

FILED
APR 20, 2017
Court of Appeals
Division III
State of Washington

No. 34352-9-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

DAVID A. MASON-DALEY, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. WAS THE DEFENDANT DEPRIVED OF A FAIR TRIAL WHEN AN OFFICER TESTIFIED THAT THE DEFENDANT DENIED BEING STABBED AND DID NOT REQUEST MEDICAL ATTENTION OR OTHERWISE REPORT BEING ASSAULTED?

2. DID THE COURT IMPROPERLY EXCLUDE TESTIMONY CONCERNING PURPORTED WITNESS TAMPERING BY THE VICTIM WHERE THE DEFENDANT FAILED TO PROPERLY CONFRONT THE WITNESS WITH HER STATEMENTS AND THE DEFENDANT'S PROFFERED TESTIMONY DID NOT COMPLY WITH THE RULES OF EVIDENCE?

3. WAS THE COURT REQUIRED TO GIVE A UNANIMITY INSTRUCTION WHERE MULTIPLE ASSAULTS WERE PART OF ONE CONTINUING COURSE OF CONDUCT?

4. WAS IT PROPER FOR THE COURT TO GIVE THE JURY THE "FIRST AGGRESSOR" INSTRUCTION

WHERE THE DEFENDANT CLAIMED SELF
DEFENSE DESPITE HAVING FORCED HIS WAY
BACK INTO THE HOUSE AND OTHERWISE BEING
IN THE RESIDENCE UNLAWFULLY?

5. DID THE COURT PROPERLY CALCULATE THE
DEFENDANT'S OFFENDER SCORE WHERE THE
DEFENDANT DID NOT ASSERT THAT CRIMES
WERE THE SAME CRIMINAL CONDUCT?

6. SHOULD THE POSSIBILITY OF IMPOSITION OF
APPELLATE COSTS BE PREEMPTORILY
FORECLOSED?

II. SUMMARY OF ARGUMENT

1. THE DEFENDANT RECEIVED A FAIR TRIAL WHERE
THE OFFICER'S TESTIMONY CONCERNED HIS
DENIAL OF BEING STABBED AND WAS NOT
OTHERWISE A COMMENT ON HIS POST MIRANDA
SILENCE.

2. THE COURT PROPERLY PRECLUDED TRIAL COUNSEL FROM QUESTIONING A WITNESS REGARDING STATEMENTS MADE BY A STATE'S WITNESS WHERE THE DEFENDANT FAILED TO PROPERLY CONFRONT THAT WITNESS WITH HER STATEMENTS AND WHERE THE TESTIMONY WOULD CONSTITUTE EXTRINSIC EVIDENCE.

3. THE COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION WHERE MULTIPLE ASSAULTS WERE PART OF ONE CONTINUING COURSE OF CONDUCT.

4. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING "FIRST AGGRESSOR" WHERE THE DEFENDANT FORCED HIS WAY BACK INTO THE HOUSE AND WAS OTHERWISE IN THE RESIDENCE UNLAWFULLY.

5. THE COURT PROPERLY CALCULATED THE DEFENDANT'S OFFENDER SCORE WHERE THE DEFENDANT DID NOT DEMONSTRATE THAT ANY

CRIMES CONSTITUTED SAME CRIMINAL
CONDUCT.

6. THE POSSIBILITY OF IMPOSITION OF APPELLATE
COSTS SHOULD NOT BE PREEMPTORILY
FORECLOSED.

III. STATEMENT OF THE CASE

The Defendant's statement of fact contains mischaracterization of testimony, argument and is otherwise incomplete.¹ The facts are as set forth herein. On the evening of January 12, 2016, Elsie Hada, and Savannah Callene came to the Turner residence in Clarkston, Washington, and brought a friend, the Defendant, David A. Mason-Daley.² RP 83-84, 155, 218. Joshua Turner lived there with his mother, Deborah Turner and his brother, Matthew Turner. RP 84. Despite Ms Hada and Ms Callene being under age, the Defendant had bought over a half gallon bottle of R&R whiskey for them to drink. RP 84-85, 337. Prior to that night, Neither Joshua, Matthew, nor Deborah³ had ever met the Defendant. RP 83, 61, 154-155.

The group stayed upstairs in the residence and watched TV for the most part during the evening. RP 86. The Defendant, who

¹By way of example, in his brief the Defendant claims that Joshua Turner washed the knife he stabbed the Defendant with. Brief of Appellant P. 6, fn.3. This misstates the testimony and evidence which showed that, when the officer arrived, Joshua Turner retrieved the knife from the kitchen sink which the officer described as containing what appeared to be the dinner dishes and was half full of water. RP 28. The Defendant's characterization that Joshua attempted to obstruct the investigation by washing away evidence is misplaced, unsupported by the testimony and evidence, and in violation of RAP 10.3(a)(5). The same should be stricken or simply ignored by the Court.

²The Defendant requested, at the conclusion of sentencing, that he be referred to as "Mason-Daley" as his legal surname. RP 464. A motion was filed and order entered post sentencing to correct the Defendant's name in future pleadings in accordance with his representations and wishes. Clerk's Papers (CP) 67, 68.

³To avoid confusion, the Turners will be referred to throughout by their first names. No disrespect is intended.

had been drinking prior to arrival, continued drinking heavily. RP 85-86, 339. During the party, Ms Hada went downstairs and was talking to Matthew. RP 87, 156-157, 227. The Defendant became jealous and began pacing aggressively. RP 87-88, 228. Joshua asked the Defendant to leave several times and the Defendant refused. RP 88-89. Joshua, being small of stature, went downstairs and summoned Matthew to have him make the Defendant leave. RP 89-90, 157. Matthew went upstairs and told the Defendant again to leave the residence. RP 157, 90. The Defendant continued to refuse to leave. RP 91, 158. Joshua then went downstairs to get his mother to help get the Defendant out of the house. RP 91.

