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Court of Appeals  
Division III  
State of Washington

No. 34352-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**David Daley,**

Appellant.

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Asotin County Superior Court Cause No. 16-1-00007-1

The Honorable Judge Scott Gallina

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Daley's convictions were entered in violation of his Fifth and Fourteenth Amendment privilege against self-incrimination.
2. Mr. Daley's convictions were entered in violation of his Fourteenth Amendment right to due process.
3. The prosecutor unconstitutionally commented on Mr. Daley's right to remain silent by eliciting testimony that he did not "attempt to report having been assaulted or... being the victim of any altercation."
4. The prosecutor unconstitutionally commented on Mr. Daley's right to remain silent by eliciting testimony that he did not "complain that he had been stabbed or [say] I really need medical attention or complain about having been assaulted or otherwise even being in a scuffle."

**ISSUE 1:** Due process prohibits the state from implying guilt based on an accused person's post-arrest silence. Did the prosecutor infringe Mr. Daley's Fifth and Fourteenth Amendment privilege against self-incrimination by eliciting testimony that he remained silent following his arrest?

5. The court violated Mr. Daley's right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§3 and 22.
6. The trial court violated Mr. Daley's confrontation right under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.
7. The court violated Mr. Daley's constitutional rights by excluding critical bias evidence that was relevant and admissible.
8. The court erred by excluding evidence that Deborah Turner tried to influence other eyewitnesses to fabricate testimony against Mr. Daley.

**ISSUE 2:** An accused person has a constitutional right to confront adverse witnesses and to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Daley's constitutional rights by excluding evidence that Deborah Turner asked multiple witnesses to fabricate testimony?

9. The burglary conviction violated Mr. Daley's right to a unanimous verdict under Wash. Const. art. I, §21.

10. The trial court erred by failing to give a unanimity instruction, in light of the prosecutor's reliance on multiple acts to prove the burglary charge.

**ISSUE 3:** In a "multiple acts" case, the prosecution must clearly elect a particular act upon which to proceed, or the court must provide a unanimity instruction. Did Mr. Daley's first-degree burglary conviction violate his right to a unanimous verdict because the prosecutor explicitly relied on multiple acts and the court failed to provide a unanimity instruction?

11. The court's instructions violated Mr. Daley's Fourteenth Amendment right to due process.
12. The court's instructions relieved the state of its burden to prove the absence of self-defense.
13. The court erred by giving Instruction No. 17.
14. The court's aggressor instruction did not make the relevant legal standard manifestly apparent to the average juror.
15. The aggressor instruction improperly stripped Mr. Daley of his self-defense claim even if his lawful conduct provoked an unreasonable belligerent response.

**ISSUE 4:** The aggressor doctrine precludes a person from acting in self-defense after provoking an attack through *unlawful* conduct. Did the court's aggressor instruction improperly direct jurors to disregard Mr. Daley's self-defense claim, even absent proof that he acted unlawfully?

16. The aggressor instruction improperly disallowed Mr. Daley's self-defense claim if jurors concluded his actions were reasonably likely to provoke an *unreasonable* belligerent response.

**ISSUE 5:** The aggressor doctrine does not protect a person's unreasonable or unlawful belligerence. Did the court's aggressor instruction improperly strip Mr. Daley of his self-defense claim based on intentional actions reasonably likely to provoke an *unreasonable* belligerent response?

17. The evidence did not support an aggressor instruction in this case.

18. The state failed to identify evidence of any unlawful intentional act reasonably likely to provoke a belligerent response.

**ISSUE 6:** Lawful conduct that is not reasonably likely to provoke a belligerent response does not warrant a jury instruction on the aggressor doctrine. Did the court err by giving an aggressor instruction in the absence of evidence that Mr. Daley unlawfully provoked the Turner family?

19. The trial court erred by failing to properly determine Mr. Daley's offender score.
20. The trial court abused its discretion by failing to determine whether Mr. Daley's two current convictions comprised the same criminal conduct.
21. The trial court abused its discretion by failing to consider whether to apply the burglary antimerger statute to the current convictions.
22. The trial court abused its discretion by failing to determine whether two of Mr. Daley's prior convictions (for second-degree theft and second-degree identity theft, both committed September 9, 2015) comprised the same criminal conduct.
23. The trial court erred by sentencing Mr. Daley with an offender score of five.

**ISSUE 7:** Multiple current offenses score as the same criminal conduct if they occurred at the same time and place, against the same victim, and with the same criminal intent. Did the sentencing court improperly fail to determine if Mr. Daley's two current offenses comprised the same criminal conduct?

**ISSUE 8:** A sentencing court may refuse to apply the burglary antimerger statute to current convictions. Did the sentencing court improperly fail to determine whether to apply the burglary antimerger statute?

**ISSUE 9:** A sentencing court must exercise independent judgment when determining if prior convictions comprised the same criminal conduct. Did the trial judge abuse his discretion by failing to determine if two of Mr. Daley's prior convictions comprised the same criminal conduct?

24. Mr. Daley was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
25. Defense counsel provided ineffective assistance by failing to argue that Mr. Daley's two current convictions comprised same criminal conduct.
26. Defense counsel provided ineffective assistance by failing to ask the sentencing court to exercise its discretion under the burglary anti-merger statute.
27. Defense counsel provided ineffective assistance by failing to argue that two of Mr. Daley's prior convictions comprised the same criminal conduct.

