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NO. 34943-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

DEACON WALLETTE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Deacon Walette asserted he acted in lawful self-defense when his friend, Mike Cowan, attacked him with a knife after inviting Walette into his home. The trial court unfairly tipped the scales by commenting on the evidence so as to favor the prosecution and incorrectly limiting defense counsel's favorable cross-examination of Walette's friend and witness, Chris Curran. The deck was further stacked against Walette by the trial court's provision of a first aggressor instruction, which negated Walette's self-defense claim, and the court's denial of Walette's request to instruct the jury that he had the right to stand his ground and act in lawful self-defense. These errors, and the failure to provide an inferior degree instruction supported by the evidence, require reversal and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. In violation of article IV, section 16, the trial court twice commented on the evidence.
2. The trial court erroneously restricted cross-examination and Walette's constitutional right to present a defense. Const. art. I, § 22; U.S. Const. amend. VI.
3. The trial court erred in providing a first aggressor instruction requested by the prosecution.

4. The trial court erred in denying the defense-requested instruction regarding the lack of duty to retreat.

5. The trial court erred in denying the defense-requested instruction for the inferior degree offense of assault in the fourth degree.

6. The trial court abused its discretion when it found the burglary, assault, and harassment convictions did not constitute the same criminal conduct for purposes of calculating Walette's offender score, even though the offenses were committed against the same victim, at the same time, with the same intent, and in furtherance of each other.

7. The sentencing court erred by sentencing Walette to twice the standard term for a deadly weapon enhancement where he had not previously been convicted of a firearm or deadly weapon enhancement under the same statutory provision.

8. The sentencing court erred by imposing consecutive sentences under RCW 9.94A.533 without recognizing its discretion to consider concurrent sentences under RCW 9.94A.535.

9. The sentencing court abused its discretion in failing to actually consider Walette's request for an exceptional sentence based on a failed defense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court unconstitutionally comments on the evidence if a reasonable juror would see the court's statement as creating an inference of the court's evaluation of a disputed issue or as conveying the court's opinion on a witness's credibility. A critical issue in the case was whether Walette reasonably believed the other party to be armed. Did the court unconstitutionally comment on the evidence and restrict Walette's right to present a defense by twice incorrectly stating that a witness did not testify he believed Mike Cowan was armed when the witness testified he believed Mike Cowan was armed?

2. Did the trial court err in providing a first aggressor instruction where the only aggressive acts Walette was alleged to have perpetrated was the assault itself?

3. Did the trial court err in denying the defense-requested no duty to retreat instruction where the court provided an instruction regarding Walette's right to act in self-defense and the jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense?

4. Did the trial court err in denying the defense-requested inferior degree instruction for fourth degree assault where there was affirmative evidence showing Walette lacked the specific intent to inflict great bodily

harm and some witnesses' testimony indicated that only a simple assault occurred?

5. Where multiple crimes arise from the "same criminal conduct," they count as a single offense for purposes of calculating the individual's offender score. Offenses constitute the same criminal conduct at sentencing if the crimes were committed at the same time and place, involved the same victim, and involved the same criminal intent. Where the assault and harassment furthered the burglary and all three offenses were committed at the same time and place, against a single victim, and with the same intent, did the trial court abuse its discretion in finding the offenses did not constitute the same criminal conduct?

6. The sentencing statutes authorize imposition of a deadly weapon enhancement for twice the standard time if the defendant has been previously convicted of a firearm or deadly weapon enhancement under the same section. The section was newly-enacted in 2002. Where Walette sentenced for a firearm enhancement under a different statute in 1996, did the sentencing court err in imposing a doubled enhancement under the 2002 statute?

7. While RCW 9.94A.533 indicates that multiple deadly weapon enhancements "shall" run consecutively, such language has been read to be subject to the exceptional sentencing statute at RCW 9.94A.535, which

provides a sentencing court discretion to impose concurrent sentences. If the sentencing court indicates it possibly would consider a concurrent sentence but believes it is required to impose consecutive sentences, the appellate court should remand for resentencing at which time the sentencing court can consider a mitigated sentence. Should Walette's sentence be remanded for resentencing where the sentencing court indicated it wished it had discretion to impose a concurrent sentence but believed it was required to impose the enhancements consecutively for a total of an additional 108 months of confinement?

8. A sentencing court abuses its discretion if it fails to consider a defendant's request for an exceptional sentence that is grounded in law. Did the sentencing court abuse its discretion by failing to actually consider Walette's request for an exceptional sentence below the standard range based on his failed defense, requiring remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

Deacon Walette and his friend Chris Curran went to their friend Mike Cowan's home after Curran told Walette that Cowan was planning

to kill Walette with a hotshot. RP 242-43; *see* RP 145-46.¹ A hotshot is a lethal dose of drugs. RP 161.