Deborah came upstairs and told the Defendant he had to leave. RP 64-65, 91. The Defendant responded that it was his house and he didn't have to leave. RP 65, 91-92. The Defendant began pushing Ms Hada and Ms Callene. RP 65. The Defendant threw Joshua into a toybox. RP 65. Everyone began trying to push the Defendant to the door and were able to push him outside. RP 66, 92, 159-160. The Defendant shoved his way back into the house and the group went to the ground near a hide-a-bed. RP 66, 92-93, 160-161. The Defendant ended up on top of Ms Hada and Deborah grabbed his head and tried to get the Defendant off of Ms Hada. RP 66-67, 92. At that point, the Defendant began biting Deborah's index and

middle fingers. RP 67, 93, 163. Deborah began screaming and the Defendant refused to release her fingers from his teeth. RP 67-69. Joshua tried hitting the Defendant to get him to let go but he continued biting down on Deborah's fingers. RP 94. Matthew struck the Defendant across the back with a skateboard, but even this was ineffective in making the Defendant release her fingers. RP 94-95. Joshua ran to the kitchen, retrieved a knife and stabbed the Defendant in an effort to get him to let go, which was not immediately successful. RP 95-96.

The Defendant did eventually release his bite and they were able to push him outside. RP 69-70, 96. The police were called as was emergency medical staff. RP 70. The Defendant fled on foot. RP 21-22. During his flight, the Defendant entered the backyard of Susan Watts who was disturbed from her sleep by a loud crash. RP 144. The Watt's residence is approximately a block and a half away from the turner residence. RP 18, 530. Mrs. Watts then heard the wind chime on her deck which is just off the bedroom. RP 144. She looked out and saw the Defendant standing on her deck right at her glass door. RP 145. She asked him what he was doing and he stated he was looking for his girlfriend. RP 145. The Defendant made no mention of being assaulted, being stabbed, or otherwise needing medical attention. RP 148. Mrs. Watts told the Defendant

she was calling the police and he fled to the back gate. RP 145. He struggled with the gate and was eventually was able to open it. RP 146. He then fled over a fence and into the adjoining neighbor's yard. RP 146. He left behind one of his shoes in the Watts' back yard. RP 146.

Police subsequently observed him running a block or so away and were able to apprehend him. RP 18, 30, 32-33. He was detained and placed into handcuffs. RP 33-34. Officer Colby Martin observed the Defendant to be missing a shoe and appeared to be bleeding. RP 34. The officer then asked the Defendant who had stabbed him and the Defendant denied knowing he had been stabbed. RP 35. The Defendant was then taken by ambulance to Tri-State Hospital for medical attention. RP 36.

Deborah Turner's injuries were quite serious. RP 71. She suffered significant injury to the tendons in her finger, resulting in loss of flexion and disfigurement. RP 72. She required sutures to close the wounds. RP 71.

The Defendant was charged by Information with Burglary in the First Degree and Assault in the Second Degree. Clerk's Papers (CP) 1 - 2. The matter proceeded to trial on April 11, 2016. RP 10. At trial, the State called and the jury heard from Officer Colby Martin, Deborah Turner, Joshua Turner, Susan Watts, Matthew Turner, and

Deputy Michael McGowan. RP 15-214. During Mrs. Watts testimony, she was asked whether the Defendant requested medical assistance or otherwise sought to report being assaulted and she testified that the Defendant only stated that he was looking for his girlfriend. RP 148.

The Defense then called Elsie Hada, Savannah Calene, Lori Hada, Officer Martin. RP 217-325. The Defendant also elected to testify on his own behalf. RP 326-349. During cross examination, the Defendant was questioned whether, instead of forcing his way back into the house, he sought law enforcement assistance. RP 344. The Defendant responded that there weren't any officers driving around and that he didn't have his phone to call for police. RP 344-345. The prosecutor then inquired why he hadn't gone to a neighbor's house to use a phone, to which he replied that it was "almost midnight" and he didn't know anyone in the area. RP 345. When confronted with the fact that had actually gone into the backyard of a nearby home, he claimed a lack of memory of the events after he was struck with the skateboard. RP 345.

Near the conclusion of the trial, the court discussed proposed jury instructions with the parties. RP 297-309. The State objected to the giving of a self defense instruction (WPIC 17.02) as proposed by the Defendant, which omitted the paragraph concerning lawful force

against a trespass to property. RP 298. The State proposed that, if the court was inclined to instruct on self defense, the court should also include the omitted language. RP 298-299. The State further proposed that the court give the "first aggressor" instruction (WPIC 16.04) as well as the "no duty to retreat" instruction (WPIC 17.05). RP 299. The Defendant did not object to WPIC 16.04 being given. The Defendant only objected to the additional paragraph from WPIC 17.02 and further objected to WPIC 17.05 and claimed that these instructions might confuse the jury because they related to evaluation of the Turners' conduct and not that of the Defendant. RP 300. After hearing argument and considering the evidence, the court gave the WPIC 17.05 instruction but modified it to include the omitted paragraph from defense proposed WPIC 17.02 concerning lawful force to defend against a trespass to property as Instruction 16. RP 302, CP 27. The court further gave the WPIC 16.04 instruction without objection from the Defendant as Instruction 17. RP 302, CP 28.

The jury deliberated and returned guilty verdicts on the charges of Burglary in the First Degree and Assault in the Second Degree. RP 444, CP 32. At sentencing, the State provided scoring sheets for each crime, calculating his offender score as "6" of both offenses based upon three prior felony convictions and the fact that he was

serving a period of community custody at the time of the current offenses, resulting in an effective range of fifty-seven (57) to seventy-five (75) months. CP 42, 43. The Defendant did not object to the State's recitation of his felony history or the calculation proffered. RP 455-456. Instead, counsel sought to implore the court to deviate downward from the standard range and impose an exceptional sentence of a year and a day. RP 456-457. The Defendant didn't ask the court to find that the two current offenses were the "same criminal conduct" nor did he request that the court look into the facts underlying his prior convictions to determine whether two or more of those charges would be considered "same criminal conduct." RP 455-457.

The court imposed a sentence near the bottom of the standard range of sixty (60) months. RP 461, CP 36. In imposing costs, the court inquired of his work history and determined that the Defendant would likely be able bodied, and had installed granite counter tops prior to his incarceration. RP 462-463. The Defendant confirmed that he would likely return to work after he is released, which would allow ample time for healing of his stab wound. RP 463.

The Defendant has now filed notice of appeal and asserts a myriad of issues concerning his trial and sentencing. CP 44-55. Because, the Defendant failed to object to nearly all of the

complained of errors and otherwise received a fair trial, his appeal should be denied and the judgement of the Superior Court affirmed.