**ISSUE 10:** Defense counsel provides ineffective assistance at sentencing by failing to argue same criminal conduct when warranted by the facts. Did counsel provide ineffective assistance by failing to argue same criminal conduct for the current convictions and for two of Mr. Daley's prior convictions?

28. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 11:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Daley is indigent, as noted in the Order of Indigency?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Joshua Turner was 17 years old. RP 60. He lived with his mother and brother, Deborah and Matt Turner.<sup>1</sup> RP 59-60. Deborah Turner was on disability benefits and taking methadone for pain. RP 59, 73.

One night, Joshua Turner had friends over to watch a movie. RP83. Savannah Calene and her father, as well as Elsie Hada and David Daley came over. RP 83, 218-219, 277. Hada and Mr. Daley were dating. RP257. The group had alcohol, and when Calene's father left after about a half an hour, he didn't take the half-gallon of whiskey with him. RP 83-86, 277-278.

The four watched the movie. RP 85. All four drank and became affected by the alcohol. RP 223. While Matt Turner didn't drink with the group, it was later noted that he was on methamphetamine. RP 225-227.

At some point, an argument broke out. Josh Turner would say that it was because Hada was interested in his brother romantically; Mr. Daley would say that Matt Turner entered the room and was physically confrontational; Hada and Calene would both say that Matt Turner struck the first blow. RP 87-88, 229, 283, 331-332.

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<sup>1</sup> Matt Turner was 24 at the time. RP 60.

Joshua Turner went to get his mother. RP 91. The Turners all began to pull and push at Mr. Daley.<sup>2</sup> RP 179, 189. Joshua Turner kicked and hit Mr. Daley. RP 93-96, 162. Mr. Daley bit down on Deborah Turner's hand as the Turners tried to hold and push him, Mr. Daley. Mr. Daley bit hard enough to damage the fingers, joints, and tendons. RP 68-72, 92-93. Matt Turner pulled Mr. Daley's hair, and then grabbed a longboard and hit Mr. Daley over the head with it, cracking the board. RP 94, 104-105, 163, 168, 180. Joshua Turner grabbed a knife from the kitchen and stabbed Mr. Daley in the back.<sup>3</sup> RP 95-96.

Police were called. Matt Turner heard that the police were being called so he fled. RP 195-196.

Mr. Daley ran away from the house, found himself at neighbor's and left when confronted. RP 38, 145, 149. Law enforcement caught and arrested Mr. Daley. RP205.

The Turners sought to keep the authorities from knowing that Matt Turner was home and involved in the incident. They denied he was there to police, and even urged Hada and Calene to tell police he wasn't there. RP 54, 103-104, 120, 128-129, 135, 167-168, 170-171, 276-277. Joshua

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<sup>2</sup> Matt Turner would testify that they pushed Mr. Daley outside, but that he came back in when Matt Turner went out after him. RP 159-160.

<sup>3</sup> Joshua Turner apparently had the time and presence of mind to wash the knife before police arrived. RP 28.

Turner sent Calene messages urging her to tell police that Mr. Daley had attacked Deborah Turner. RP 121, 276.

The state charged Mr. Daley with burglary in the first degree and assault in the second degree. CP 1-2. Mr. Daley claimed self-defense. RP 393-413.

During trial, the officer who arrested Mr. Daley was asked about what Mr. Daley said, after his arrest. The officer responded that Mr. Daley did not “attempt to report having been assaulted or... being the victim of any altercation.” RP 36. He told the jury that after this statement, he read Mr. Daley his rights. RP 36. The officer who first seized Mr. Daley testified that Mr. Daley did not “complain that he had been stabbed or [say] I really need medical attention or complain about having been assaulted or otherwise even being in a scuffle.” RP 209-210.

Deborah Turner testified, and claimed that Mr. Daley was assaulting Hada and that she (Deborah Turner) asked him to leave. RP 64. The defense sought to show the jury that Deborah Turner had contacted Calene and urged her to change her story. RP 288. The court did not allow the testimony. RP 289.

Hada completed a written statement about the incident and gave it to police not long after the event. RP 238-239, 243-244, 248, 267. That statement was not turned over to the defense until after the defense

attorney had completed the direct examination of Hada.<sup>4</sup> RP 248-249.

Over objection, the court allowed the prosecutor to cross-examine Hada from the document. RP 248-249.

Mr. Daley told the jury that Matt Turner became aggressive and pushed him multiple times. RP 331. He said that after this, the two men fought in the room, and then both Joshua and Deborah Turner joined Matt Turner and all three punched and kicked him. RP 331-333. Mr. Daley described his fear, intoxication, and belief that he should not leave without Hada and his phone. RP 333, 340.

During the prosecutor's cross-examination of Mr. Daley, he acknowledged that he had been convicted of theft and identity theft offenses. RP 347. Over defense objection, after this acknowledgment, the state offered and the court admitted the Judgment and Sentence documents. RP 347-349; Ex 26.

The court instructed the jury using the standard form initial aggressor instruction. CP 28; RP 302. Over the defense objection, the court also instructed the jury regarding the state's "stand your ground" law. CP 27; RP 300.