Walette and Curran knocked and were invited into Cowan's house. RP 230-31.² Once inside, Walette asked Cowan about his plan to kill Walette with a hotshot. Cowan's hand was in his pocket while Walette is talking. Walette explained what Curran told him. Cowan removed a steak knife from his pocket. Walette, believing Cowan was about to stab him with the knife, reached for a metal bar that was on the table and hit Cowan in the face with it. They danced around the kitchen and each other with their weapons, during which time Cowan stabbed himself with the knife, apparently accidentally, and Walette hit Cowan again with the bar and Cowan fell to the ground. Exhibit 5 (file 1).

Cowan recounted the story differently. He admitted he might have joked with someone about giving Walette a hotshot, but claims he did not formulate such a plan. RP 161-62, 165-66. Cowan asserted he went inside his house, which he acknowledged was a "trap house" or "drug house,"

¹ Appellant refers to the three consecutively paginated volumes of the verbatim report from the trial, labeled Volumes 1, 2, and 3, as "RP." The other transcripts prepared for this appeal are not cited.

² In addition to the citations interlineated in this paragraph, these facts are taken from the police interview at Exhibit 5, file 1. The exhibit was played for the jury during trial. RP 261-62.

when he saw Walette approaching. He thought Walette was mad at him because he did not drive Walette home from the hospital one night. RP 151, 163-64; *see* RP 146-48. As Cowan was walking to the bathroom, out of the corner of his eye, he saw Walette walking behind him and “flip out a wand.” RP 152. Cowan recalls being hit in the back of the head and “That’s about all . . . until I woke up with the machete and then [Walette] took the machete to my leg and stuck it in my leg.” RP 152-54. Cowan was not sure whether Walette or Curran had the machete initially. RP 154-55. According to Cowan, Walette and Curran went into the other room and Walette told Cowan that “if he said anything [to anyone] he would kill him.” RP 155, 158. Cowan was not scared but believed Walette would actually carry out the threat. RP 158. Cowan also claimed Walette asked Cowan for 40 dollars and took Cowan’s wallet when Cowan took it out of his pocket. CP 156-57.

When the police arrived, Cowan had a large cut over his left eye and a large cut on his right hand, which was also swollen. RP 139.

Based on Cowan’s account, the State charged Walette with assault, burglary and robbery, all in the first degree. CP 7-8, 20-21. The State also charged a count of felony harassment. *Id.* For all four counts,

the State also charged enhancements for being armed with a deadly weapon, namely a metal bar or machete. *Id.*³

At trial, Cowan testified his memory is really bad and he has nerve damage in his hand. RP 159. He says he still experiences pain and has trouble working his hand well. *Id.* He also has a lot of nightmares. RP 160. A doctor who attended to Cowan in the emergency room testified Cowan had a superficial laceration to his left forehead with a surrounding swollen bruise. RP 180. The doctor “irrigated [the head wound], cleaned it up and bandaged it.” RP 181. The hand wound was also treated with a bandage. RP 182-84. A CT scan for the head and x-ray for the knee were performed. RP 184. The doctor did not remember any knee injuries and did not note any in his report, but a nurse noted Cowan expressed pain in the knee and it was tender. RP 184, 186.

The State presented postings from social media, which did not contradict Walette’s claim of self-defense and in which Walette discussed hurting Cowan after Cowan thought he “could kill” Walette. RP 219.

³ Walette was also charged with possession of a controlled substance, but Walette does not raise any claims as to these charges. *See* CP 7-8.

Curran testified at trial that he believed Cowan was armed that night, even though he did not see Cowan with a knife and had told the police he was sure Cowan was not armed. RP 231-32, 234. The court prevented defense counsel from following up on this point in cross-examination. RP 244. Curran testified he witnessed Walette hit Cowan with a baton, and that Curran left the house at that point. RP 232-34. He further testified that both Walette and Cowan had angry demeanors that night. RP 239.

The machete, which Cowan claimed Walette inserted into his knee, was tested by the crime laboratory for blood or DNA, but nothing related to Cowan was found on it. RP 255-57, 264.

Walette requested jury instructions on assault in the fourth degree as an inferior degree offense, on self-defense, and on his lack of obligation to retreat in the face of danger (a so-called “no duty to retreat” instruction). RP 280-81, 304.⁴ The court provided the self-defense

⁴ Walette proposed the following language from the pattern instruction,

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

Notwithstanding the requirement that lawful force be “not more than necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”

CP 38.

instruction, but denied the no duty to retreat and the inferior degree offense instructions. CP 68; RP 289-93, 295-96. Finally, Walette objected to the first aggressor instruction requested by the prosecution, but the court provided the instruction.⁵ RP 282-85, 294, 304; CP 43-47, 69.

The jury acquitted Walette of the robbery charge, but convicted on the remaining counts as well as the deadly weapon enhancements. CP 103-10.

