified on the other hand that Higgins did not do anything aggressive toward him until he mentioned the reason for his errand at his wife's house: the disclosure of Higgins' status as a convicted sex offender. Thus according to the defense evidence, Higgins' charge at Mr. Russell was "provoked" by speech alone.

In *State v. Wasson, supra*, the court held that giving an aggressor instruction was improper when the only aggressive conduct by the defendant was arguably the charged assault itself:

Perhaps there is evidence here of an unlawful act by Mr. Wasson, a breach of peace. However, there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault. Under these circumstances, our holding in *State v. Brower, supra*, is controlling.<sup>7</sup>

*Wasson, supra* at 159.

*Wasson* and *Brower* are controlling here because there was no evidence that Mr. Russell tried to *provoke* a fight with Higgins. The defense evidence was that Higgins attacked when Mr. Russell brought up his status as a sex offender. The state's evidence did not show provocation either.

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<sup>7</sup> "If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper." *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

Higgins testified that Mr. Russell *immediately* launched an attack on him from the moment of his arrival. The latter scenario would have allowed the prosecutor to argue that the force Mr. Russell used was not lawful self-defense because it was not *in response* to an attack by Higgins. There was no need to muddy the water with an aggressor instruction. The court erred in so doing. This court should reverse and remand for a new trial without the aggressor instruction.

- B. Mr. Russell was denied due process of law by the introduction of evidence and argument which constituted a comment on his exercise of his right to remain silent.

At the close of the testimony from Officer Thomson the prosecutor asked whether he had been able to get into contact with Mr. Russell and then also asked whether he had *ever* been able to do so. During cross-examination and closing argument, the prosecutor commented on the fact that Mr. Russell had never called 911 himself or ever attempted to call the police. He then argued that a “reasonable person” would have done so. RP 285, 289, 327. Defense counsel did not object to this argument, nor to the introduction of the evidence, which furnished its foundation.<sup>8</sup> This evidence and argument were improper comments on Mr. Russell’s pre-arrest silence.

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<sup>8</sup> Defense counsel did raise this issue in his motions for new trial and for arrest of judgment. Supp. CP \_\_\_\_\_, RP II 2-3.

a. Nature of the constitutional violation

It is well settled that due process of law is violated when the state calls attention to the fact that a person in custody has claimed the protection of his constitutional rights after being advised about them by the police. *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976); *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979), *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). This is true whether the fact is elicited on cross examination of the defendant (*Doyle*), or direct examination of the police (*Fricks*), or in closing argument (*Belgarde, Fricks*). Under Const. art. I, §3, it is also a violation of due process when the state calls attention to a person's silence even absent *Miranda* warnings. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984).

In *State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997), the investigating detective testified that she had tried to make appointments with Keene without success to discuss allegations of sexual misconduct with a minor. The prosecutor commented on this in closing argument, rhetorically asking the jury if those were the actions of an innocent person. The court held that this violated Mr. Keene's right to remain silent, and ordered a new trial. The Court of Appeals reviewed this error even though it was raised for the first time on appeal, pursuant to RAP 2.5 (a).

In *State v. Knapp*, 148 Wn. App. 414, 199 P.3d 505 (2009), the prosecutor commented during closing argument about the fact that the defendant there, when identified as a suspect in a burglary by the police, did not immediately deny the accusation. The court held that argument, which used the silence as substantive evidence of guilt, was a violation of his right to remain silent.

In the present case, the prosecutor's closing argument and his elicitation of the evidence of non-contact with the police were clearly intended to have the jury determine Mr. Russell's guilt on the basis that he had never given a statement to the police. Because this was a direct comment on his right to remain silent before an arrest, this was an impermissible argument and violated Const. art I, §§ 3 and 9.

b. Reviewability

Neither error was objected to at trial. They are nevertheless reviewable here because each is manifest error affecting a constitutional right. RAP 2.5 (a); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988); *State v. Heller*, 58 Wn. App. 414, 793 P.2d 461 (1990); *State v. Gutierrez*, 50 Wn. App. 583, 749 P.2d 213, *rev. den.* 110 Wn.2d 1032 (1988); *State v. Keene*, *supra* at 592. Moreover, this issue was raised in the motion for new trial, which gave the trial court an opportunity to rule on the validity of the evidence and prosecutor's argument about Mr. Russell's pre-arrest silence.

c. Standard for review: Evidence of silence

Constitutional error is presumed to be prejudicial. Constitutional error requires reversal unless it was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *State v. Gutierrez, supra*. The state bears the burden of proving that a constitutional error is harmless. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). In order to be harmless beyond a reasonable doubt, the untainted evidence in the case must be so overwhelming that it “necessarily leads to a finding of guilt.” *Guloy, supra*, at 426.

The evidence in this case was far from overwhelming. The evidence about illegal entry for the burglary charge was sharply contested. Ms. Russell made it clear that although she and Mr. Russell had not specifically discuss his coming over the day of the incident, he was welcome to come to her house anytime, and had been welcome to come over all during the period of their separation. Similarly, the assault charge was sharply contested. Mr. Russell testified that he had not used force against Higgins until the latter rushed him, and then only for the time necessary to convince Higgins to cease his attack. He completely denied making any threat to kill or injure Higgins. The evidence here would not “necessarily lead to a finding of guilt.” As a result, reversal for the constitutional error is required.

d. Standard for review: Closing argument

Prosecutorial misconduct during argument can deny a fair trial to an accused person. Only a fair trial is a constitutional trial. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). Prosecutorial misconduct during argument requires a new trial where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *State v. Davenport, supra* at 762. If the reviewing court "is unable to say from the record whether the [appellant] would or would not have been convicted but for the comment, then [the court] may not deem the error harmless." *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); *Davenport, supra*, at 765. When the misconduct is so flagrant that no instruction could have cured it, no objection is necessary. *State v. Belgarde, supra* at 507; *State v. Charlton, supra* at 661.

Given the highly contested nature of the evidence, the prosecutor's argument that Mr. Russell's failure to contact the authorities himself and make a statement was not what a "reasonable person" would have done, did have a substantial likelihood of affecting the jury's verdict. The prosecutor plainly implied by this argument that an innocent person would have contacted the police to tell them his story, and Mr. Russell's failure to do so made it clear he was not innocent. This court should hold that Jay Russell's right to a fair trial was violated by the prosecutor's argument and elicitation of evidence which commented on Mr. Russell's right to remain

silent in the face of an accusation, reverse his conviction, and remand for a new trial.