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<sup>4</sup> The state's paralegal later explained that she meant to provide the statement to the defense, but did not. RP 291-292.

The instructions did not state which of the alleged assaults the state meant to underlie the burglary charge. CP 10-30. The state did not make this clear during the closing argument. RP 366-392, 414-429. In fact, the state highlighted the gap in the jury's instructions, telling them that any act that the state witnesses claimed Mr. Daley did, like pushing or punching or biting or throwing a person, any of them would be sufficient for conviction. RP 378-379.

During deliberations, the jury sent out a question: "Is the trespass in element of #1 in Inst. #5 sufficient to fulfill the crime element in #2. Do we need to agree on the intended crime in #2?" CP 31; RP j 436-437.

The court answered:

The jury need not be unanimous as to a particular crime so long as you are all convinced that the defendant intended to commit a crime against a person or property therein.  
CP 31.

The jury convicted Mr. Daley. CP 32.

At sentencing, none of the parties addressed whether any of the offenses may constitute the same course of conduct. Without comment, the court signed the Judgment and Sentence which counted them separately. RP 451-468; CP 33-38.

Mr. Daley timely appealed. CP 44-55.

## ARGUMENT

### **I. THE PROSECUTION IMPROPERLY ELICITED COMMENTS ON MR. DALEY'S POST-ARREST SILENCE IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS.**

The prosecutor elicited Officer Martin's testimony that Mr. Daley, following his arrest, did not "attempt to report having been assaulted or... being the victim of any altercation." RP 36.<sup>5</sup> The prosecutor also introduced Deputy McGowan's testimony that Mr. Daley did not "at any point... complain that he had been stabbed or [say] I really need medical attention or complain about having been assaulted or otherwise even being in a scuffle." RP 209-210.

This testimony about Mr. Daley's post-arrest silence undermined his self-defense claim and cast doubt on his credibility. One clear implication of the testimony was that Mr. Daley would have spoken up if he had been the victim of violence rather than its perpetrator. By eliciting this evidence, the prosecutor violated Mr. Daley's constitutional privilege against self-incrimination and his right to due process.

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<sup>5</sup> The prosecutor asked Martin if Mr. Daley attempted to report an assault "[d]uring [Martin's] contact with him there." RP 36. This question covered Mr. Daley's post-*Miranda* silence. RP 36.

- A. Mr. Daley may raise the improper comments on his post-arrest silence for the first time on appeal.

An improper comment on an accused's post-arrest silence creates a manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. *State v. Terry*, 181 Wn. App. 880, 890, 328 P.3d 932 (2014); RAP 2.5(a)(3).<sup>6</sup> To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).<sup>7</sup> An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, the trial court could have corrected the error. The court “knew at that time” that the prosecutor's questions were improper, and could have sua sponte directed each witness not to answer. The court could also have instructed jurors to disregard any answer given. *See, e.g., State v. Sublett*, 176 Wn.2d 58, 70 n. 5, 292 P.3d 715 (2012) (“[L]imiting instructions are assumed to cure most risks of prejudice.”).

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<sup>6</sup> A comment is improper when the state uses the person's silence as substantive evidence of guilt or suggests the silence was an admission of guilt. *Id.*

<sup>7</sup> The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

The improper comments created manifest error affecting Mr. Daley's constitutional rights. The violations can be raised for the first time on appeal, despite the lack of an objection below. RAP 2.5(a)(3).

B. The improper comments on Mr. Daley's post-arrest silence violated his privilege against self-incrimination and his right to due process.

Both the federal and state constitutions protect an accused person's right to silence. *Terry*, 181 Wn. App. at 887-89; U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9. Courts liberally construe the privilege against self-incrimination. *State v. Fuller*, 169 Wn. App. 797, 814, 282 P.3d 126 (2012).

In addition to the constitutional protections afforded by the privilege against self-incrimination, due process protects the implicit assurance provided by *Miranda*<sup>8</sup> warnings that silence carries no penalty. *Terry*, 181 Wn. App. at 889.

A constitutional violation occurs when testimony on post-arrest silence is “responsive to the State's questioning, with even slight inferable prejudice.” *Id.* (quoting *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002)).<sup>9</sup> Here, the testimony provided was

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<sup>8</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

<sup>9</sup> Constitutional error also occurs when the witness effectively states an opinion that the defendant's silence is evidence of guilt, when the testimony is unresponsive and given to

(Continued)

responsive to the prosecutor's questioning. In each case, the prosecutor specifically and directly asked if Mr. Daley had mentioned being attacked. RP 36, 209-210.

Each comment also created at least "slight inferable prejudice." *Romero*, 113 Wn. App. at 790-91. After being stabbed by an assailant, a reasonable person would naturally seek medical attention and report the attack. The same cannot be said of a guilty person whose assaultive behavior provoked the stabbing.

One clear implication to be drawn from the testimony was that Mr. Daley was the aggressor and was not acting in self-defense. In addition, the testimony suggested that jurors should disregard Mr. Daley's testimony claiming self-defense: had he truly been defending himself, he would have reported the stabbing and sought medical care.

The questions about Mr. Daley's post-arrest and post-*Miranda* silence violated his privilege against self-incrimination and his right to due process. *Terry*, 181 Wn. App. at 889. The error requires reversal. *Id.*

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prejudice the defense (or if it is likely to prejudice the defense), or when the prosecutor exploits the comment during argument. *Terry*, 181 Wn. App. at 889.