Walette advocated for the offenses to be treated as the same criminal conduct and for an exceptional sentence below the standard range based on his failed claim of self-defense. CP 145-52; RP 420-21; RCW 9.94A.535(1).⁶ The court imposed the middle of the standard range for each of the offenses. CP 198-203; RP 436-37. However, the court never

⁵ The instruction stated,

No person may, by an intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 69.

⁶ On Walette's motion, the court appointed new counsel for sentencing. CP 153-59, 162, 169.

considered the exceptional sentence and believed the statutes required it to run the full terms of the deadly weapon enhancements consecutively. RP 435, 437-38. It sentenced Walette to 258 months' of confinement. CP 198-203, 220-21.

E. ARGUMENT

1. The court commented on the evidence when it twice stated its view of a key witness's testimony on the critical issue of whether Cowan was armed.

The trial court commented on the evidence when it ruled, in front of the jury, that it was a mischaracterization to say Curran believed Cowan was armed, when Curran had testified to precisely that fact. The trial court repeated the constitutional violation by later stating it was true that Curran indicated Cowan did not have a weapon, when Curran had actually said he believed Cowan did have a weapon. The court improperly limited Walette's cross-examination based on its incorrect view of the evidence. The error unconstitutionally restricted Walette's right to present a defense. The comments prejudiced Walette on key evidence pertaining to his self-defense claim and, therefore, require reversal.

a. Our constitution prohibits courts from commenting on the evidence by expressing its view of a disputed issue or the credibility of a witness.

Under our constitution, the jury alone judges the weight of testimony and the credibility of witnesses. *State v. Crofts*, 22 Wash. 245,

250-51, 60 P. 403 (1900). Article IV, section 16 does not allow judges to “charge juries with respect to matters of fact, nor comment thereon.” Const. art. IV, § 16. This provision prohibits a court from “conveying to the jury his or her personal attitudes toward the merits of the case” expressly or impliedly. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). It prevents the jury from being influenced by the trial judge’s opinion of the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

The provision requires the jury be uninfluenced by what it might view as the court’s personal opinion. “It is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.” *Crotts*, 22 Wash. at 250-51.

Remarks from the judge are generally imbued with authority and influence. Thus, its words are viewed critically. A court unconstitutionally comments on the evidence if a reasonable juror hearing the statement in the context of the case would interpret it as an inference of the court’s evaluation of a disputed issue. *State v. Lane*, 125 Wn.2d 825, 838, 889

P.2d 929 (1995); *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 670 (1986). A court's comments are also unconstitutional if they convey the court's opinion on the veracity of a witness. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Even if the comment is inadvertent, it is unconstitutional. *Id.*

This constitutional error may be raised and reviewed for the first time on appeal. *Lampshire*, 74 Wn.2d at 892-93; *Crotts*, 22 Wash. at 248-49.

- b. Before the jury, the court twice stated its erroneous view of a witness's testimony.

Curran testified on direct examination that he believed Mike Cowan had a weapon, even though he did not see Cowan with a weapon. RP 231, 234. He also testified he had told the police he was sure Cowan was not armed. RP 232. On cross-examination, defense counsel asked Cowan:

Q. Okay. And you said you believed that Mr. Cowan had a weapon?

RP 244.

Curran's direct testimony indicated the answer to this question was "yes," he believed Cowan had a weapon. RP 231. Yet, the prosecutor objected to defense counsel's as a mischaracterization. RP 244. The court

sustained the objection and explicitly stated the question mischaracterized the testimony on direct:

MR. CRUZ: Mischaracterization of his testimony.

THE COURT: It is. Sustained.

RP 244.

This was erroneous, yet it was repeated on defense counsel's next question, including the court's adoption of the State's incorrect assertion that Curran had not testified to believing Cowan had a weapon.

Q. (BY MR. JONES) Do you believe that Mr. Cowan had a weapon at that time?

A. I believe he did.

MR. CRUZ: Objection, your Honor. He indicated that Mr. Cowan did not have a weapon.

THE COURT: That's true. Sustained.

THE WITNESS: I believe he did.

MR. CRUZ: Objection. There is no question posed to this witness.

THE COURT: Next question, Counsel. Let's move on.

RP 244.

- c. The court commented on the evidence by telling the jury it is a mischaracterization that Curran testified he believed Cowan was armed and it is true Curran indicated Cowan did not have a weapon, which statements were directly contrary to Curran's testimony that he believed Cowan had a weapon.

The court's ruling and, even more clearly, its statements explicitly averring its view of Curran's testimony on direct, expressed to the jury the court's opinion on Curran's testimony. The jury heard Curran's testimony that he believed Cowan was armed, but the jury then heard the court's comments that "it is" a mischaracterization to say Curran believed Cowan was armed and it is "true" Curran "indicated that Mr. Cowan did not have a weapon." *Compare* RP 231 *with* RP 244.