IV. DISCUSSION

In his brief, the Defendant raises twenty-eight assignments of error, but substantively only truly raises six issues. In each of these issues, the Defendant attempts to color the claim as constitutional error in an effort to avail himself of heightened levels of scrutiny, reduced burdens of persuasion, or to avoid fatal procedural bars to consideration. Under any level of review, the issues raised do not create a basis upon which this Court should disturb the Defendant's conviction or the sentence imposed herein.

1. THE DEFENDANT RECEIVED A FAIR TRIAL WHERE THE OFFICER'S TESTIMONY CONCERNED HIS DENIAL OF BEING STABBED AND WAS NOT OTHERWISE A COMMENT ON HIS POST MIRANDA SILENCE.

The Defendant first claims that the State improperly commented on the Defendant's post-Miranda⁴ silence when it elicited testimony concerning his flight from the scene and his failure to seek medical assistance or report being assaulted. The Defendant's argument is based upon an incorrect characterization of the facts of

⁴Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

the case and misapplication of the law. Further any error, was not objected to at trial, and was, in any event, clearly harmless beyond a reasonable doubt.

This Court ordinarily will not review a claim of error raised for the first time on Appeal. RAP 2.5(a). An exception to this rule exists where the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). The Defendant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Once the defendant has identified such an error, it is for the State to establish that the error was harmless beyond a reasonable doubt. Gordon, 172 Wn.2d at 676, RAP 2.5. The Defendant asserts that the issue is clearly one of manifest constitutional error where the claim revolves around a comment on his Fifth Amendment right to silence. However, it is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (Div. I, 1992). Rather, an appellant must first make a showing how, in the context of the trial, the alleged error

actually "affected" the defendant's rights. *Id.* Some reasonable showing of a likelihood of actual prejudice is what makes a "manifest error affecting a constitutional right". *Id.*

RAP 2.5(a) affords the trial court an opportunity to rule correctly on a matter before it can be raised on appeal. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so could simply lie in the weeds and not allow the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The requirement in RAP 2.5, that the issue be raised below serves the goal of judicial economy. State v. Strine, 176 Wn.2d at 749-50 (2013). The rule enables trial courts to correct mistakes and obviate the need for and expense of appellate review and a subsequent trial and facilitates appellate review by ensuring that a complete record of the issues will be available. *Id.* at 749. The rule further prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. *Id.* 749-750. Here, the Defendant fails to show such "manifest" error and should be precluded from capitalizing on his failure to object.

Substantively, the Defendant's argument is factually flawed. The Defendant claims that the State used post-arrest, post-Miranda silence as evidence of guilt. The Fifth Amendment prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285, 1289 (1996). However, this characterization ignores the facts of the case. The Defendant did not remain silent. He spoke with Mrs. Watts and later with the officer concerning whether or not he had been stabbed. When a defendant does not remain silent and talks to law enforcement officers, the State may comment on what the defendant does not say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citing State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)). Upon initial detention he was asked about being stabbed and denied that he had been stabbed. He was subsequently placed under formal arrest and read his Miranda warnings. RP 36. The State did not comment on his pre-arrest, post-Miranda silence as claimed by the Defendant. Rather the State introduced the fact that, when speaking to police, he denied being stabbed and did not otherwise seek medical assistance. This was wholly consistent with the evidence of the Defendant's flight from police, which clearly and unassailably was admissible to demonstrate consciousness of guilt. State v. Bruton, 66 Wn.2d 111, 112-13, 401

P.2d 340 (1965). The fact that he fled from scene, ran from police, and denied knowing he was stabbed was properly admitted as circumstantial evidence of guilt.

Assuming that the testimony could be considered an impermissible comment on silence, any claimed error is clearly harmless in any event. In analyzing whether an improper comment on the defendant's right to silence was harmless, the standard of review depends on whether the comment was direct or indirect. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (Div. III, 2002). A direct comment on a defendant's right to silence occurs when the State or a witness specifically refers to the defendant's invocation of the constitutional right to silence, whereas an indirect comment occurs when the State or a witness refers to conduct of the defendant that could be inferred as an invocation of the right to silence. State v. Pottorff, 138 Wn. App. 343, 347, 156 P.3d 955 (Div. III, 2007). If the comment on the defendant's right to silence is direct, then the Court must determine whether the error was harmless beyond a reasonable doubt. Romero, 113 Wn. App. at 790. Conversely, where the comment was indirect, this Court applies the non-constitutional harmless error standard to determine whether there was any reasonable probability that the error affected the outcome of the case. Pottorff, 138 Wn. App. at 347.

Here, any claimed comment was indirect. The State did not elicit testimony that the Defendant invoked his right to remain silent after being advised of his rights.⁵ At worst, the State's comments could be characterized as questioning his claim that he was attacked, in that he failed to report either his injuries or his attack to the police when contacted and when speaking to them. In the context of the evidence produced at trial clearly demonstrated he was told to leave the house, fought with the residents, and ran from the scene fo the attack and from police, this indirect reference to alleged "silence" gets lost in flood of compelling evidence of guilt. The complained of testimony would not constitute a direct comment on his right to remain silent. The Defendant has failed to show that the outcome would have been different.

Even assuming the heightened standard of a direct comment, it is clear that the complained of testimony was harmless beyond a reasonable doubt. Mrs. Watts⁶ also testified that the Defendant spoke to her and did not ask her to call the police or seek medical assistance for him. When questioned about his presence at her back

⁵In fact, the State interrupted the officer before he inadvertently testified concerning the Defendant's invocation of his rights after being read Miranda. RP 36.

⁶The Defendant assigns no error to the testimony of Mrs. Watts, nor does he make any claim that her testimony, as a non-state actor, was an improper comment on his pre-arrest silence.

bedroom slider door, he stated only that he was looking for his girlfriend. He then fled when Mrs. Watts told him she was calling the police, all of which occurred well before law enforcement caught up to the Defendant. In light of Mrs. Watt's testimony, any claimed comment on "silence" with police was clearly harmless beyond a reasonable doubt.