C. The constitutional violations are not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial. *Fuller*, 169 Wn. App. at 813. Reversal is required “unless the State meets the heavy burden of establishing that the constitutional error was harmless beyond a reasonable doubt.” *Id.* The state meets this burden by showing that “the evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty.” *Id.*; see also *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Here, the state cannot prove beyond a reasonable doubt that the violations were harmless. The evidence was conflicting, and cannot be described as overwhelming. A reasonable juror could have harbored doubts regarding Mr. Daley’s intent to commit a crime, his mental state at the time that he inflicted substantial bodily harm on Deborah Turner, or the state’s attempt to disprove self-defense.

Absent the improper comments, a reasonable juror may have voted to acquit. The convictions must be reversed and the case remanded for a new trial. *Easter*, 130 Wn.2d at 242-43.

**II. THE EXCLUSION OF EVIDENCE SHOWING BIAS AND IMPEACHING THE ALLEGED VICTIM VIOLATED MR. DALEY'S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE.**

Deborah Turner tried to get three witnesses to give false statements to the police. She asked Calene, Hada, and Hada's mother to say that Mr. Daley hurt and/or sexually touched the two young women. RP 288-290.

The trial judge refused to allow Mr. Daley to introduce this evidence. This violated Mr. Daley's right to confront the state's witnesses and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *State v. Jones*, 168 Wn.2d 713, 719-720, 230 P.3d 576 (2010).

A. The Court of Appeals should review these constitutional errors *de novo*.

Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

Even when a trial court makes a discretionary decision, review is *de novo* if the error is alleged to violate a constitutional right. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to

present a defense. *Jones*, 168 Wn.2d at 719.<sup>10</sup> Similarly, the *Iniguez* court reviewed *de novo* the trial judge’s discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id.*

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,<sup>11</sup> review is *de novo* where such a ruling violates a constitutional right. *Id.*; *Jones*, 168 Wn.2d at 719.<sup>12</sup> Here, as in *Jones*, Mr. Daley alleges a violation of his constitutional right to present a defense. He also alleges a violation of his confrontation right. Review is therefore *de novo*. *Jones*, 168 Wn.2d at 719; *see also State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012) (“An alleged violation of the confrontation clause is reviewed *de novo*.”)

The Supreme Court’s decision in *Dye* does not compel a different result. *See State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Although

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<sup>10</sup> Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

<sup>11</sup> A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

<sup>12</sup> *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11<sup>th</sup> Cir. 1992).

the *Dye* court indicated that merely alleging a violation of the “right to a fair trial does not change the standard of review,” it did so without citing *Iniguez* or *Jones. Id.*, at 548. In fact, the petitioner in *Dye* did not ask the court to apply a *de novo* standard. *See Dye*, Petition for Review<sup>13</sup> and Supplemental Brief.<sup>14</sup> As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].” *Id.*<sup>15</sup>

There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*.<sup>16</sup> This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye*. Accordingly, review in this case should be *de novo*, notwithstanding the *Dye* court’s *dicta*.

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<sup>13</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 11/7/16).

<sup>14</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 11/7/16).

<sup>15</sup> By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20Obrief.pdf> (last accessed 11/7/16).

<sup>16</sup> The same is true for of the Supreme Court’s decision in *State v. Clark*, 92021-4, 2017 WL 448990 (Wash. Feb. 2, 2017). In that case, as in *Dye*, Respondent argued for application of the abuse-of-discretion standard. *See* Respondent’s Supplemental Brief, p. 16, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17). Petitioner did not ask the court to apply a different standard. Petitioner’s Supplemental Brief, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

Defense counsel did not specifically mention Mr. Daley's constitutional rights in arguing for admission of the evidence. However, the denial of these rights may be reviewed for the first time on appeal because the issues involve manifest error affecting a constitutional right. RAP 2.5(a)(3).

Based on defense counsel's oral representations and on the materials attached to Mr. Daley's omnibus filing, the trial judge "knew at [the] time"<sup>17</sup> Deborah Turner had tried to get the other eyewitnesses to lie to police. RP 288-289. Given this, the court "could have corrected" the violation of Mr. Daley's constitutional rights by admitting the excluded evidence. *O'Hara*, 167 Wn.2d at 100.

B. The trial court's ruling violated Mr. Daley's constitutional rights to confrontation and to present his defense.

The federal and state constitutions guarantee an accused person the right to confront adverse witnesses and to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620. These constitutional rights require admission of even

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<sup>17</sup> *O'Hara*, 167 Wn.2d at 100.

minimally relevant evidence.<sup>18</sup> *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 621.

Evidence that meets the “minimally relevant” standard can only be excluded if the state proves that it is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 622. No state interest is compelling enough to prevent evidence that is of high probative value (or if the defendant’s need for the evidence outweighs the state’s interest in exclusion). *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 619, 622. Here, the state advanced no justification strong enough to warrant excluding the proffered evidence.

Mr. Daley sought to introduce evidence showing that Deborah Turner asked other witnesses to lie to police. RP 288-289. She wanted Calen, Hada, and Hada’s mother to accuse Mr. Daley of hurting and sexually touching the two young women. RP 288-289. Apparently, Deborah Turner hoped to strengthen the justification for her own family’s use of force against Mr. Daley, including the stabbing and the attack with the skateboard.