The court's comments and rulings, furthermore, limited Walette's defense in violation of article I, § 22 and the Sixth Amendment. The Sixth Amendment and article I, section 22 guarantee "a meaningful opportunity to present a complete defense." U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)); *accord Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The constitutional right to present a complete defense limits the authority to exclude evidence relevant to the defense from criminal trials. *Holmes*, 547 U.S. at 324. "[A]t a minimum . . . criminal defendants have . . . the

right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

A court makes an unconstitutional comment on the evidence when its evaluation of a disputed issue is inferable from the statement. *Lane*, 125 Wn.2d at 838. Here, it was disputed whether Cowan was armed and whether Walette acted in lawful self-defense in response to Cowan. The judge’s evaluation of at least the first question, whether Cowan was armed, was plainly stated in the court’s two comments. Moreover, the witness’s testimony he believed Cowan was armed, at a minimum, was directly relevant to the second question, whether Walette acted in lawful self-defense. Accordingly, the court’s comments conveyed his evaluation of a disputed issue, in violation of article IV, section 16. *See Lane*, 125 Wn.2d at 838.

The court’s comments undoubtedly communicated to the jury “the feeling of the trial court as to the truth value of the testimony of a witness,” Curran. *Lane*, 125 Wn.2d at 838. This was constitutional error. *See id.* (touchstone of comment on evidence is whether court’s feeling as to truth value of witness’s testimony is communicated to the jury).

The court’s statements were not merely a proper explanation of its rulings. *See State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005);

State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (1975) (not a comment where it was “clear” court was ruling on a legal matter and provided “remarks in legal terms”). The court’s statements were flatly incorrect. Indeed, Curran testified he believed Cowan was armed. RP 231-32, 234. Yet, the court agreed with the prosecutor “it is” a mischaracterization to say Curran believed Cowan was armed and it is “true” Curran “indicated that Mr. Cowan did not have a weapon.” RP 244. These statements were direct comments on the evidence. Even if in the eyes of the appellate court they could be viewed as statements buttressing a legal ruling, they were not “remarks in legal terms.” *Knapp*, 14 Wn. App. at 113. Thus, in the eyes of the jury they were a clear expression that the court did not believe Curran’s efforts to disavow what he told the police.

d. The comments are presumed prejudicial and require reversal and remand for a new trial.

The State bears a high burden to demonstrate the comments did not prejudice the case. “Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced,

unless the record affirmatively shows that no prejudice could have resulted.” *Levy*, 156 Wn.2d at 723.

The error was prejudicial because it undermined Curran’s credibility and removed from the jury his testimony that he believed Cowan was armed. *See Lampshire*, 74 Wn.2d at 892 (“the record affirmatively shows that the court’s comment was prejudicial, since it undermined the credibility of the defendant’s testimony, and there is an absence of any showing to the contrary”). Any generic instruction to the jury that the court is not allowed to comment on the evidence does not cure such an error. *Id.*

The State relied on the court’s erroneous ruling and reinforced the unconstitutional comment on the evidence four times. The prosecutor told the jury that Curran said “he was sure” Cowan did not have a weapon. RP 339-40. This was contrary to Curran’s direct testimony, where he stated he believed Cowan was armed. RP 231, 234. Yet, in light of the court’s comments, the prosecution seized on the opportunity to alter the record. The prosecutor repeated the court’s interpretation of the evidence three more times in his argument to the jury. RP 360-61 (arguing Curran indicated Cowan did not have a weapon; thus, Walette was the only one armed); RP 346 (arguing Curran “testified to that same fact” that Cowan did not have a weapon); RP 359 (arguing Walette is the only witness who

testifies Cowan had in knife; when, in fact, Curran testified he also believed Cowan was armed).

The comment was also prejudicial because Walette's defense was self-defense. The jury was incorrectly told—twice by the court and four additional times by the prosecutor—the only other witness to the fight did not believe Cowan was armed. When, in fact, that witness did believe Cowan was armed.

The State cannot show the trial court's comments were harmless beyond a reasonable doubt. The matter should be reversed and remanded for a new trial.

2. The trial court erred in providing a first aggressor instruction requested by the State.

Walette requested and received instructions on his theory of self-defense (with the exclusion of the no duty to retreat instruction discussed in section 3). However, the court also granted the State's request for a first aggressor instruction. Walette objected. RP 282-85, 294, 304; CP 43-47, 69.

a. First aggressor instructions are disfavored.

Aggressor instructions negate a defendant's self-defense claim, "effectively and improperly removing it from the jury's consideration." *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). That

increased burden runs counter to the constitutional requirement that the State bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Thus, first aggressor instructions are disfavored. *E.g., id.*; *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), *overruled on other grounds as recognized by State v. Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007).

Moreover, “[f]irst aggressor instructions should be used sparingly because the other self-defense instructions will generally be sufficient to allow the theory of the case be argued.” WPIC 16.04 comment. In fact, “[f]ew situations come to mind where the necessity for an aggressor instruction is warranted.” *State v. Wasson*, 54 Wn. App. 156, 161, 772 P.2d 1039, *rev. denied*, 113 Wn.2d 1014 (1989).