During his trial testimony, the Defendant admitted that he had been told several times to leave the house. RP 330-331. He admitted being highly intoxicated, and becoming jealous. RP 330, 339. He further admitted that, after being pushed outside, he pushed his way back into the house. RP 343-344. Finally, he admitted that he bit down on Deborah Turner's fingers and held on as hard as he could for thirty for forty-five seconds , causing serious injury to her fingers. RP 346. Based upon his own testimony, he was guilty of the crimes charged and was not in a position to use self defense, and therefore, any claimed comment was harmless beyond a reasonable doubt.

Finally, the fact that he testified at trial made the testimony relevant. No constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of Miranda warnings. Fletcher v. Weir, 455 U.S. 603, 606-07, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)

(post-arrest silence could be used for impeachment when no Miranda warnings given); Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (pre-arrest silence can be used to impeach defendant's exculpatory testimony). Here, the Defendant testified and the State properly inquired about his failure to seek police or medical assistance before his arrest. In light of his own testimony and proper cross examination, officer testimony concerning any claimed "silence" was harmless beyond a reasonable doubt. Any alleged comment on silence, taken in the context of the entire trial, and in light of proper impeachment questioning of the Defendant, Mrs. Watt's proper testimony concerning the same, and the Defendant's own admissions to the elements of the crimes, and which went without objection at trial, was harmless beyond any doubt.

2. THE COURT PROPERLY PRECLUDED TRIAL COUNSEL FROM QUESTIONING A WITNESS REGARDING STATEMENTS MADE A STATE'S WITNESS WHERE THE DEFENDANT FAILED TO PROPERLY CONFRONT THAT WITNESS WITH HER STATEMENTS AND WHERE THE TESTIMONY WOULD CONSTITUTE EXTRINSIC EVIDENCE

Next, the Defendant complains that the trial court violated his constitutional right to present a defense when it excluded extrinsic impeachment evidence. Once again, the Defendant attempts to frame the issue as one of constitutional magnitude instead of a simple evidentiary error. He does so by misstating the precedural posture

where the ruling occurred and mischaracterizing the trial court's ruling. Because, in light of the procedural setting and the basis for the objection upon which the court ruled, the court's ruling was proper, the Defendant's claim on this point should be rejected.

As a preliminary issue, the Defendant claims that the court outright precluded inquiry into whether Deborah Turner tried to get other witnesses to alter their testimony. Brief of Appellant, p. 15. This is not an accurate portrayal of the court's ruling. At trial and without having confronted Deborah Turner on cross examination with her alleged statements, the Defendant offered to elicit from Lori Hada that she received a call from Deborah a few nights after the assault, wherein she allegedly asked the witness to "change her story." RP 289. The trial court noted that the defense had not confronted Deborah with these alleged statements and that such testimony could only be offered for impeachment. RP 289. The court ruling was therefore that the defense was precluded from offering these statements for failing to lay proper foundation and comply with the evidentiary rules as discussed more completely below. RP 289. The court did not preclude the Defendant from attempting to impeach the witnesses, but simply required him to comply with the rules. This is not a unconstitutional interference with the Defendant's right to

present his theory of the case and any evidentiary error complained of is not a constitutional issue in any event.

An evidentiary error which is not of constitutional magnitude, such as erroneous exclusion of evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The erroneous admission of evidence under ER 609(a) is evaluated under the nonconstitutional harmless error standard. State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997).

"Admission of evidence lies largely within the sound discretion of the trial court". Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 76, 684 P.2d 692 (1984). A trial court's decision to exclude evidence is reviewed for an abuse of discretion. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). An abuse of discretion occurs only where "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Kleist, 126 Wn.2d 432, 436, 895 P.2d 398, 400 (1995).

To the extent that the Defendant was offering a specific instance of conduct or "prior bad acts evidence" to attack the credibility of Deborah Turner under ER 404(a)(3), that rule provides that when evidence of a specific instance of conduct is offered to impeach a witness's credibility, it may be admitted under ER 608 or

ER 609. ER 609, which applies to prior convictions, is not pertinent here. ER 608 requires that non-conviction evidence be "in the form of reputation" or be adduced by examining the witness herself. ER 608(b) forbids adducing non-conviction evidence through another witness. ER 608(b) specifically declares:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

As such, the Defendant would be precluded from offering extrinsic evidence, under ER 608(b) of this prior conduct to impeach Extrinsic evidence would include testimony of another witness concerning the conduct. See State v. Simonson, 82 Wn. App. 226, 234-35, 917 P.2d 599, 603 (Div. II, 1996). The Defendant had ample opportunity to inquire of Deborah Turner concerning this alleged phone call when she testified and was cross examined by trial counsel. No inquiry was attempted. Under ER 608(b), the Defendant was precluded from such extrinsic proof.

Assuming the Defendant claims that the allegations of witness tampering were colorable as "prior inconsistent statements," and

offered pursuant to ER 613, the result is the same, and for largely the same reasons. ER 613 allows for impeachment of a witness based upon a prior inconsistent statement of that witness. Unlike ER 608, ER 613 would allow for proof by extrinsic evidence. However, ER 613 requires that the witness be confronted with the statement and given an opportunity to explain or deny the statement before such extrinsic evidence be admissible.

The Defendant did not ask Deborah Turner about this alleged phone call to Lori Hada. He did not give Ms Turner an opportunity to deny or explain the alleged statement, and instead sought to elicit the testimony from a third party witness. As the trial judge noted, “[I]t doesn’t take much of a dog to bark at the bones of a lion.” The Defendant failed to comply with the requirements of either rule. The court did not preclude him from presenting a defense; his failure to comply with the rules of evidence did. The restrictions of ER 404 evidence does not violate the Defendant’s constitutional right to present a defense. See State v. Donald, 178 Wn. App. 250, 263, 316 P.3d 1081, 1087 (Div. I, 2013).

The Defendant’s case citations are completely inapplicable. In State v. Darden, 145 Wn.2d 612, 26 P.3d 308 (2002), the court precluded the defense therein from inquiring regarding the location of the witness to the crime. Darden involved a drug investigation where

the State's primary witness was an officer observed the crime from an elevated but undisclosed location. *Id.* at 618. The Defense was precluded from learning the location and was therefore unable to test the reasonableness of officer's ability to observe the events he claimed to see. *Id.* In Darden, the Supreme Court determined that this limitation violated the Defendant's right to confront the witnesses. *Id.* at 620. This is a far cry from the facts here which reveal that, it was only the Defendant's failure to comply with the rules and confront the witness that precluded him from eliciting extrinsic testimony.