C. Appellant was denied effective assistance of counsel.

a. Standard of review

The standard for ineffectiveness of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984). To establish ineffective assistance, a defendant must first demonstrate that his lawyer's performance was deficient. Secondly, he must show he was prejudiced by the deficient performance. To meet the showing on the first prong, a defendant must show that the representation fell below an objective standard of reasonableness based on the circumstances. Regarding the second prong, a defendant does *not* have to show "that the counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland, supra*, at 693. Rather, he need only show

There is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.  
*Strickland, supra* at 694.

b. Counsel failed to ask for an instruction on the lesser-included offense of assault in the fourth degree.

Mr. Russell was charged with second-degree assault<sup>9</sup>, alleged to have been committed with the intent to commit the felony of burglary or

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<sup>9</sup> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree weapon;

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harassment. RCW 9A.36.021 (1)(e). Trial counsel did not ask for a lesser-included offense instruction for the crime of fourth degree assault. In failing to do so, he was ineffective.

Under the *Workman* test, a defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal prong) and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Fourth degree assault meets this legal test and is a lesser-included offense of this type of second-degree assault, since it requires a common law “assault” as one of its elements. Secondly, the evidence supported an inference that only the lesser crime was committed.

The evidence did not support the state’s charging theory that the assault was committed *with the intent to commit a burglary*. Rather, the state used the allegation that an assault was committed to raise the degree of burglary to first degree. The second alternative, that the assault was committed with *the intent* to commit the felony crime of harassment, depended on whether or not the jury believed that Mr. Russell also threatened Mr. Higgins during the course of the assault. The evidence also supports the inference that there was no threat made, based on Mr. Russell’s own testimony. The second part of the *Workman* test is also met under the facts of this case.

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(e) With intent to commit a felony, assaults another;

Several recent Washington cases have considered whether the failure to request a lesser-included offense instruction constitutes ineffective assistance of counsel. In *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221 (2009), the court held it was ineffective assistance of counsel to fail to request a manslaughter instruction which was justified under the facts during a murder prosecution. Similarly, in *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), the court held that it was ineffective assistance to fail to request an instruction on fourth degree assault in a prosecution for second degree assault. In both cases, the “all or nothing” approaches taken by defense counsel prejudiced the client, because the jury was left with no alternative between total acquittal or conviction with no possible middle ground. See also *State v. Pittman*, 134 Wn. App. 376 166 P.3d 720 (2006)(“All or nothing” strategy was ineffective assistance in burglary case, no lesser of trespass requested.); *State v. Smith*, \_\_\_ Wn. App. \_\_\_ (No. 38182-6-II, Dec. 2009)

Washington courts have used three themes to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

All three of these themes are present here. Mr. Russell faced a much higher sentence if convicted of assault in the second degree, both

because it had an intrinsically higher sentencing range than a misdemeanor offense, and because as a “violent” felony it raised his offender score for the burglary charge by two points. This increased the standard range by 14 months at the top end. Secondly, his theory of the case was the same whether this was considered a second-degree assault or a fourth degree assault, namely that the force he used was in lawful self-defense.<sup>10</sup> Third, there was a significant overall risk in the present case because acquittal on all three charges depended chiefly on Mr. Russell’s own credibility. As in *Grier*, there was a significant danger that given all three charges, the jury was going to find some degree of wrongdoing. A lesser-included offense on the assault allegation would have given the jury the option to exercise some degree of leniency if the facts justified that action. Consequently, the decision to forego asking for the lesser-included offense for fourth degree assault cannot be justified as a legitimate tactical decision, and satisfies the second *Strickland* prong, prejudice to the defendant. This court should vacate the conviction on the assault count and order a new trial on that count.

c. Defense counsel failed to ask for a limiting instruction on the use of prior statements to impeach Ms. Russell.

Defense counsel properly objected when the prosecutor attempted to introduce alleged prior inconsistent statements made by Ms. Russell to the police. The prosecutor replied that these were merely being

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<sup>10</sup> See *Ward*, supra at 249

offered for impeachment. RP 193. However, the jury was never given any instruction about the limited use of this type of evidence. Counsel failed to render effective assistance when he did not ask the court to give such a limiting instruction. Prejudice resulted when the prosecutor relied on this “impeachment” as substantive evidence that Mr. Russell did not have permission to enter his wife’s house, and therefore was guilty of burglary. RP 333.

ER 105 provides that when evidence is admitted for a limited purpose, a party is entitled upon request to an instruction from the court to the jury concerning the proper use of the evidence. Here, Mr. Russell was entitled to have an instruction given to the jury that it could not consider Ms. Russell’s alleged statement to the police as proof that he did not have permission to enter her house. See *State v. Newbern*, 95 Wn. App. 277, 295, 975 P.2d 1041 (1999).

Trial counsel’s objection to the evidence shows he was aware of its potentially damaging nature. His failure to request a limiting instruction, to which he was entitled under ER 105 and the case law, constitutes deficient performance under the *Strickland* standard. The failure was prejudicial because it had the definite possibility of affecting the outcome of the burglary count, which carried the longest sentence of the three felony counts with which Mr. Russell was charged. Without a limiting instruction the prosecutor argued to the jury that they could consider Ms. Russell’s inconsistent statements as substantive evidence that

Mr. Russell was not licensed or privileged to enter her apartment on the day of the incident.

d. Defense counsel failed to object to “expert” testimony by the patrol officer regarding the nature of Mr. Higgins’ injuries.

The prosecutor elicited testimony from his investigating officer about whether the marks on Mr. Higgins were “offensive” or “defensive” injuries. The officer gave his opinion that they were “defensive” and then proceeded to explain that he thought the abrasions he observed were not self-inflicted or staged. RP 190. Defense counsel did not object to this testimony.

In *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987), defense counsel failed to ascertain before trial the lack of qualifications of a proposed expert witness called by the defense in a case involving the effects of alcohol. The witness in question was an alcohol counselor trainee, who was not yet certified under Washington law, and was not allowed by the court to testify. Testimony on alcoholic blackouts was highly relevant to the case, which was a prosecution for attempting to elude a pursuing police officer. The court held that failing to learn of the deficiencies in the proposed expert’s testimony was deficient performance and that there was a reasonable probability that this affected the outcome of the case.