This Court reviews de novo the legal question whether the State produced sufficient evidence to justify an aggressor instruction. *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016). The State must produce some evidence showing Walette was the first aggressor to meet its burden of production. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010) (citing *Riley*, 137 Wn.2d at 909-10).

An aggressor instruction is appropriate only “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need [for the alleged victim] to act in self-

defense.” *Riley*, 137 Wn.2d at 909-10. For example, the evidence supports providing a first aggressor instruction if there is credible evidence the defendant initiated hostility by drawing a weapon. *Id.* at 910. The provoking act must be intentional, but it cannot be the actual assault. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948, *rev. denied*, 173 Wn.2d 1003, 271 P.3d 248 (2011); *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847, *rev. denied*, 115 Wn.2d 1010, 797 P.2d 511 (1990).

- b. The charged assault was the only alleged aggressive act; there was no preceding act of aggressiveness.

To constitute a first aggressor, the provoking act must be an intentional act reasonably likely to provoke a belligerent response from the victim. *Birnel*, 89 Wn. App. at 473; *Wasson*, 54 Wn. App. at 159.

In *Wasson*, this Court found insufficient evidence the defendant acted as a first aggressor. The defendant and his cousin were in a fight, and the alleged victim came outside after hearing the commotion, told the two to quiet down, and eventually fought with the defendant’s cousin, knocking him to the ground. *Wasson*, 54 Wn. App. at 157. When the victim then “took several rapid steps” towards the defendant, the defendant shot him in the chest. *Id.* at 157-58. Because the defendant did not initiate any belligerent act towards the victim until the final assault, there was no evidence he acted in order to provoke an assault. *Id.* at 159-

60 (“Perhaps there is evidence here of an unlawful act by Mr. Wasson, a breach of peace. However, there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed.”). The jury could be instructed that the defendant acted in self-defense, but not that he was the first aggressor. *Id.* at 158, 160-61. Accordingly, the Court remanded for a new trial. *Id.*

In *Birnel*, the defendant had moved out of the family home, but slept at his wife’s house one night because of a child’s birthday and awoke to noises that caused him to suspect his wife was taking methamphetamine. *Birnel*, 89 Wn. App. at 462-63. The defendant went through his wife’s purse, found drugs, and decided to confront her, waiting for her at the top of the stairs. *Id.* at 463. The two argued about her drug use and ability to pay the bills, as well as his search of her purse. *Id.* The wife then ran to the kitchen and returned with a large knife. *Id.* The defendant claimed he fell over his wife as he arose from the floor where he was sitting, she attacked him, and a fight over the knife ensued, during which the wife was fatally stabbed in the back. *Id.* at 463-64.

The defendant argued he acted in self-defense, whereas the State claimed he acted out of rage and should have known how his wife would react when he searched her purse without permission. *Birnel*, 89 Wn. App. at 466, 473. This Court found the trial court erred by giving an aggressor

instruction, as the defendant did nothing but wait for his wife at the top of the stairs and it was not reasonable to assume searching his wife's purse would provoke a the attack. *Id.* at 473. "Even if he knew that his wife did not like him to search her purse, a juror could not reasonably assume this act and these questions would provoke even a methamphetamine abuser to attack with a knife." *Id.* The Court also remanded for a new trial. *Id.*

There was simply a single fight here. Walette did not precipitate the fight with a separate aggressive act. If Cowan was attacked from behind and hit on the head with a metal bar or baton with essentially no idea why, the jury could find that act constituted an assault by Walette. RP 294 (court's explanation of decision to provide first aggressor instruction); *see* RP 153, 168 (Cowan's testimony he was hit from behind). But, it was not an act preceding the assault that warranted the first aggressor instruction. Rather, it was the assault itself. *See* RP 338-39 (prosecutor argues in closing that Walette struck Cowan in the head with metal bar).

On the other hand, Walette's self-defense claim was that Cowan removed his weapon, a knife, first. Exhibit 5 (file 1) at 14:16, 14:55-15:05.

Either Walette committed assault by hitting Cowan from behind with the metal bar—and Cowan did not even see it coming, so it was not a precipitating act, such as merely drawing a weapon—or Cowan first drew

his knife such that Walette's actions were lawful self-defense in response to Cowan drawing a weapon. The first aggressor instruction was not supported by any additional precipitating act. *See Riley*, 137 Wn.2d at 910 ("An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." (emphasis added)). There was no evidence of a precipitating act of aggression. *Riley*, 137 Wn.2d at 910-11 (words alone do not constitute sufficient provocation). The erroneous first aggressor instruction put a weight on the scale in favor of the State's case.

- c. The State cannot prove the erroneously provided instruction was harmless beyond a reasonable doubt.