The evidence showed her bias<sup>19</sup> against Mr. Daley and her willingness to tolerate lies to protect herself and her sons from potential

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<sup>18</sup> Evidence is relevant “if it has any tendency to make the existence of any consequential fact more probable or less probable.” *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401).

legal consequences (such as prosecution for the stabbing or skateboard attack). Admission of the evidence would have seriously undermined her credibility, providing strong reason to doubt her testimony regarding the altercation.

Such bias evidence is always relevant. *See, e.g., State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002). Furthermore, because Deborah Turner denied assaulting Mr. Daley, the evidence was critical to the state’s effort to disprove his self-defense claim. It helped the state establish their aggressor theory: that Mr. Daley provoked her two sons into stabbing him and attacking him with the skateboard.

The excluded evidence was critical to the defense. Because it was “of *high* probative value... ‘no state interest can be compelling enough to preclude its introduction.’” *Jones*, 168 Wn.2d at 720 (emphasis in original) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Accordingly, the trial court violated Mr. Daley’s constitutional rights to confrontation and to present a defense when it barred the evidence. *Id.*, at 721; *Darden*, 145 Wn.2d at 622.<sup>20</sup>

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<sup>19</sup> “Bias” describes a relationship (usually between a witness and a party) “which might lead the witness to slant, unconsciously or otherwise, his testimony.” *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984).

<sup>20</sup> Even if the excluded evidence were only minimally relevant, it should not have been excluded absent prejudice so great “as to disrupt the fairness of the fact-finding process.” *Jones*, 168 Wn.2d at 720. The state did not show prejudice of that magnitude. Furthermore,  
(Continued)

- C. The violation of Mr. Daley’s constitutional right to present a defense is not harmless beyond a reasonable doubt.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Even non-constitutional error is prejudicial unless it can be described as trivial, formal, or merely academic. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Here, the state cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, and that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724; *Lorang*, 140 Wn.2d at 32. The trial amounted to a contest between Mr. Daley’s version of events (supported, at least in part, by the testimony of Calene and Hada) and the Turners’ version of events. The evidence would have cast significant doubt on Deborah Turner’s testimony, exposing her bias and demonstrating her cavalier attitude toward the truth.

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any improper prejudicial effect could have been cured with an instruction. *See, e.g., Sublett*, 176 Wn.2d at 70 n. 5 (“[L]imiting instructions are assumed to cure most risks of prejudice.”)

The trial court violated Mr. Daley's constitutional right to present a defense and to confront adverse witnesses. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620-622. The state cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Mr. Daley's convictions must be reversed and the case remanded with instructions to admit the excluded evidence. *Id.*

**III. MR. DALEY'S BURGLARY CONVICTION VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT BECAUSE THE STATE EXPLICITLY RELIED ON MULTIPLE ACTS AND THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION.**

In closing argument, the prosecutor relied on multiple acts to prove that Mr. Daley assaulted someone within the residence, elevating the burglary charge to a class A felony. RP 376-379. The court did not give a unanimity instruction. CP 10-30. This violated Mr. Daley's right to a unanimous verdict. *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005).

A. The Court of Appeals should review this constitutional issue *de novo*.

A violation of the right to a unanimous verdict may be raised for the first time on appeal. *See, e.g., State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Here, "given what the trial court

knew,” it could have corrected the error by providing a unanimity instruction. *O’Hara*, 167 Wn.2d at 100.

As with all constitutional errors, the error is reviewed *de novo*. *Lenander*, 186 Wn.2d at 403; *Samalia*, 186 Wn.2d at 269.

B. Because the state presented evidence of multiple acts to prove the burglary charge, the trial judge should have provided a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict. Art. I, § 21; *Elmore*, 155 Wn.2d at 771 n. 4. Jurors must unanimously agree that the accused person committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

Where the prosecution introduces evidence of multiple acts to support a single charge, the state must “clearly” identify the basis for the charge. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (citations omitted). If the prosecutor does not clearly elect a single act, the court must provide a unanimity instruction as to that charge. *Coleman*, 159 Wn.2d at 511. This requirement “protect[s] a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *Id.*

Here, the prosecutor explicitly argued that there were “several assaults,” and that there were “an awful lot of offensive touchings.” RP

378, 379. According to the prosecutor, “[a]ny one of these was an assault and there’s your crime that he had committed or that he intended to commit.” RP 379.

The court did not give a unanimity instruction. CP 10-30. Because the state relied on multiple acts to prove first-degree burglary, the failure to provide a unanimity instruction violated Mr. Daley’s right to a unanimous verdict. *Coleman*, 159 Wn.2d at 511.

Some jurors may have voted to convict based on the allegations that Mr. Daley assaulted one of the two young women. Others may have believed he assaulted Matt Turner during their initial confrontation. Still others may have believed that he did not assault the two women, that he used lawful force against Matt Turner’s aggression, and that the only assault was against Deborah Turner.