Here the officer never testified that he had any qualifications as a medical expert or pathologist which would allow him to offer opinions

as to the possible or probable causation of physical injuries. He was a patrol officer who had received basic police training in the academy, and then on the job training through his career. RP 185. The prosecutor never laid any foundation that he had the expert training to interpret the nature or causation of physical injury. Nevertheless, trial counsel failed to object to this glaring lack of foundation for the testimony. Under *Thomas* this constituted deficient performance.<sup>11</sup>

The admission of this unsupported opinion testimony also caused prejudice. The officer testified both that the abrasions were “defensive” in nature, and that they were not self-inflicted. Given that the defense theory of the case was that Mr. Russell was the one acting in self-defense and Higgins the attacker, this testimony by a law enforcement officer was particularly damaging. The error in allowing this opinion testimony is sufficient to undermine confidence in the outcome.<sup>12</sup>

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<sup>11</sup> See also *State v. Maurice*, 79 Wn. App, 544, 903 P.2d 514 (1995) (failure to obtain expert mechanic in vehicular homicide constitutes deficient performance, remand for reference hearing on prejudice prong.)

<sup>12</sup> Although the testimony offered here was not, strictly speaking, opinion evidence regarding the guilt or innocence of the defendant, which is clearly improper, Washington courts have warned that particularly when given by a law enforcement officer, opinions on the ultimate issue of guilt deprive a defendant of a fair trial. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001); *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). This is because testimony by the police may carry a special aura of trustworthiness. *Demery*, *supra* at 763, citing *United States v. Espinosa*, 827 F.2d. 604, 613 (9th Cir. 1987). The same observations apply when the officer purports to give expert testimony beyond his credentials.

- D. The trial court erred in allowing testimony by Mr. Higgins of an alleged prior threat made to him by Mr. Russell.

During the pretrial motions, the state sought permission to introduce a statement allegedly made by Mr. Russell in which he told Mr. Higgins that he would “snap him like a twig.” The state argued that this was admissible to show Mr. Higgins had a legitimate fear of Mr. Russell. RP 36-37.

A court considering the admissibility of “other bad acts” evidence must make several findings. The court must (1) find by a preponderance of the evidence that the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The court listened to an offer of proof concerning the alleged threat to “snap [Higgins] like a twig.” Initially, Higgins said this was something that was conveyed to him by Christina Russell. RP 53. Then he said that this statement was made during a time when Jay Russell was dropping off his children at the house. RP 53. He said this comment was made while Mr. Russell was in his vehicle and did even not approach him. Later on in the offer of proof, he said that the comment might have been made over the phone, but he could not recall. RP 54. During cross-examination, he acknowledged he had told defense counsel during his interview that the *only* threats he was aware of were ones he had heard relayed from Christina. RP 57.

The court initially determined that the statement had not been proven by a preponderance. RP 72. After the prosecutor argued that *State*

*v. Berrigan*, 102 Wn. App. 754, 9 P.3d 942 (2000) provided authority for admission of the evidence, the court apparently reserved ruling. RP 74.<sup>13</sup> The prosecutor then asked if Mr. Higgins could testify about statements that were made directly to him, and the court indicated that would be allowed.<sup>14</sup>

The record is thus remarkably unclear about whether the court ever made a finding that Mr. Russell had actually made the statement about snapping Higgins like a twig. The court did not, however, identify a purpose for admitting the evidence. Moreover, the court never balanced the probative value of this evidence against its significant prejudicial impact. The court abused its discretion in admitting this testimony by Mr. Higgins.

A trial court's interpretation of ER 404(b) is reviewed *de novo* as a matter of law. *Fisher, supra* at 745; *Foxhoven*, 161 Wn.2d at 174. If the trial court interprets ER 404(b) correctly, a trial court's ruling to admit or exclude evidence of misconduct is reviewed for an abuse of discretion. *Id.* A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.*

As noted above, the court's interpretation of ER 404 (b) was incorrect, as it never required the state to prove by a preponderance that Mr. Russell had made the statement attributed to him by Mr. Higgins at some unspecified earlier time. In addition, the trial court's admission of the evidence was an abuse of discretion, since it never balanced the prejudicial impact of the evidence against its probative value regarding Mr. Higgins' state of mind. This court should hold that the trial court erred

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<sup>13</sup> Yup. If for some reason the door is opened and we get there, re-raise the issue.

<sup>14</sup> JH: And Your Honor, as far as Mr. Higgins' own personal observations, he – he can, of course, testify to that.

Judge: Yes.

JH: As far as the one statement the Defendant made to him?

Judge: He can testify to it. We've got – we've heard what –

in admitting this evidence, and order a new trial.

- E. The trial court erred in excluding Mr. Higgins' conviction for theft in the second degree.

Matt Higgins was convicted of second-degree theft in 1999, ten years and several months before he testified as the state's star witness in this trial. The trial court ruled *in limine* that the defense could not cross-examine concerning this conviction, relying on ER 609 (b).<sup>15</sup>

The rule does not set out an absolute bar to the admission of older convictions, however. It grants discretion to the trial court to admit such a conviction if its probative value outweighs its prejudicial effect.

This was certainly the case here. Convictions for theft are automatically admissible under section (a) of the rule, regardless of punishment. This is because crimes which are *crimen falsi* are always deemed to be probative concerning a witness' credibility. The court does not have to subject such convictions to the usual balancing test. So there was really no question about the probative value of this conviction.

It was also in the interest of justice to allow the state's only transaction witness to be impeached with his prior felony theft conviction. If the jury had doubts about Matt Higgins' credibility based on his past, that was a basis for giving greater credence to Mr. Russell's version of

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<sup>15</sup> ER 609 (b) provides as follows:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, *unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.* However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. (Emphasis added)

their encounter. The jury here was deprived of information that could easily have affected its assessment of Higgins' credibility; information which would have been automatically admissible had the trial taken place just a few months earlier.

In *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), the prosecutor had concealed the fact that the state's complaining witness in a rape case had a conviction for felony theft. In determining whether this had a reasonable possibility of affecting the outcome of the case, the court observed as follows:

The State's case essentially relied upon the credibility of the complaining witness, A.M. The theft conviction is admissible as relevant to the complaining witness' credibility. ER 609(a)(2). We cannot say that this evidence would not have created a reasonable doubt that did not otherwise exist. There is a substantial likelihood that the misconduct affected the jury's verdict.

Here too, the state's case depended on Matt Higgins' credibility to support all three counts. It was not in the interest of justice to conceal from the jury information about his past felony theft conviction, which undoubtedly would have affected the jurors' assessment of his credibility. The trial court erred in granting the state's motion in *limine*. This court should reverse the convictions and remand for a new trial on all three counts.

- F. The prosecutor's argument regarding tailoring of testimony unconstitutionally burdened Mr. Russell's trial rights under Const. Art. I §22.