When the court provides an unwarranted first aggressor instruction, the error is constitutional. *Stark*, 158 Wn. App. at 961; *Birnel*, 89 Wn. App. at 473. It requires reversal and remand for a new trial unless the State proves the error harmless beyond a reasonable doubt. *Stark*, 158 Wn. App. at 961; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot show the erroneous first aggressor was harmless. Walette's case hung on whether the jury believed he acted in lawful self-defense. The court diluted this claim by inserting an unsupported first

aggressor instruction. The State cannot show the error was harmless; the matter should be reversed and remanded for a new trial.

3. The trial court erred in denying the defense-requested no duty to retreat instruction.

While the court provided the prosecution's-requested first aggressor instruction, the court denied Walette an instruction informing the jury he had no duty to retreat. An individual has no duty to flee a place they have the right to be, however reasonable an alternative flight may be. *State v. Williams*, 81 Wn. App. 738, 743-44, 916 P.2d 445 (1996).

Washington state adheres to this long-standing rule to reflect the notion that one lawfully where they are entitled to be should not be made to yield and flee by a show of unlawful force against them. *Id.* at 744.

[W]hen one is feloniously assaulted in a place where he has the right to be and is placed in danger, either real or apparent, of losing his life or of suffering great bodily harm at the hands of his assailant, he is not required to retreat or to endeavor to escape, but may stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm.

State v. Meyer, 96 Wash. 257, 164 P. 926 (1917).

The jury should be instructed that the defendant lacks a duty to retreat if the evidence shows he was assaulted in a place he had the right to be. *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984). “[W]here a jury

may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.” *Williams*, 81 Wn. App. 738. If it is possible for the jury to speculate about the defendant’s chances for a successful retreat, the court should provide a no duty to retreat instruction. *State v. Redmond*, 150 Wn.2d 489, 494-95, 78 P.3d 1001 (2003) (reversing and remanding for a new trial because trial court did not instruct jury that persons acting in self-defense had no duty to retreat when assaulted in a place they have a right to be; and error was prejudicial).

Evidence supported that Walette was invited into Cowan’s home. RP 231 (Curran testifies Cowan let them into the house after Walette knocked on front door). There was no evidence Cowan explicitly revoked Walette’s right to be in the home. Thus, the duty to retreat would depend upon an implied revocation of Walette’s right to be in the home. *See State v. Collins*, 110 Wn.2d 253, 259, 751 P.2d 837 (1988) (in context of burglary charge, where evidence shows no express limitations on license, question becomes whether there was any implied limitation on invitation or license).

The court denied the instruction because it incorrectly believed Walette’s right to be in the home “would have been revoked the minute you . . . end up in an altercation” with the homeowner “with violent

force.” RP 295. “[I]n some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case.” *Collins*, 110 Wn.2d at 261. Thus, whether a defendant’s presence becomes unlawful because of an implied limitation on, or revocation of, his privilege to be on the premises is decided on a case-by-case basis. *Id.* at 261-62; *State v. Lambert*, 199 Wn. App. 51, 73, 395 P.3d 1080 (2017) (discussing license revocation in context of felony murder predicated on burglary without self-defense claim).

Arguably, if Walette initiated the altercation, his license from Cowan to be in Cowan’s home might have been impliedly revoked. However, Walette contended Cowan initiated the altercation—the need for Walette to act in self-defense—by drawing his weapon. In those circumstances, Walette had no duty to retreat. *See* RP 354 (in closing, defense counsel argues “when someone pulls a steak knife out on you, has already threatened to kill you with a hot shot, is that a person you want to turn your back on?”). A homeowner cannot remove an individual’s right to act in self-defense, and to stand their ground while doing so, by inviting the individual into their home and provoking a fight (in other words, a need to act in self-defense). Walette was not a stranger to Cowan; even Cowan testified that they were friends with no history of violence between

them. RP 145-46, 167-68. Under Walette's theory, Cowan invited him into Cowan's home as a friend. *See id.*; RP 231.

In denying a no duty to retreat instruction, the trial court presumed Walette was not acting in self-defense. But, having determined there was some evidence to support a self-defense instruction, the court could not so presume.

The failure to provide a no duty to retreat instruction to the jury is reversible error. *Redmond*, 150 Wn.2d at 495. Even where the trial court believes the self-defense evidence is weak, "the no duty to retreat instruction is required where, as in this case, a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense. *Id.*; *see* RP 354 (counsel argued in closing that the State suggested Walette had to leave once the fight started, but it would not have been wise for Walette to turn his back on Cowan, who had a knife and had previously threatened to kill Walette with a hot shot). The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case. *Redmond*, 150 Wn.2d at 495.

Failure to provide the no duty to retreat instruction, particularly where the court provided self-defense and first aggressor instructions, constitutes prejudicial error. *Redmond*, 150 Wn.2d at 495. Accordingly,

this Court should reverse and remand for a new trial. *See id.* (reversing and remanding for a new trial where court denied defense a no duty to retreat instruction).

4. The trial court erred in failing to provide the requested instruction on fourth degree assault where the jury could have found only the inferior degree assault occurred.