The absence of a unanimity instruction and the state’s failure to elect violated Mr. Daley’s state constitutional right to a unanimous verdict. *Coleman*, 159 Wn.2d at 511. The violation requires reversal of the burglary conviction. *Id.* The charge must be remanded for a new trial. *Id.*

**IV. THE COURT’S AGGRESSOR INSTRUCTION MISSTATED THE LAW AND IMPROPERLY STRIPPED MR. DALEY OF HIS RIGHT TO ARGUE SELF-DEFENSE.**

The trial court instructed the jury on the aggressor doctrine, even though Mr. Daley did not engage in any unlawful provoking conduct prior

to the alleged assault. The aggressor instruction improperly stripped Mr. Daley of his self-defense argument. It precluded Mr. Daley from claiming self-defense, even if he “provoked” the Turners through lawful action that would not have provoked a reasonable person. CP 28. This violated Mr. Daley’s Fourteenth Amendment right to due process and impermissibly lowered the state’s burden to disprove self-defense.<sup>21</sup>

- A. The aggressor instruction erroneously directed jurors to disregard Mr. Daley’s self-defense claim even absent an unlawful provoking act.

Washington courts disfavor aggressor instructions. *State v. Stark*, 158 Wn.App. 952, 960, 244 P.3d 433 (2010). Such instructions are rarely necessary to permit the parties to argue their theories of the case, and have the potential to relieve the state of its burden in self-defense cases. *Id.*

The “aggressor doctrine” derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443 (1896). The common law has always

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<sup>21</sup> Mr. Daley objected to the aggressor instruction at trial. RP 300. If the objection was insufficient to preserve the specific constitutional arguments presented here, review is nonetheless appropriate under RAP 2.5(a)(3). *State v. McCreven*, 170 Wn.App. 444, 462, 284 P.3d 793 (2012).

required evidence of an unlawful (or “lawless”) aggressive act.<sup>22</sup> *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930).

When first published, the pattern aggressor instruction required jurors to determine if the defendant created the need to act in self-defense “by any *unlawful* act.” Former WPIC 16.04, 11 Wash. Prac., Pattern Jury Instr. Crim. (1<sup>st</sup>. Ed) (emphasis added). This language was found to be “vague and overbroad *unless directed to specific unlawful intentional conduct.*” *State v. Thompson*, 47 Wn.App. 1, 8, 733 P.2d 584, 589 (1987) (emphasis added) (citing *State v. Arthur*, 42 Wn.App. 120, 708 P.2d 1230 (1985)).<sup>23</sup>

The pattern committee subsequently replaced the word “unlawful” with the word “intentional.” *See* WPIC 16.04 (4<sup>th</sup> Ed.). This was an attempt to address the *Arthur* court’s concern—that jurors in that case might have stripped the defendant of his self-defense claim because of an accidental fender bender. *See Arthur*, 42 Wn.App. at 124.

However, this revision created a new problem. If taken literally, the amendment significantly lowers the state’s burden to disprove self-

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<sup>22</sup> *See also State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn.App. 646, 591 P.2d 1212 (1979).

<sup>23</sup> In *Arthur*, jurors may have believed that an automobile accident was the unlawful act that made the defendant the aggressor. *Id.*, at 123-124. The *Arthur* court found that this was “not rational, reasonable, or fair.” *Id.*

defense. The language precludes a self-defense claim based on *lawful* intentional acts that foreseeably provoke a belligerent response, relieving the state of its burden to prove an unlawful or lawless provoking act.<sup>24</sup>

Washington appellate courts have continued to require clear proof of an unlawful provocation before the instruction can be given.<sup>25</sup> For example, the Supreme Court has held that “words alone do not constitute sufficient provocation” for an aggressor instruction. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). The *Riley* court’s explanation rested, in part, on the “unlawful” force requirement inherent in the aggressor rule:

the reason one generally cannot claim self-defense when one is an aggressor is because “the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.”

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<sup>24</sup> For example, approaching a group of drug dealers to tell them to leave the neighborhood is an intentional act reasonably likely to produce a belligerent response. Starting a business next to a competitor is an intentional act reasonably likely to produce a belligerent response. These actions are lawful but come within a literal reading of the aggressor instruction’s language.

<sup>25</sup> See *State v. Hardy*, 44 Wn.App. 477, 484, 722 P.2d 872 (1986) (“the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-defense”); *State v. Brower*, 43 Wn.App. 893, 902, 721 P.2d 12 (1986) (“Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident”); *State v. Douglas*, 128 Wn.App. 555, 563-564, 116 P.3d 1012 (2005) (“The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct.”); *Stark*, 158 Wn.App. at 960 (lawfully obtaining a restraining order was not provocation that warranted an aggressor instruction).

Other decisions have upheld use of the aggressor instruction based on the defendant’s unlawful conduct, even where the unlawfulness determination was left to the jury. *Thompson*, 47 Wn.App. at 8 (noting that former WPIC 16.04 “is vague and overbroad unless directed to specific unlawful intentional conduct”); *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) (“the evidence of unlawful conduct was clear”).

*Id.* (quoting 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).

In this case, the jury may have believed that Mr. Daley engaged in lawful conduct that nonetheless qualified as a provoking act. Jurors could read the instruction to strip Mr. Daley of his self-defense claim based on his lawful conduct, if they found it reasonably likely to provoke the Turner family.<sup>26</sup>

The instruction lowered the state’s burden of disproving the lawful use of force. The court erroneously told jurors that Mr. Daley was not entitled to defend himself, even if his allegedly provocative actions were wholly lawful. *McCreven*, 170 Wn.App. at 462. Mr. Daley’s conviction must be reversed and his case remanded for a new trial. *Id.*

B. The aggressor instruction improperly stripped Mr. Daley of his self-defense claim even if his actions provoked an *unreasonable* belligerent response.