The prosecutor argued that Mr. Russell had been able to tailor his testimony by virtue of the fact that he had been able to attend his trial and listen to the testimony of other witnesses:

And he was, again, the only witness who got to sit through and see all the other witnesses testify before him. Our officer got to sit through two witnesses beforehand. Defendant got to sit through everyone, including the officer. And so the Defendant had an opportunity to observe – observe all the witnesses. Observe all the evidence against him, look through all that and try and fit his story into there and make it sound reasonable. RP 335.

This argument violated Mr. Russell's right under Art. I, §22 of the Washington Constitution to appear and defend his case in person and confront the witnesses against him face to face. Although Mr. Russell did not object to this argument at the time it was made, it was part of his motion for a new trial, which gave the opportunity to correct this trial error. RP II 4-5. Moreover, this error can be raised for the first time on appeal as a manifest constitutional error under RAP 2.5 (a).

The decision in *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) held that prosecutors were not forbidden under the Sixth Amendment to argue that the defendant in a criminal case had the opportunity to tailor his testimony based on the fact that he has attended his trial. In a footnote, the court noted that state courts were free to reach their own conclusions about the fairness of this practice:

Our decision, in any event, is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

*Portuondo*, 529 U.S. at 76, fn 4.

Justice Stevens' concurring decision agreed with the majority on this point:

The Court's final conclusion, which I join, that the argument survives constitutional scrutiny does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries

with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial.

*Portuondo*, 529 U.S. at 76.

In *State v. Martin*, 151 Wn. App. 98 (2009)(petition for review pending), Division One of this Court declined an invitation to assess the validity of this type of prosecutorial argument under Washington Constitution Art I §22. Consequently, whether prosecutorial accusations of testimony-tailoring infringe upon a defendant's rights under Art. 1, § 22 is a question that has yet to be decided by our Supreme Court. Previously, Washington Courts held that the State violated the Sixth Amendment by implying that a testifying defendant tailored his testimony to the State's evidence. See *State v. Johnson*, 80 Wn. App. 337, 340, 908 P.2d 900 (1996), *rev. denied*, 129 Wn.2d 1016, 917 P.2d 575 (1996). Cf. *State v. Smith*, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996). These cases were implicitly overruled by *Portuondo*. *State v. Miller*, 110 Wn. App. 283, 285, 40 P.3d 692, 693 (2002).

*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) set forth six factors to guide the court in determining whether a state constitutional protection affords greater rights than a similar federal provision.<sup>16</sup> An analysis of these factors – in particular, the first four – reveals that Art. I, § 22 provides greater protection for the rights to be present, mount a defense, testify, and confront witnesses than does the Sixth Amendment.

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<sup>16</sup> The six factors are: (1) the textual language of the state constitution; (2) significant difference in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the state and federal constitutions; and (6) matters of particular state interest of local concern. *Gunwall*, 106 Wn. 2d at 61-62.

a. Factors One and Two - Textual Language of the Washington Constitution and Significant Differences in the Texts of Parallel Provisions of the Federal and State Constitutions.

Art. 1, § 22 expressly provides for a defendant's right “to appear and defend in person” and “to testify in his own behalf.” This contrasts with the U.S.

Constitution, as the federal rights to appear in person and to present a defense are not explicit but merely derived from the defendant's right to confront witnesses and due process. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Davis v. Alaska*, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Similarly, the federal right to testify is not spelled out in any amendment but is derived from the Sixth and Fourteenth Amendments and as a corollary to the Fifth Amendment's guarantee of freedom from self-incrimination. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), citing *Faretta*, 422 U.S. at 819, n. 15; *Ferguson v. Georgia*, 365 U.S. 570, 602, 81 S.Ct. 756, 5 L.Ed. 783 (1961).

In *Martin, supra*, Division One dismissed the difference between the express guarantee of the right to testify in Art. 1, § 22 and the lack of a corresponding explicit guarantee in the Sixth Amendment as a “distinction of no moment.” *Martin*, 151 Wn. App. at 111. However, our Supreme Court has made clear that distinctions of this sort are precisely the kind that merit an independent analysis: “The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the

federal constitution. *It may be more explicit or it may have no precise federal counterpart at all.*” *Gunwall*, 106 Wn.2d 54 at 61 (emphasis added). Although the Sixth Amendment *impliedly* protects the right to testify, the inclusion of express language in Art. 1, § 22 demonstrates that the framers intended a broader set of protections.

The Supreme Court employed the same analysis in *Gunwall* itself. There, the Court found the express protection of “private affairs” in Art. 1, § 7 was greater than the Fourth Amendment’s privacy protections. *Id.* at 65.

The *Martin* court attempted to distinguish *Gunwall* by stating that unlike Const. Art. 1, § 7, “there is nothing in the language of article I, section 22 to suggest that the defendant’s rights, as set forth therein, are any different from those protected by the Sixth Amendment.” *Martin*, 158 Wn. App. at 111. However, the *Martin* court did not explain how the broad reference to “private affairs” in Art. I, §7 can support such a specific holding while the explicit guarantee of the right to testify in person in Art. 1, § 22 fails to suggest the possibility of broader protection. In fact, this issue, which involves a right expressly protected by the text of the state constitution but not found in the language of the federal constitution, requires an analysis very similar to that used in *Gunwall*.

At the very least, Art. 1, § 22’s express provision demonstrates the framers’ intent to provide broader and stronger protection to defendants than the Sixth Amendment. While the Sixth Amendment does not describe how confrontation is to be achieved, Art. 1, § 22 specifies the method of confrontation as “face to face.” But if *Portuondo* is to control the interpretation of our state constitution, a person will be taxed by prosecutorial accusations of

tailoring his testimony as a routine cost of exercising the bundle of rights explicitly named and protected by Art. 1, § 22 (appearance in person, confrontation face to face, and testifying in person) but which are not explicitly mentioned by the Sixth Amendment.

The framers of the Washington Constitution were aware of the federal constitution when they drafted and adopted more specific language. *State v. Foster*, 135 Wn.2d 441, 485, 957 P.2d 712 (1998) (Johnson, dissenting). See Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496-97 (1984). In addition to the rights named above, Art. 1, § 22 lists other rights not included in the Sixth Amendment, such as the right to have a copy of the charge and to appeal. *Id.* at 485-86. The state constitution is thus more detailed, again meriting a different interpretation than that given to the Sixth Amendment. See e.g. *State v. Rohrich*, 132 Wn.2d 472, 477, fn 9, 939 P.2d 697 (1997)(Art. I §22 confrontation clause more specific than federal counterpart).

b. Factor Three - State Constitutional and Common Law History.