Walette also requested a lesser included jury instruction on assault in the fourth degree. CP 34-42. The trial court denied the request, and Wallette objected. RP 296, 304. The court found the testimony “absolutely did not support” the lesser because Wallette was clearly armed and Cowan was seriously injured. RP 296.

In addition to the offense charged in the information, the accused may be convicted of any offenses which are either lesser included offenses or inferior degrees of the charged offense. U.S. Const. amend. VI; Const. art. I, § 22; *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989); *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998) (citing *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1998); RCW 10.61.003). Furthermore, the accused is “entitled to have the jury fully instructed on the defense theory of the case.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) (quoting

State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)); *see also, e.g.*, U.S. Const. amend. VI.

Where the defendant requests an inferior degree instruction, the instruction is legally proper if the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense.”

Fernandez-Medina, 141 Wn.2d at 461-62. The statutes criminalizing assault are divided into degrees that charge the single crime of assault.⁷

State v. Peterson, 133 Wn.2d 885, 890-91, 948 P.2d 381 (1997); *State v. Foster*, 91 Wn.2d 466, 471-72, 589 P.2d 789 (1979). Thus, assault in the fourth degree is an inferior degree offense of first degree assault.

Before either an inferior degree offense instruction can be provided, the court must also determine that affirmative evidence leads to a reasonable inference that only the inferior crime occurred. *Fernandez-Medina*, 141 Wn.2d at 454-55. The evidence is viewed in the light most favorably to the requesting party. *Id.* at 455-56. Here, that is Walette.

Assault in the fourth degree is simple assault. RCW 9A.36.041. On the contrary, to prove first degree assault, the State was required to show

⁷ The inquiry is distinct from that which is required on a lesser included offense. *Id.* There, the court must evaluate whether each element of the lesser offense must necessarily be proved to establish the greater offense as charged. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Walette had the specific intent to inflict great bodily harm and assaulted Cowan with a deadly weapon. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439, 442 (2009); RCW 9A.36.011; CP 60, 67 (jury instructions). Great bodily harm is a high threshold. It is harm that “creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

Specific intent cannot be presumed. *State v. Louthier*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945). It must be demonstrated by the evidence. *Id.* Evidence of intent can be gathered from the manner and act of inflicting the wound, the nature of the prior relationship between the parties, or other circumstances. *State v. Ferreira*, 69 Wn. App. 465, 468-70, 850 P.2d 541, 543 (1993).

For example, a prior altercation between the parties preceding the alleged assault could indicate a defendant’s intent to continue or conclude the fight by amassing great bodily injury. *Ferreira*, 69 Wn. App. at 469. In *State v. Pedro*, for example, the evidence included extensive testimony about prior altercations between the defendant and the victim. 148 Wn. App. 932, 951-52, 201 P.3d 398 (2009). On the other hand, in *Ferreira*, the evidence was insufficient to show specific intent to inflict great bodily harm. 69 Wn. App. at 469. One relevant circumstance was that the

defendant had no prior contact with the victims. *Id.* at 467, 469. Likewise, here, there was no prior history of fighting between Walette and Cowan to support a heightened intent. RP 145-46, 167-68.

The lack of prior disagreements or violence between the parties and the testimony of the responding officer that Cowan suffered only a large cut over left eye and a large cut on his right hand, which was swollen could have been interpreted by the jury as insufficient evidence to support assault in the first degree and as affirmative evidence that only the lesser offense occurred. RP 139 (testimony of responding officer); *see* RP 182 (doctor testifies to small injury on finger and a head wound that required cleaning and bandaging); *Fernandez-Medina*, 141 Wn.2d at 454-55. The court should have granted the requested instruction on fourth degree assault. *Id.*

Because the instruction was erroneously denied, the Court should reverse and remand for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462 (reversing conviction where court failed to give inferior degree instruction of second degree assault).

5. If, despite these errors, the Court does not reverse and remand for a new trial, the sentence should be stricken and remanded for resentencing.

If the Court does not remand for a new trial, the Court should strike the sentence and remand for a new sentencing hearing because (a)

the burglary, assault, and harassment constitute the same criminal conduct, (b) the deadly weapon enhancement could not be doubled under the plain language of the statute, (c) the court erred in believing it lacked discretion to run the deadly weapon enhancements concurrently, and (d) the court failed to actually consider Walette's request for an exceptional sentence below the standard range.

- a. The matter should be remanded for resentencing because the burglary, assault, and harassment constituted the same criminal conduct that should have been sentenced as a single offense.

A person's offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. 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." *Id.* Thus, when determining same criminal conduct for purposes of calculating an offender score, courts look for the concurrence of intent, time and place, and victim.

The trial court's determination that multiple offenses do not constitute the same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 533, 535-37, 295 P.3d 219 (2013).