The court instructed jurors that Mr. Daley was not entitled to act in self-defense if he had committed “any intentional act reasonably likely to provoke a belligerent response...” CP 28. The instruction did not require

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<sup>26</sup> Furthermore, the instruction applied even if Mr. Daley’s acts were reasonably likely to provoke an *unreasonable* belligerent response, as argued elsewhere in this brief.

proof that the intentional act would provoke a belligerent response from a reasonable person. CP 28.

But the common-law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. *See, e.g., Riley*, 137 Wn.2d at 911 (explaining that aggressor instructions apply when the victim’s use of force qualifies as self-defense). If it were, it would grant those who are known to be bellicose, combative, and thin-skinned the right to attack others with impunity.<sup>27</sup> For example, a letter carrier who approaches the house of a person known to hate postal workers would be guilty of an “intentional act reasonably likely to provoke a belligerent response.” CP 28. Similarly, efforts to calm someone who is having an angry public meltdown might be “reasonably likely to provoke a belligerent response.” CP 28. In both examples, the actor would be unable to ward off an attack from the other person.

The instruction given at Mr. Daley’s trial was flawed. It did not make manifestly clear the aggressor rule’s objective standard, because it directed jurors to disregard Mr. Daley’s self-defense claim even if they believed the Turners’ belligerent response to be unreasonable or even unlawful. Thus, for example, the jury may have concluded that Mr.

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<sup>27</sup> This is especially true if the “unlawfulness” requirement is eliminated as well, as argued above.

Daley's words were reasonably likely to provoke a belligerent response from Matthew Turner, given Matthew Turner's aggressive behavior.

The court's aggressor instruction did not properly convey the aggressor rule's objective standard. CP 28. It stripped Mr. Daley of his right to use self-defense if his lawful acts were likely to provoke an unreasonable belligerent response.

The court's instruction violated due process because it improperly relieved the state of its burden to disprove self-defense. *McCreven*, 170 Wn.App. at 462. Mr. Daley's conviction must be reversed and his case remanded for a new trial. *Id.*

C. Substantial evidence did not support the aggressor instruction because Mr. Daley did not engage in any "specific unlawful intentional conduct" reasonably likely to provoke a belligerent response.

Jury instructions are not warranted unless supported by substantial evidence. *Cooper v. State Dep't of Labor & Indus.*, 188 Wn.App. 641, 647-48, 352 P.3d 189 (2015). Courts review *de novo* whether sufficient evidence justifies a first aggressor instruction in a self-defense case. *Stark*, 158 Wn.App. at 959.

As outlined above, a court may not give an aggressor instruction absent intentional unlawful conduct. *See Hardy*, 44 Wn.App. at 484; *Brower*, 43 Wn.App. at 902; *Douglas*, 128 Wn.App. at 563-564; *Stark*,

158 Wn.App. at 960. The provoking act cannot be the assault itself. *Brower*, 43 Wn.App. at 902; *State v. Kidd*, 57 Wn.App. 95, 786 P.2d 847 (1990).

The court did not identify any specific action that warranted instructing the jury on provocation. RP 301-307. Nor did the prosecutor point to any specific unlawful intentional act reasonably likely to provoke a belligerent attack, either in requesting the instruction or in arguing the case to the jury. RP 301-307.

The instruction was not supported by substantial evidence. It improperly prevented the jury from considering Mr. Daley's self-defense claim, and relieved the state of its burden of proof. *Stark*, 158 Wn.App. at 961. Mr. Daley's conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

D. The erroneous aggressor instruction prejudiced Mr. Daley because it improperly prevented the jury from considering his defense and relieved the state of its burden to disprove justification.

An improper aggressor instruction violates the accused person's right to due process. *Stark*, 158 Wn.App. at 961. The error is not harmless unless the state proves beyond a reasonable doubt "that the jury would have reached the same result in the absence of the error." *State v. Ortuno-Perez*, 196 Wn.App. 771, 385 P.3d 218 (2016). The state cannot do so in this case.

Jurors may have decided that Mr. Daley was the aggressor because of his words, or because of some other lawful conduct. Applying the court's instruction, the jury would have disregarded his self-defense claim. CP 28. Furthermore, the state relied heavily on the aggressor instruction in closing argument.

The instruction relieved the state of its burden to disprove self-defense, and the error is not harmless beyond a reasonable doubt. *Stark*, 158 Wn.App. at 961. Mr. Daley's conviction must be reversed and his case remanded for a new trial. *Id.*

**V. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. DALEY'S OFFENDER SCORE AND STANDARD RANGE.**

A. The trial court did not enter findings addressing how Mr. Daley's current offenses should score.

A sentencing court must determine the defendant's offender score. RCW 9.94A.525. Offenses that comprise the "same criminal conduct" are "counted as one crime." RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The phrase "same criminal intent" does not refer to a crime's *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall

criminal objective, and whether one crime furthered the other. *Id.* When objectively viewed, the intent for a “continuing, uninterrupted sequence of conduct” likely remains the same from one crime to the next. *See State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

Here, the two current offenses comprised the same criminal conduct. They involved a continuing uninterrupted sequence of conduct, during which Mr. Daley struggled with Deborah Turner as they tried to remove him from the house. The two crimes occurred at the same time and place. They involved the same victim: Mr. Daley was charged with burglarizing Deborah Turner’s house and assaulting her. The two offenses were intimately related, and his overall objective did not differ.