Little is known about the drafting of Art. 1, § 22. *State v. Silva*, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Art. 1, § 22 to be interpreted identically to the federal Bill of Rights, since they copied it from a state

constitution and the federal Bill of Rights did not then apply to the states. *Silva, supra* at 619, citing *Utter, supra*.

As early as 1902, our Court explained that Art. 1, § 22 provided a criminal defendant due process, including the right to meet the witnesses against him face to face and cross-examine those witnesses in open court. *State v. Stentz*, 30 Wash. 135, 142, 70 P.241 (1902). Therefore, as in *Foster*, state constitutional and common law history require an independent interpretation of Art. 1, § 22. 135 Wn.2d at 486-93.

While it was decided under the Sixth Amendment, *State v. Johnson, supra*, at p. 36, demonstrates that as a matter of common law history, Washington disfavored the practice of comment by the prosecutor on the exercise of the right to attend trial and confront the State's witnesses.

#### c. Factor Four - Preexisting Washington Law

Art. 1, § 22 was revised by amendment 10, but the relevant portion of the original 1889 text was unchanged, still explicitly providing the accused with "the right to appear and defend in person." Historical Notes to Const, art. 1, § 22. In contrast, although Maine, in 1864, was the first state to make defendants competent witnesses, other states "attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses." *Portuondo*, 529 U.S. at 66, citing 3 J. Wigmore, Evidence §§ 1841,1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Term. Code Ann., ch. 4, § 5601 (1896). Yet in 1889, Washington had no such requirements, and the right to be present and testify at trial was already established in our Constitution. Thus, preexisting Washington law demonstrates that the framers intended to protect the rights of a

criminal defendant to appear, to present a defense, to testify, and to confront witnesses face-to-face, and were not willing to sacrifice these rights to the spectre of tailored testimony simply because the defendant's testimony follows that of the State's witnesses. Allowing the State to burden these rights by allowing the prosecutor to argue that their exercise always makes the defendant less credible offends the framers' purpose.

This court should determine that Art. I §22 should give greater protection to defendants who exercise their core trial rights than is given by the Sixth Amendment, and grant a new trial, since Mr. Russell's first trial was unfairly burdened by the prosecutor's unconstitutional argument.

G. A new trial should be ordered under this court's supervisory powers to regulate trial procedure.

In *Portuondo*, the U.S. Supreme Court invited the state courts to continue to review the issue of whether a prosecutor may argue or imply that a defendant has tailored testimony as a matter of trial procedure. 529 U.S. at 76, fn 4. Justice Stevens' concurrence pointed out that the holding did not deprive States or judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial. 529 U.S. at 76.

Washington Courts have a history of using their supervisory powers to maintain sound judicial practice. Our Supreme Court has recognized its "inherent rulemaking powers as 'an integral part of the judicial process.'" *State v. Fitzsimmons*, 94 Wn.2d 858, 859, 620 P.2d 999 (1980) (quoting *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974)). In

*Fitzsimmons*, this Court initially held that “both justice court rules and constitutional case law” required the defendant be given access to counsel as soon as possible after being arrested and charged. *State v. Fitzsimmons* (“*Fitzsimmons I*”), 93 Wn.2d 436, 441, 610 P.2d 893 (1980), remanded by *Washington v. Fitzsimmons*, 449 U.S. 977, 101 S.Ct. 390, 66 L.Ed.2d 240 (1980). On remand from the U.S. Supreme Court, the Washington Supreme Court clarified that its “discussion of constitutional law merely helps demonstrate the application and effect of the court rules that provide the rationale for” its earlier ruling, but that the opinion was based on state court rules *and the Court's “inherent rulemaking powers”*, not the Constitution. *Fitzsimmons II*, 94 Wn.2d at 859 (emphasis added). The Court was not troubled by the limitations of the federal constitution in this context, explaining that “[r]eliance on federal precedent and federal constitutional provisions would not preclude us from taking a more expansive view of the right to counsel under state provisions should the United States Supreme Court limit federal guaranties.” *Id.*

Our Court has similarly used its supervisory powers to condemn other procedures or practices which result in unfair trials. *See e.g. State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007); *State v. Fields*, 85 Wn.2d 126, 130, 530 P.2d 284 (1975); *State v. Bonds*, 98 Wn.2d 1, 13, 653 P.2d 1024 (1983).

The *Martin* court stated in a footnote that because it found no “constitutional infirmity in the prosecutor’s questions, there is no principled basis on which to fashion the rule that Martin seeks.” *Martin*, 151 Wn. App. at 117. In

fact, this is precisely the reason the Court of Appeals should have considered exercising its supervisory power to prescribe rules of practice in this context. In fact, supervisory power can only be exercised if constitutional error is *not* found. If constitutional error is found, there is no need to reach the alternative argument. If, as here, the Court finds no constitutional violation, it must turn to the alternative argument that the fundamental unfairness of the practice calls for the exercise of the courts' supervisory powers. Constitutional infirmity or no, courts have a principled basis for adopting rules that would bar prosecutorial practices which undermine the goal of a fair trial.

Justice Ginsberg's dissent in *Portuondo* noted the existence of many state courts which had restricted this prosecutorial practice under their supervisory powers.<sup>17</sup> The New Jersey line of cases set out a bright line rule prohibiting prosecutors drawing the jury's attention to defendant's presence during trial and his presumed opportunity to tailor his testimony. This rule was recently

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<sup>17</sup> [fn5] In recent years, several state courts have found it improper for prosecutors to make accusations of tailoring based on the defendant's constant attendance at trial. See, e.g., *State v. Cassidy*, 236 Conn 112, 672 A. 2d 899 (1996); *State v. Jones*, 580 A.2d 161, 163 (Me. 1990); *Hart v. United States*, 538 A.2d 1146, 1149 (D.C. 1988); *State v. Hemingway*, 148 Vt. 90, 91-92, 528 A.2d 746, 747-748 (1987); *Commonwealth v. Person*, 400 Mass. 136, 138-42, 508 N.E.2d 88, 90-92 (1987); *State v. Johnson*, 80 Wn. 2d 337, 908 P.2d 900 (1996) (1996). In *Commonwealth v. Elberry*, 38 Mss. App. Ct 912, 645 N.E. 2d 41 (1995), the trial judge sustained defense counsel's objection to a prosecutor's tailoring argument that burdened the defendant's right to be present at trial and issued the following curative instruction: "Of course, the defendant, who was a witness in this case, was here during the testimony of other witnesses, but he's got every right to be here, too. . . . [Y]ou should take everything into consideration in determining credibility, but there is nothing untoward about the defendant being present when other witnesses are testifying." *Id.*, at 913, 645 N.E.2d 645 N.E.2d, at 43

affirmed in *State v. Feal*, 194 N.J. 293, 298, 944 A.2d 599 (2008), which followed the rule earlier articulated in *State v. Daniels*, 182 N.J. 80, 98, 861 A.2d 808 (2004). In *Daniels*, the New Jersey Supreme Court noted that under *Portuondo*, the prosecutor's remarks were permissible under the federal constitution and declined to address the issue under the state constitution. *Daniels*, 182 N.J. at 88. However, the Court discussed approvingly the *Portuondo* dissent and concurrence:

Justice Ginsburg condemned the majority for “transforming a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.” The dissent advocated a “carefully restrained and moderate” approach and would have permitted the prosecutor to argue, during summation, that the defendant tailored his testimony *only* if there was evidence that supported that contention.

*Daniels*, 182 N.J. at 91, quoting *Portuondo*. 529 U.S. at 76, 79 (Ginsburg, J., dissenting)(emphasis added).

The defendant's Sixth Amendment right “to be confronted with the witnesses against him” serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor's argument in this case demeaned that process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated.

*Daniels*, 182 N.J. at 91-92, quoting *Portuondo*, 529 U.S. at 76 (Stevens, J. concurring).

The *Daniels* Court noted that it had a responsibility “to exercise its supervisory authority over criminal trial practices in order to curb government actions that are repugnant to the fairness and impartiality of trials,” and determined that function was warranted where prosecutorial misconduct interferes with a fair trial. *Daniels*. 182 N.J. at 96 (internal citations omitted). The Court observed that a testifying defendant, like

any other witness, is compelled to tell the truth, but at the same time, “*a criminal defendant is not simply another witness*. Those who face criminal prosecution possess fundamental rights that are ‘essential to a fair trial,’” including the right to be present at trial, to hear the evidence and confront the witnesses against him, to present evidence and witnesses in his defense, and to testify on his own behalf. *Id.* at 97-98 (emphasis added; internal citations omitted). Therefore, the Court found,

Prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees. Although, after *Portuondo*, prosecutorial accusations of tailoring are permissible under the Federal Constitution, *we nonetheless find that they undermine the core principle of our criminal justice system—that a defendant is entitled to a fair trial.*

*Daniels* at 98 (emphasis added).

The Court distinguished between “generic accusations...when the prosecutor, despite no specific evidentiary basis that the defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony” and specific accusations, based on evidence in the record. *Id.* Even with evidence of tailoring, the Court held, the prosecutor may not “refer explicitly” to the defendant's exercise of his right to be present at trial and hear the evidence against him. *Id.* at 99. Thus, although there was evidence in the record to support an inference of tailoring, the prosecutor's explicit remarks highlighting the defendant's presence and opportunity to “craft his version to accommodate” the State's evidence were unfairly prejudicial to the defendant, requiring reversal. *Id.* at 101-02.

The Massachusetts Supreme Court has taken a different approach. In *Commonwealth v. Gaudette*, the Court reaffirmed its pre-*Portuondo* holding that “it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony to conform to the trial evidence unless there is evidence introduced at trial to support that argument.” 441 Mass. 762, 767, 808 N.E.2d 798 (2004) (citing *Commonwealth v. Person*, 400 Mass. 136, 140, 508 N.E.2d 88 (1987) and *Commonwealth v. Beauchamp*, 424 Mass. 682, 690-91, 677 N.E.2d 1135 (1997)). The Court did not consider the state constitution but instead apparently exercised its supervisory authority. *Gaudette*, 441 Mass. at 767. The Massachusetts Court emphasized the prosecutor’s responsibility to argue “within the bounds of evidence,” making clear it would not tolerate what the New Jersey Court termed “generic accusations.” *Id.* at 803 (internal citations omitted). The Court affirmed the conviction because the accusation was not generic; the evidence supported the prosecutor's accusations of tailoring.

As the New Jersey and Massachusetts Courts recognized, the prosecutorial practice at issue here burdens not just the defendant but the very process of the trial. The defendant has an absolute right to be present at his entire trial; in fact, it cannot begin without him. CrR 3.4. Moreover, the state presents its case first because it carries the burden of proof, thus enabling the defendant to hear the witnesses against him. While a defendant could theoretically attempt to waive these rights – declining to be present at his own trial or testifying before the state's witnesses – the court would be under no

obligation to grant such waivers And this would present an agonizing choice for the defendant, forcing him potentially to waive fundamental rights in order to insulate himself against the prosecutor's unfettered accusations of tailoring. Thus, when the prosecutor is permitted to accuse a defendant of tailoring his testimony merely because the trial has been conducted correctly, this places a burden on every defendant who chooses to testify. Such a burden is completely at odds with the principles of a fair trial.

Accordingly, this Court should follow the lead of the Massachusetts and New Jersey courts, and should use its inherent supervisory powers to protect the goal and principles of a fair trial by prohibiting prosecutorial accusations of tailoring based on the defendant's exercise of his rights.

H. The evidence was insufficient to convict Mr. Russell of burglary in the first degree.

In order to sustain a conviction, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct.1068, 25 L.Ed.2d 368 (1970). The standard of review when a challenge to the sufficiency of the evidence is made on appeal is whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt, giving the benefit of the inferences from the evidence to the non-moving party, the state. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hoffman*, 116 Wn. 2d 51, 82, 804 P.2d 577 (1991); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

To convict Mr. Russell of burglary in the first degree, the state had to prove that he entered or remained unlawfully in a building with the intent to commit a crime, and that during the course of the burglary or in flight therefrom, he committed an assault.

Ms. Russell testified that Mr. Russell was welcome at her home at any time, and that if she had been home on the day in question, he would have been welcome to come in. She had entrusted him with the knowledge of where her spare house key was located, which was strong circumstantial evidence he was licensed to enter her apartment even when she was not home. Mr. Russell reasonably believed that his wife was home on the day in question since her car was parked out front. His entry into the home of his wife and children was not unlawful and was reasonable under the circumstances.<sup>18</sup>

As a casual and occasional social visitor to Ms. Russell's house, Mr. Higgins had no power to exclude Mr. Russell from the premises, given Ms. Russell's standing invitation to her husband. So even if the jury gave credence to his account of trying to exclude Mr. Russell from the house, the entry was not made unlawful by Higgins' resistance to the entry.