Likewise, State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), cited by the Defendant, is equally unhelpful. In Jones, the trial court precluded the Defendant from cross examining the rape victim concerning an alleged "sex party" or otherwise presenting evidence that the acts complained of were consensual. *Id.* at 721. The Court therein held that preclusion of this evidence violated the defendant's right to present a defense. *Id.* Unlike Jones, here the Defendant was allowed to present testimony concerning self defense and otherwise present his case to the jury. The Defendant could have inquired properly under ER 608 and ER 613, but did not do so. He was not precluded from presenting a defense, but rather, the Defendant was merely required to comply with the rules in so doing.

His arguments to the contrary and misconstruction of the facts and procedure notwithstanding, the trial court properly precluded the Defendant from offering extrinsic evidence of conduct or inconsistent statements, without first confronting the witness with the accusations. This Court should affirm the ruling of the trial court for the reasons stated.

3. THE COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION WHERE MULTIPLE ASSAULTS WERE PART OF ONE CONTINUING COURSE OF CONDUCT.

The Defendant next complains that the trial court failed to give a unanimity or Petrich⁷ instruction concerning the charge of Burglary in the First Degree. Specifically, the Defendant argues that the trial court should have given a unanimity instruction where the State did not elect which of several potential assaults elevated that charge to First Degree Burglary. Like many raised herein, this error, if any occurred, was not properly preserved. As stated above, this Court should decline to address this issue pursuant to RAP 2.5. In order to avail himself of the exception in RAP 2.5(a) and raise an error for the first time on appeal, the Defendant must demonstrate "(1) the error is manifest, and (2) the error is truly of constitutional dimension." State

⁷State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984)

v. O'Hara, 167 Wn.2d at 98. This exception "is not intended to afford a criminal defendant a means for obtaining new trials whenever they can identify a constitutional issue not litigated below." State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1998). In a case similar to this, the Court of Appeals stated:

An error is considered manifest when there is actual prejudice. The focus of this analysis is on whether the error is so obvious on the record as to warrant appellate review. An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial.

State v. McNearney, 193 Wn. App. 136, 142, 373 P.3d 265 (Div. III, 2016)(*internal citations omitted*). In that case, the Court stated

To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.

Id. (*internal quotations and citation*). Therein, the Court found that the issue was not reviewable under RAP 2.5. *Id.* In so ruling, the Court stated.

Given the evidence presented, we find that the failure of the court to give a Petrich instruction, if error at all, does not merit review under the RAP 2.5(a)(3) exception. If error occurred, it was surely constitutional, but Mr. McNearney has failed to demonstrate that it was manifest.

The Court continued:

Placing ourselves in the shoes of the trial court, it was not at all apparent that the two touchings could be viewed as separate acts, as opposed to a continuing course of conduct.

Id. at 142-3. There, as here and as discussed more thoroughly below, the Defendant's attack on the multiple occupants of the residence, pushing and punching anyone within arm's reach, was one continuing course of conduct. The Defendant neither requested a Petrich instruction, nor objected to the trial court's failure to *sua sponte* give such an instruction. The Defendant should therefore be precluded from raising this issue for the first time on appeal.

Reaching the merits, the Defendant's argument is factually and legally flawed. First, it should be noted that the Defendant, in establishing the basis for this issue, points to a portion of the State's closing argument. Brief of Appellant, p. 24. This leads to some confusion concerning the element that the Defendant complains was not unanimous.

To convict the Defendant of the crime of Burglary in the First Degree, the State had to prove:

- (1) That on or about the 12th day of January 2016, the Defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with ***the intent to commit a crime against a person or property therein***;

(3) That in so entering or while in the building or in immediate flight from the building ***the Defendant assaulted a person***; and

(4) That the acts occurred in Asotin County, the State of Washington.

CP 16 (*emphasis added*). The prosecutor's argument pointed to by the Defendant as evidence of a lack of unanimity is improperly characterized and taken out of context. However, this argument went to the Defendant's ***intent to commit a crime*** as required in element (2) and not the specific assault required in element (3). To the extent that the Defendant is arguing that the court should have instructed the jury that it had to be unanimous as to the crime intended, this argument has been soundly rejected. See State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985).

Presuming that the Defendant's complaint relates to unanimity of the specific assault from element (3) above, because the Defendant's conduct was a continuing course of conduct and not separate, distinct acts, a Petrich instruction was not required. "In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." Petrich, 101 Wn.2d at 569. "When the evidence indicates that several distinct criminal acts have been committed, but [the] defendant is charged with only one count of criminal conduct,

jury unanimity must be protected.” *Id.* at 572. To adequately protect jury unanimity, either the State must elect the specific act on which it relies for the crime charged, or the court must give the jury a “Petrich” instruction, explaining that all “12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *Id.*

A Petrich unanimity instruction is not required, however, when the State presents evidence of multiple acts that indicate a “continuing course of conduct.” State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991); State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (Div. I, 1996). “A continuing course of conduct requires an ongoing enterprise with a single objective.” Love, 80 Wn. App. at 361. To determine whether multiple acts constitute a continuing course of conduct, we evaluate the facts in a commonsense manner. Handran, 113 Wn.2d at 17; Love, 80 Wn. App. at 361. Here, the Defendant’s various assaults occurred in a rapid succession, without discernment or focus on any particular victim. He was merely attacking anyone who was within reach and who was attempting to expel him from the home. Under a common sense approach, this was a continuing and contemporaneous course of conduct, not requiring a unanimity or Petrich instruction.