The two crimes comprised the same criminal conduct, and the trial court had discretion to score them as one, despite the applicability of the burglary antimerger statute.<sup>28</sup> *See State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998) (A sentencing court “may, in its discretion, refuse to apply the burglary antimerger statute based on the facts of the case before it.”)

Here, the trial court failed to exercise its discretion. It did not enter findings addressing the issue of same criminal conduct. CP 45-46. Nor

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<sup>28</sup> *See* RCW 9A.52.050, which provides that “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary...”

did it find that application of the burglary antimerger statute was warranted by the facts. RP 452-468; CP 45-46.

The sentencing court's failure to exercise discretion was itself an abuse of discretion. *See State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). Mr. Daley's sentence must be vacated and the case remanded for a new sentencing hearing. *Id.* On remand, the sentencing court must determine if the two current convictions comprised the same criminal conduct or were separate and distinct. It must also enter a finding on the appropriateness of applying the burglary antimerger statute under these facts.

B. The trial court failed to exercise independent judgment in scoring Mr. Daley's prior convictions.

A sentencing court must "determine independently" whether prior convictions comprise the same criminal conduct. *State v. Mehaffey*, 125 Wn. App. 595, 600-01, 105 P.3d 447 (2005) (applying former RCW 9.94A.400 (2000)).<sup>29</sup>

Here, there is no indication that the sentencing court determined how Mr. Daley's prior convictions should score. Two of the prior offenses

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<sup>29</sup> The rule is particularly important where the prior sentencing involved an antimerger statute. *See State v. Williams*, 181 Wn.2d 795, 801, 336 P.3d 1152 (2014) (finding burglary antimerger statute inapplicable to prior convictions). In such cases, the current sentencing court may lack discretion that was afforded the prior sentencing court. *Id.*

(theft and identity theft) took place on the same day and were of a similar character. CP 45; Ex. 26. The prior sentencing court did not explicitly find they were separate and distinct. Ex. 26.<sup>30</sup>

Under these circumstances, the current sentencing court abused its discretion by failing to make a finding on how the prior convictions should be scored. *O'Dell*, 183 Wn.2d at 697. Mr. Daley's sentence must be vacated and the case remanded for a new sentencing hearing.

C. If these sentencing errors are not preserved for review, Mr. Daley was deprived of the effective assistance of counsel at sentencing.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllö*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). An attorney has "the duty to research the relevant law." *Id.* An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.* A reasonable probability is a probability sufficient to undermine confidence

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<sup>30</sup> Furthermore, the statute criminalizing identity theft includes an antimerger provision. RCW 9.35.020(6). This raises the possibility that the prior sentencing court exercised discretion denied to the current sentencing court. *Williams*, 181 Wn.2d at 801.

in the outcome. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013)

An attorney provides ineffective assistance at sentencing by failing to argue same criminal conduct when warranted. *Id.*, at 548. Here, defense counsel unreasonably failed to argue that Mr. Daley’s two current offenses and two of his prior convictions comprised the same criminal conduct. RP 462-473. This deprived Mr. Daley of the effective assistance of counsel. *Phuong*, 174 Wn. App. at 548.

To show prejudice for failure to argue same criminal conduct, an appellant need only show that a sentencing court “could determine” that the offenses comprised the same criminal conduct. *Id.* That showing is met here. As outlined above, a sentencing court “could determine” that each pair of offenses comprised the same criminal conduct. *Id.*

If defense counsel had argued same criminal conduct at sentencing, there is a reasonable probability that the sentencing court would have reduced Mr. Daley’s offender score. This would have decreased his standard range for each current offense, resulting in a lower sentence.

There is a reasonable probability that counsel’s deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548. Mr. Daley’s sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

**VI. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

The Court of Appeals should decline to award appellate costs because Mr. Daley “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Daley indigent at the end of the proceedings in superior court. CP 56. That status is unlikely to change, especially with the addition of two felony convictions and imposition of a 60-month prison term. CP 48. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

**CONCLUSION**

For the foregoing reasons, the Court of Appeals should reverse Mr. Daley’s convictions and remand the case for a new trial. In the

alternative, the court should vacate the sentence and remand for a new sentencing hearing.

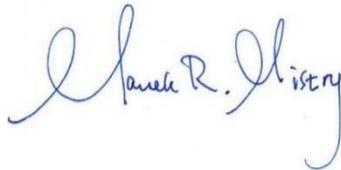
Respectfully submitted on March 3, 2017,

**BACKLUND AND MISTRY**

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is written in a cursive style with a large initial "M".

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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

David Daley, DOC #386405  
Washington State Penitentiary  
1313 North 13<sup>th</sup> Ave  
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Asotin County Prosecuting Attorney  
bnichols@co.asotin.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 3, 2017.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**BACKLUND & MISTRY**

**March 03, 2017 - 4:51 PM**

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