No rational jury could have found the element of unlawful entry or unlawful remaining under the facts of this case. This court should vacate the conviction for first-degree burglary.

- I. The evidence was insufficient to convict Mr. Russell of assault in the second degree.

The successive charging documents in this case show an interesting evolution in the state's theory of liability on the assault charge. In the information filed on November 24, 2008, the assault was charged as a misdemeanor assault in the fourth degree. CP 1. It was also charged as a misdemeanor in the information filed on December 16, 2008. CP 3. In the

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<sup>18</sup> The jury was instructed on this principle in Instruction 8: A person acts with lawful authority to enter a building if acting under valid consent to the entry or under a reasonable mistaken belief that the owner had consented to the entry.

information filed on May 12, 2009, the prosecutor charged second-degree assault for the first time, and oddly added the allegation that this was a crime of domestic violence, even though Mr. Higgins was not a relative of Mr. Russell's. CP 5. The information alleged that the assault was committed with the intent to commit another unspecified felony, pursuant to RCW 9A.36.021 (1)(e). The next amended information filed August 13, (shortly before trial) deleted the allegation that this was a crime of domestic violence, and altered the charging language so that the assault was now alleged to have been committed "in the facilitation of a felony crime", without specifying what crime was being "facilitated". CP 35. The final information, filed on the day of trial, retained this "facilitation" allegation, again without specifying the crime which was being facilitated. CP 63. The jury was ultimately instructed that in order to convict, it had to find that Mr. Russell had assaulted Mr. Higgins with the specific intent to commit the crime of burglary or harassment. The jury was *not* instructed that it had to be unanimous as to which of these crimes Mr. Russell allegedly had the intent to commit. Absent such an instruction, the reviewing court must be able to conclude that substantial evidence supports each alternative predicate crime in order to sustain the conviction. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007).

As argued above, there was no substantial evidence supporting the burglary allegation, because Mr. Russell did not enter or remain

unlawfully in his wife's apartment. He had her standing permission to enter, and did not require a specific invitation on each occasion he visited. Moreover, there was no evidence that the force used against Mr. Higgins, after Mr. Russell had gained entry to the front hall, was used with the intention of committing a burglary. According to Mr. Higgins, Mr. Russell had already gained entry into the house when he was assaulted, so the assault was not a means to accomplish a burglary.

Similarly, although Mr. Higgins testified that Mr. Russell threatened his life, there was no evidence that the alleged assault was committed with the specific intention of committing the crime of harassment. At most, the state's evidence showed that the threat constituting the harassment was made *during* a 30 second scuffle between the two men in the front hall of the apartment.

Given the fact that there was not evidence to support either prong of the element which raised the assault here to second degree, and given the fact that the jury was not required to unanimously agree on one or the other, this court should vacate the conviction for assault in the second degree, and remand for a new trial.

J. The trial court erred in the calculation of the offender score.

Mr. Russell had no previous felony criminal convictions. The trial court calculated his offender score at 3, however, based on the "other current offenses" of assault and harassment. Defense counsel argued that the offender score should have been zero, based on the statutory definition

of “same criminal conduct” in RCW 9.94A.589. RP 403-404. Multiple crimes constitute the “same criminal conduct” 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). Satisfaction of each of these elements is a prerequisite to a finding of same criminal conduct. An appellate court will reverse a sentencing court's “same criminal conduct” ruling only for a clear abuse of discretion. *State v. Elliott*, 114 Wn. 2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990).

The offenses in this case happened at the same time and place. They involved the same “victim”, Mr. Higgins. Based on the state’s charging pattern and the jury’s verdict, they were committed with the same intent. The burglary was alleged to have occurred with the intent to commit a crime within the apartment, which factually was the assault on Mr. Higgins. The assault was alleged to have been committed with the intent to commit either burglary or harassment. So both the charging document and the jury’s verdict make it clear that the crimes were committed with the same intent.

The trial court made no mention of the statute, and made only a passing reference to the burglary anti-merger statute. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn. 2d 647, 654, 71 P.3d 638 (2003); *State ex rel. Carroll v Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). The decision here was based on untenable grounds because the trial court

failed to utilize the “same criminal conduct” statute in analyzing the offender score, despite argument on this point by trial counsel. The prosecutor’s interlocking charging documents, and the facts as they developed at trial also made it clear that the three charges involved the “same criminal conduct.” The court’s failure to exercise any discretion in considering a sentencing issue is itself an abuse of discretion. See *State v. Grayson*, 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005). *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008). This court should vacate the sentence, and remand to the trial court for resentencing with an offender score of zero.

K. The trial court erred in failing to impose an exceptional sentence downward.

Defense counsel argued that the court should make a downward departure from the standard range sentence based on a number of reasons. First, the facts constituting the offense were significantly less serious than typical for the offense. This mitigating circumstance is the mirror image of several of the aggravating circumstance found in RCW 9.94A.535<sup>19</sup>. There was no illegal entry, given the fact that Mr. Russell had a standing invitation to enter his wife’s apartment to see their children. There was no sign of any forced entry either. Although most second-degree assaults are

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<sup>19</sup> For example:

RCW 9.94A.535 (3)(d)(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;  
RCW 9.94A.535 (3)(e)(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

based on the infliction of serious bodily injury, none was inflicted here during the brief scuffle which occurred just inside the entryway to the dwelling. Mr. Higgins never required nor received any medical attention. RP 116.

Second, there was no apparent pre-disposition on Mr. Russell's part to commit an offense. His sole purpose in going to his wife's apartment on a day when he expected to find her at home was to have a discussion with her about the extremely disturbing news that his wife was apparently but unwittingly allowing a sex offender to have frequent access to their young daughters. It was not his expectation that Mr. Higgins would be at his wife's apartment, given the fact that her car was parked outside the house and Higgins' car was not.

Third, a trial court may also grant an exceptional sentence on the basis of a failed affirmative defense. See RCW 9.94A.535 (1)(c); *State v. Jeannotte*, 133 Wn. 2d 847, 947 P.2d 1192 (1997); *State v. Ramires*, 109 Wn. App. 749, 766, 37 P.3d 343 (2002); *State v. Whitfield*, 99 Wn. App. 331, 994 P.2d 222 (1999). Here, the theory of the defense as to the assault was that Mr. Russell had been acting in lawful self-defense. While the jury clearly rejected this, it is unclear whether it did so because of the "aggressor" instruction or because it concluded that Mr. Russell had used more force than was necessary to repel the force used against him by Higgins. The court here failed to exercise its discretion with regard to this basis for an exceptional sentence below the standard range.