If the Court were inclined to overlook the obvious procedural bar to raising this issue, and further determined that a Petrich instruction was appropriate, under the facts of this case, reversal of his conviction for Burglary in the First Degree would be unnecessary and improper. Any such failure to instruct on unanimity was clearly harmless beyond a reasonable doubt. Under Petrich, where this error occurs, the courts apply constitutional harmless error analysis. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907, 912 (2009). Further, light of his defense that he was merely defending against an unlawful attack, there is no reason to distinguish between an assault on Joshua, Matthew, Deborah, or any other occupant of the residence. As in Bobenhouse, the defense was the same with regard to any individual assault. See *id.* at 895. Therein, the Court noted that there were several acts testified to by the child victim which would constitute rape. *Id.* Further, the defendant in Bobenhouse offered only a general denial of any the sexual conduct. *Id.* There the Supreme Court noted that, “[T]he jury had no evidence on which it could rationally discriminate between the two incidents. *Id.*

Like Bobenhouse, the Defendant’s theory of the case was that he was justified in using force against any and all persons in the

house.⁸ His testimony at trial makes clear that he was just swinging indiscriminately and he didn't deny that he assaulted anyone. RP 333. His defense wasn't that he didn't use force against the Turners, but rather, that the force he used was justified. Under these circumstances, the jury wasn't being asked to parse out a particular victim, or being asked to decide if he could use force against Joshua, Matthew, or Deborah Turner. They were only being asked if the Defendant had the right to use force at all, where he had been told to leave, pushed outside, and forced his way back inside. As in Bobenhouse, there was no reason to believe that the jury distinguished between any of the individual assaults. Any error was clearly harmless beyond a reasonable doubt.

Finally, based upon the verdicts entered by this jury, there is no doubt that the error was harmless. The jury returned a verdict of guilty as to Count 2, which charged the Defendant with Assault in the Second Degree. CP 32. That charge was based upon his act of biting Deborah Turner's fingers. CP 2, RP 382-383. The jury was instructed that it had to be unanimous in order to convict the Defendant of that charge. CP 20, 30. Therefore, there is no doubt whatsoever that, at least as to the assault on Deborah Turner, the jury

⁸The Defendant sought and received an instruction that he was allowed to act on appearances even if he wasn't actually in danger. CP 25. So even if one person struck was not actually attacking him, he would be justified in using force against all persons he perceived to be a threat. See WPIC 17.04.

was unanimous that it had occurred. Any claim of error in failing to instruct the jury with regard to unanimity of an assault victim in Count 1 was clearly harmless beyond ANY doubt, in light of the guilty verdict on Count 2. This Court should therefore reject this claim as well.

4. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING "FIRST AGGRESSOR" WHERE THE DEFENDANT FORCED HIS WAY BACK INTO THE HOUSE AND WAS OTHERWISE IN THE RESIDENCE UNLAWFULLY.

The Defendant next complains that the trial court erred in giving the "First Aggressor" instruction (WPIC 16.04). Because the Defendant is procedurally barred from raising this issue and further, because the testimony at trial justified the instruction, the Court should reject the Defendant's argument.

As already discussed *ad nauseam* above, issues not raised in the trial court will generally not be reviewed on appeal. RAP 2.5. The State further recognizes the exception for constitutional errors, and that further recognizes that instructions which misstate the law on self defense are considered constitutional. State v. Lynn, 67 Wn. App. at 345.

Here, the Defendant's trial counsel did not object to the "aggressor" instruction. CrR 6.15(c); see State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977) (*purpose of CrR 6.15(c) is to afford the trial court an opportunity to correct any error*). While dedicating an

impressive portion of his brief to historical discussion of WPIC 16.04 and its revision, the Defendant does not argue an exception to the rule that this Court will not consider issues raised for the first time on appeal. The Defendant merely asserts, through hypotheticals not relevant to the facts or testimony at trial, that the use of an “aggressor” instruction was improper and instructed the jury to disregard his self-defense claim. Brief of Appellant, p. 25. But the appellant courts “will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)). The Defendant has not demonstrated that any claimed error was manifest and therefore, his argument that the trial court improperly gave the “First Aggressor” instruction was not preserved for review. Even if this Court reaches the merits, his claim necessarily fails based upon the facts and testimony at trial.

His argument really boils down to a factual question regarding whether the testimony supported the court’s decision to give the instruction. The standards for review of this question were stated in State v. Bea, 162 Wn.App. 570, 577, 254 P.3d 948 (Div. III, 2011):

Whether the State produced sufficient evidence to justify a first aggressor instruction is a question of law, and our review is therefore de novo. When determining if evidence at trial was sufficient to support the giving of

an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. The State need only produce some evidence that Mr. Bea was the aggressor to meet its burden of production.

(Internal citations omitted). A "First Aggressor" instruction is proper when the record shows the defendant was intentionally involved in wrongful or unlawful conduct before the charged assault occurred, which a "jury could reasonably assume would provoke a belligerent response by the victim." State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (Div. I, 1985). A trial court may properly give a "First Aggressor" instruction even when there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992). The appellate court, gives deference to "the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence." State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (*review denied*, 119 Wn.2d 1011, 833 P.2d 386 (Div. III, 1992)).

Here, the Defendant's precipitous provocation occurred when he became drunkenly belligerent and refused to leave the residence. His provocation was further exacerbated when he forced his way back into the residence. The Defendant may only invoke self-defense, if the force defended against is unlawful force. State v. Riley, 137

Wn.2d 904, 911, 976 P.2d 624 (1999). A trespass may support the giving of an aggressor instruction as the owner of property may lawfully use reasonable force to expel a malicious trespasser. RCW 9A.16.020; State v. Bea, 162 Wn.App. at 578. Here, the Turners were entitled to use force to expel the Defendant as a trespasser. He had been told by Joshua, Matthew, and Deborah to leave. He refused. He was forced outside and pushed his way back into the residence. As stated in Bea:

An owner of property may lawfully use reasonable force to expel a malicious trespasser. The first aggressor instruction was needed for the State to argue that these acts could negate Mr. Bea's theory of self-defense.

Id. Just as in Bea, the “First Aggressor” instruction was necessary to allow the State herein to argue that the Defendant, once trespassed, did not have the right to use force against the residents of the home to repel their efforts to expel him. The Defendant ignores this fact in his brief and instead focuses upon speculation and hypothetical. It was undisputed that at the time of his physical attack on the Turners, he was no longer lawfully in the residence. He acknowledged this in his testimony. RP 331, 340. Regardless of whether the postman can be said to reasonably have provoked the dog,⁹ those were not the facts of this case. The Defendant’s refusal to leave the house after being told that his presence was no longer welcome was both an

⁹Brief of Respondent, p. 29.

unlawful and intentional act that was likely to provoke the very response that occurred here. Trial counsel didn't even bother to object or argue against the State's proposed "First Aggressor" instruction, as the evidence was entirely clear that the instruction was appropriate under the facts and the law. See Bea, supra. It would have been error for the trial court to refuse the "First Aggressor" instruction under these facts and light of the trial testimony. This Court should therefore reject the Defendant's arguments and affirm the trial court's decision to instruct the jury in accordance with WPIC 16.04.