A fourth recognized basis for an exceptional sentence below the standard range which was applicable to this case is where the effect of the multiple offense policy of RCW 9.94A.589 regarding “other current offenses” doctrine would yield a sentence which is clearly excessive. RCW 9.94 A.535 (1)(g). Here, according to the state’s charging doctrine and its theory of the case, the other current offenses were totally interlocked with one another. The burglary was raised to first degree by the commission of the assault. The assault was raised to second degree by the allegation that it was committed with the intent to commit a burglary, or the crime of harassment. The harassment threat, according to Mr. Higgins, was made in the middle of the assault itself.

Mr. Russell had no previous felony criminal history. But due to the application of the “other current offense” method of calculating the offender score he wound up with an offender score which was the equivalent of three previous felony convictions. Given the highly interrelated charges, this resulted in a sentence which was clearly too excessive for the actual conduct which had occurred.

Generally, a party cannot appeal a standard-range sentence. RCW 9.94A.585 (1); *State v. Williams*, 149 W. 2d 143, 146, 67 P.3d 1214 (2003). “This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” *Williams*, 149 Wn. 2d at 146-47 (citing *State v.*

*Ammons*, 105 Wn. 2d 175, 183, 713 P.2d 719 (1986)). In the present case, however, the court abused its discretion because it gave no consideration to the several arguments made in support of an exceptional sentence and noted tersely<sup>20</sup> that “I don’t know that there are mitigating circumstances to impose a – mitigating circumstances sentencing range down.”

Seemingly because the court was pressed for time, it gave little or no consideration to the meritorious arguments offered by trial counsel in mitigation of the sentence.

“While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005). *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008). A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. *State v. Garcia-Martinez*, 88 Wn. App 322, 329, 944 P.2d 1104 (1997). See also *State v. Pettitt*, 93 Wn. 2d 288, 296-97, 609 P.2d 1364 (1980)(prosecutor’s failure to exercise discretion is an abuse of discretion).

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<sup>20</sup> At the beginning of the defense presentation, the trial court had made it clear that it had limited time to listen to argument:  
“All right. You – you need to know I need to be in Juvenile First Appearance Docket at nine o’clock.” RP 400. Defense counsel prefaced several of his arguments with the comment that he was trying to shortcut his presentation. RP 400, 403.

The record here reflects little if any consideration by the trial court of the various mitigating circumstances that were presented. The trial court's earlier comment that "I'm not here to legislate the Sentence Reform Act nor legislate how the prosecutor's office does. I've got to impose what there is" suggests the court felt bound to impose a standard range sentence despite finding the result to be disproportionate with a sentence she had imposed earlier in a much more serious case. RP 413-414.

The court's failure to give consideration to the idea of an exceptional sentence under the facts of this case constitutes a clear abuse of the court's discretion. This court should vacate the sentence and remand to the trial court for reconsideration of the sentence.

#### V. CONCLUSION

The results of Mr. Russell's trial were skewed by the trial court's errors and the errors of trial counsel. The trial court erred by giving the jury an "aggressor" instruction which short-circuited and distorted the jury's analysis of whether Mr. Russell was acting in self-defense when he scuffled with Mr. Higgins. The trial court erred in excluding from the jury the knowledge about Higgins' prior felony conviction for theft, which very well could have tipped the balance in the credibility contest between Mr. Russell and Higgins. The trial court also erred in allowing evidence of a prior threat allegedly made to Higgins by Mr. Russell, by not making specific findings that such a threat was actually made, and by not

conducting an on the record balancing of its probative value vs. prejudicial impact. Finally, the results of trial were skewed by the prosecutor's improper comments on Mr. Russell's pre-arrest silence and on his exercise of his constitutional right to attend trial, testify, and confront the witnesses against him and hear their testimony.

Trial counsel's errors also require a new trial. Trial counsel's performance was deficient in several crucial ways. He failed to request a jury instruction on the lesser included offense of assault in the fourth degree which was supported by the evidence and the law. Had the jury been given the option to convict on a lesser included offense, there would have been a significant impact on Mr. Russell's sentence. The failure to request a limiting instruction on the use of a prior inconsistent statement by Ms. Russell allowed the prosecutor to use this impeachment evidence as substantive evidence on the issue of whether Mr. Russell entered or remained unlawfully at his wife's residence. Finally, counsel failed to object to "expert" testimony by the investigating officer regarding the nature and significance of Mr. Higgins' physical injuries. Coming from a law enforcement officer, this testimony undercut Mr. Russell's testimony that he was acting in lawful self-defense.

There was insufficient evidence to convict Mr. Russell of first degree burglary. Because he had *carte blanche* from his wife to visit the house, he did not enter or remain unlawfully. Nor did he enter with the intention of committing a crime. His whole purpose in coming over that

day was to discuss with his wife the disturbing news that a sex offender had access to their young girls. Similarly, there was insufficient evidence that Mr. Russell had committed an assault with the specific intent to commit either burglary or harassment. The scuffle between the two men occurred *after* Mr. Russell's entry, and the alleged harassing threat took place during the scuffle. Any assault committed was not with the requisite specific intent. The court should reverse and dismiss the burglary and assault counts.

Even absent any errors requiring reversal and remand for a new trial, this court should nevertheless vacate the sentence and remand for a new sentencing hearing. The trial court erred in not finding the three counts to constitute "same criminal conduct", despite the fact that all three were committed at the same time and place, involved the same victim, and were committed with the same intent, according to the prosecutor's own charging scheme in the information.

Secondly, the court erred in not considering and imposing a sentence below the standard range. The sentence was clearly excessive, due to the effect of the "other current offenses" rule for counting the offender score. This was especially true here because the burglary charge was elevated to first degree based on the assault, and the assault was elevated to second degree based on the alleged intent to commit burglary. The court did not consider Mr. Russell's lack of predisposition, and also did not consider the effect of the failed affirmative defense as mitigating

circumstances to support a sentence below the standard range, despite recognizing the disproportionate nature of the sentence. This court should vacate the sentence and remand for a new sentencing hearing at which the trial court could exercise its informed discretion.

Dated this 8<sup>th</sup> day of January, 2010

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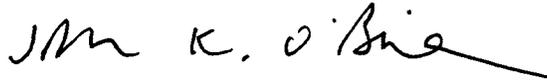
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's opening brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 8th day of January ,2010 with postage fully prepaid, or by hand delivery (prosecutor's copy)

DATED this 8th day of January ,2010



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