5. THE COURT PROPERLY CALCULATED THE DEFENDANT'S OFFENDER SCORE WHERE THE DEFENDANT DID NOT DEMONSTRATE THAT ANY CRIMES CONSTITUTED SAME CRIMINAL CONDUCT.

In his final assault on his conviction, the Defendant launches a series of challenges to his offender score, each premised upon the issue of "same criminal conduct," both in relation to the current charges and in relation to prior convictions. Because, like virtually every other assignment of error complained of herein, the Defendant failed to object or otherwise request inquiry, RAP 2.5 precludes review. Further, based upon the facts and the requirements of the law, the Defendant's arguments fail on the merits.

"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*." See RCW 9.94A.589(1)(a). (*Emphasis added*). "[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." See *id*. The same-criminal conduct test focuses on the extent to which a defendant's criminal intent, as objectively viewed, changes from one crime to the next. See State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The defendant bears the burden of proving that his offenses encompass the same criminal conduct. See State v. Williams, 176 Wn. App. 138, 142, 307 P.3d 819 (Div. III, 2013), *aff'd*, 181 Wn.2d 795 (2015).

Pursuant to RAP 2.5, a defendant may not challenge the calculation of his or her offender score because of the belief that the trial court, if asked, could have found the defendant's current offenses encompassed the same criminal conduct. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618, 625 (2002); State v. Nitsch, 100 Wn. App. 512, 520, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (Div. I, 2000). The failure to request a same criminal conduct analysis leaves the reviewing court an insufficient record to review the required factual determinations supporting a same criminal conduct analysis. Nitsch, 100 Wn. App. at 524. As stated in Nitsch:

Second, the effect of permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. In the same criminal conduct context, such a search requires not just a review of the evidence to support the State's calculation, or a review to ensure application of the correct legal rules, but an examination of the underlying factual context in every sentencing involving multiple crimes committed at the same time. Because this is not the legislature's directive, the trial court's failure to conduct such a review *sua sponte* cannot result in a sentence that is illegal. The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon.

Id. at 524-25. The Defendant did not object to the State's calculation of his offender score, nor did he request that the two present crimes be treated as "same criminal conduct." Instead, he sought an exceptional sentence downward. Further, the Defendant did not propose that his prior convictions for Identity Theft and Theft Second Degree were the "same criminal conduct" for scoring purposes. Therefore, the Defendant's failure to object to the State's calculation or request that the Court conduct "same criminal conduct" inquiry should preclude review herein. This is especially true for the prior convictions where there is no evidence in this record upon which to conclude that all the elements of "same criminal conduct" are met. On this basis, this Court should decline to reach these issues.

With regard to the two current convictions for Burglary First Degree and Assault Second Degree, the Defendant's arguments hinge on a premise which has previously been soundly rejected. The

Defendant asserts that the sentencing court was, *sua sponte*, required to conduct the "same criminal conduct" analysis. As mentioned above, this is not the status of the law. See Nitsch, *supra*. at 525. As stated by the Supreme Court:

[A] "same criminal conduct" finding favors the defendant by lowering the offender score below the presumed score. State v. Farias Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007) ("*In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct.*"); In re Pers. Restraint of Markel, 154 Wn.2d 262, 274, 111 P.3d 249 (2005) ("*[A] 'same criminal conduct' finding is an exception to the default rule that all convictions must count separately. Such a finding can operate only to decrease the otherwise applicable sentencing range.*"). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.

State v. Aldana Graciano, 176 Wn.2d 531, 539, 295 P.3d 219, 223 (2013). If the defendant fails to prove any element under the statute, the crimes are not the "same criminal conduct." *Id.* at 540. The "same criminal conduct" statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act. *Id.*

The Defendant did not seek to establish that each of the elements (same place, time, victim, and criminal intent) were met at the time of sentencing for the current charges. The Defendant made no effort to prove that either of his prior convictions met the test for

“same criminal conduct.” Because he failed to carry his burden to establish that the test was met in either case, his argument herein must necessarily fail.

Assuming this Court wishes to review the current offenses *de novo*, the Defendant's arguments fail on the merits. The victims of a the burglary include the occupants of a residence and their guests. See State v. Davison, 56 Wn. App. 554, 559-60, 784 P.2d 1268 (Div. I, 1990). Here, there were a total of five people - three residents and two lawful guests. Considering further that this was a charge of Burglary in the First Degree, three persons who were clearly assaulted by the Defendant. Both Davison and State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (Div. I, 1998) hold that a burglary of a home in which more than one person is present does not have the same victims for "same criminal conduct" purposes as an assault against one of the persons present in the course of the burglary. Davison, at 558 - 560; Davis, at 782. See also State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, (1987). ("Convictions of crimes involving multiple victims must be treated separately."). Here, only Deborah Turner was the victim of the Assault Second Degree charge. While she was also a victim of the Burglary First Degree charge, Matthew and Joshua were not the victim of the Assault Second

Degree charge. These crimes are therefore not the “same criminal conduct.”

Looking at the language of the statute, it is further clear that when crimes have multiple victims, they cannot be treated as “same criminal conduct. The “same criminal conduct” analysis requires that the two crimes involve the same victim (singular) not the same victims (plural). See RCW 9.94A.589(1)(a). Multiple victims, even if the victims are all identical between counts, should further preclude a finding of “same criminal conduct.” *See also* State v. Johnson, 180 Wn. App. 92, 105 n.3, 320 P.3d 197, 204 (Div. I, 2014)(“*Two crimes cannot be the same criminal conduct if one crime involves only one victim and the other involves multiple victims.*”).

Even where the crime of burglary and the underlying crime share the same victim and otherwise meet the requirements of the “same criminal conduct” test, the sentencing court has discretion under the Anti-Merger statute (RCW 9A.52.050) to score each crime separately. *See* State v. Lessley, 118 Wn.2d at 781. The court properly counted each current offense separately.

With regard to the Defendant’s prior convictions for Theft in the Second Degree and two counts of Identity Theft in the Second Degree, the Defendant complains that, at least with regard to Theft

Second Degree and the first count¹⁰ of Identity Theft, the court should have treated these offenses as “same criminal conduct” at the time of the current sentencing. Again, the Defendant made no such request at the time of sentencing and the record herein lacks sufficient information upon which this Court can review the issue. The Judgement and Sentence in Asotin County Cause 15-1-00163-1 contains no information that those two offenses were committed at the same time or place, or whether they involved the same victim or intent. Exhibit (Ex.) 26. The only indication is that the two crimes occurred on the same day. However, it is also clear that the sentencing court therein scored each crime separately and made no finding that the two offenses constituted the “same criminal conduct.” Ex. 26, p. 2, ¶ 2.3. The Defendant instead argues that the “sentencing court did not explicitly find they were separate and distinct.” Brief of Appellant, p. 35. This mischaracterizes the law, the presumption of separate offenses, and the sentencing court’s obligations concerning inquiry. The sentencing court is not required to make any affirmative finding that each crime is “separate and distinct” as each conviction is presumed to be scored independently, and is only required to enter findings where the defendant has proven

¹⁰The Defendant appears to concede, since the second count of Identity Theft occurred on a different day, it is properly scored separately.

the sentencing court likely would have agreed with the Defendant's characterization on appeal. As noted above, other than the same date of offense, there is no showing that the two offenses involved the same time, place, victim, or intent, and as such, no showing that the Defendant likely would have prevailed.¹¹ As such, his argument on this point is meritless and should be rejected.

6. THE POSSIBILITY OF IMPOSITION OF APPELLATE COSTS SHOULD NOT BE PREEMPTORILY FORECLOSED.

Finally, the Defendant asks this Court to rule that, should the State prevail on appeal, he should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that the Defendant has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

¹¹ It should be noted that trial counsel in the current case was also counsel in the Theft Second Degree and Identity Theft case under Asotin County Cause 15-1-00163-1. Ex. 26. As such, counsel would have been aware that the Theft Second Degree involved the taking of a bank card and the Identity Theft charge involved his use of the card at a merchant's establishment (different times, places, and multiplicity of victims). It was, no doubt, this knowledge regarding the prior case that convinced counsel of the dubiousness of a "same criminal conduct" argument.

As in most cases, the Defendant's ability to pay was not fully litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains very little information about the Defendant's future financial status or employment prospects, and the State did not have the right to obtain information about his financial situation.

The Defendant obtained an ex parte Order Authorizing Appeal In Forma Pauperis after presenting a declaration regarding his current financial circumstances. CP 56-57. In fact, this order was not even presented to the State for the prosecutor to review and sign prior to entry. CP 57. No declaration of indigency was designated by the Defendant. Any declaration filed with the Court concerning the Defendant's employment history, potential for future employment, or likely future income, has not been provided to the State, sufficient for the State to properly and intelligently respond to any claims therein.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (*indigence is a constitutional bar to the collection of monetary assessments only if the*

defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

In State v. Sinclair, 192 Wn.App. 380, 393, 367 P.3d 612, review denied 185 Wn.2d 1034 (Div. I, 2016), the court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. The court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy." Sinclair, 192 Wn.App. at 391.

The record is devoid in this case of any information that would support a finding that there is "no realistic possibility" he will be able in the future to pay appellate costs. In such circumstances, appellate costs should be awarded. State v. Caver, 195 Wn.App. 774, 786-87, 381 P.3d 191 (Div. I, 2016). On the contrary, the record herein indicates that the Defendant will be employable upon release and had construction and carpentry skills. The Defendant is only 24 years old, and received a sixty month sentence. CP 48. He thus has the majority of his working years ahead of him. Because the record in

this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

V. CONCLUSION

The Defendant's claims herein were not properly preserved and are otherwise without merit. The State did not improperly comment on his post-arrest silence, and any such indirect comment was harmless beyond a reasonable doubt. The Defendant was not deprived of an opportunity to present his defense, and was properly required to follow the Rules of Evidence. The court was not required to give a Petrich instruction where the assaults were part on an continuing course of conduct. Further and in light of evidence, the nature of his defense, and the jury's verdict on the charge of Assault Second Degree, any such error was clearly harmless beyond a reasonable doubt. The court properly gave a "First Aggressor" instruction where the Defendant was not lawfully upon the premises. The instruction did not preclude the Defendant from arguing his claim of self defense. The court properly calculated the Defendant's offender score where he failed to prove "same criminal conduct" and

failed to request inquiry into the facts of the current offense or of his prior convictions. The Defendant has failed to carry his burden to show that counsel was ineffective in arguing his offender score. The Defendant received a fair trial as required and was sentenced in accordance with applicable law. Finally, in the event that the State prevails, the State should not be preemptively precluded from recovering appellant costs. The State respectfully requests this Court deny the Defendant's appeal and affirm the conviction and sentence imposed herein.

Dated this 20th day of April, 2017.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID A. MASON-DALEY,

Appellant.

Court of Appeals No: 34352-9-III

DECLARATION OF SERVICE

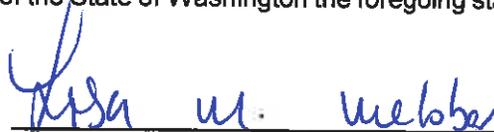
DECLARATION

On April 20, 2017 I electronically mailed, with prior approval from Ms. Backlund, a copy of the BRIEF OF RESPONDENT in this matter to:

JODI R. BACKLUND
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 20, 2017.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTORS OFFICE CRIMINAL
April 20, 2017 - 2:32 PM
Transmittal Letter

Document Uploaded: 343529-Daley Brief.pdf

Case Name: David A. Mason-Daley

Court of Appeals Case Number: 34352-9

Party Represented: State

Is This a Personal Restraint Petition? Yes No

Trial Court County: Asotin - Superior Court #: 16-1-00007-1

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
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- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
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- Personal Restraint Petition (PRP)
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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to backlundmistry@gmail.com.

Sender Name: Lisa M Webber - Email: lwebber@co.asotin.wa.us