- i. *The intent coincided because the burglary was predicated on the assault and the harassment further the burglary.*

In determining whether the criminal intent element of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). To constitute separate conduct, there must be a substantial change in the nature of the criminal objective. *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

Intent does not focus on the "particular *mens rea* element of the particular crime, but rather" regards "the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Each crime is not viewed solely on the basis of the statute but in the objective context of the facts of the case. The proper examination focuses on to "what extent did the criminal intent, when viewed objectively, change from one crime to the next." *Tili*, 139 Wn.2d at 123. For example, "the unlawful possession of property taken in a theft is a mere continuation of the thief's act of depriving the true owner of his

or her right to possess their property.” *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000).

Objective intent also may be found when one crime furthered the other or if both crimes were part of a recognizable scheme or plan. *Graciano*, 176 Wn.2d at 540 (citing *Dunaway*, 109 Wn.2d at 215); *State v. Israel*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). One crime furthers another where the first crime facilitates commission of the other crime. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004); *Collins*, 110 Wn.2d at 263.

The harassment furthered the burglary under the State’s theory because Walette allegedly threatened Cowan if he told anyone about what happened. RP 158. Thus, the harassment was an attempt to cover up the other crimes. Moreover, the burglary was ongoing—again, under the State’s theory—while the assault and harassment occurred. *See Tili*, 139 Wn.2d at 124-25 (extremely short timeframe and unchanging conduct pattern between three rapes indicates continuity of intent). Therefore, Walette did not objectively begin a new crime when he assaulted or harassed Cowan under the State’s argument. *See State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997) (different intent for same criminal conduct analysis where first criminal episode ended with time and opportunity for defendant to pause, reflect, and cease or recommit a

criminal act when second episode was undertaken; “crimes were sequential, not simultaneous or continuous”).

State v. Davis is on point. *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998). There the trial court held the burglary and an assault committed to cover up the burglary constituted the same criminal conduct and the Court of Appeals affirmed. “Davis pointed the gun at [the victim] when she threatened to call the police to stop the burglary and assault on [a second victim].” *Id.* at 782. “On these facts, the trial court could reasonably conclude that the assault furthered the burglary and, therefore, Davis had the same criminal intent in each.” *Id.* The same analysis applies to the burglary and harassment offenses here.

In short, the objective intent for the three crimes was the same.

- ii. *Cowan was the only victim and the time and place coincided as well.*

The remaining two factors should be undisputed. *See* CP 120 (prosecution does not argue crimes had different victims, times or places). Cowan was the single victim of the burglary, assault and harassment. CP 20-21 (amended information alleges Cowan as the single victim of all three counts). As stated, the assault and harassment occurred while the burglary was ongoing. And harassment immediately followed the assault. RP 158. All three offenses occurred in Cowan’s home. *E.g., id.*

Because all the components coincide—intent, victim, time and place—the trial court abused its discretion in failing to find they constituted the same criminal conduct.

- iii. *Even under the burglary anti-merger statute, the court retains authority to sentence Walette for a single offense.*

The burglary anti-merger statute allows the court to sentence burglary and the predicated offense separately, but it does not require it. *Davis*, 90 Wn. App. at 783-84 (citing *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992)). Thus, the sentencing court retains discretion to sentence multiple offenses as a single offense if they constitute the same criminal conduct, even if one of those offenses is a burglary. *Id.*

- b. The matter should be remanded for resentencing because Walette did not have a prior deadly weapon finding ‘under this section’ of the statute such that the enhancement could be doubled here.

The court sentenced Walette to deadly weapon enhancements for twice the standard time based on a prior sentence for a firearm

enhancement under RCW 9.94A.533(4)(d). RP 437-38; CP 121, 203, 220-21. This was error.

The SRA provides for a doubled deadly weapon enhancement only if the individual has previously been sentenced for a firearm or deadly weapon enhancement under the same SRA provision.

If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) **of this section** [for a firearm], or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed

RCW 9.94A.533(4)(d) (emphasis added). Under the plain language of the statute, only prior deadly weapon and firearm enhancements imposed pursuant to RCW 9.94A.533(4)(d) or (3)(d) (“this subsection” or “this section”) count to double the weapon enhancement for the current offense. *E.g., State v. Delgado*, 148 Wn.2d 723, 726-28, 63 P.3d 792 (2003) (strictly construing statute that limits qualifying prior offenses to “an offense listed in (b)(i) of this subsection”); *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001) (“Courts should assume the Legislature means exactly what it says. Plain words do not require construction.” (footnote omitted)). The statute does not state it applies to prior enhancements under this section, prior versions of the law, or prior

comparable laws. Rather, the legislature specifically enacted the “this section” language.

Walette had one prior deadly weapon enhancement sentence from 1996. RP 417; CP 127. At that time, RCW 9.94A.533 did not exist. Rather, the provision was enacted in 2002. Laws of 2002, ch. 290 § 11. When the law was passed, it enacted an entirely new provision that was codified at RCW 9.94A.533. *Id.* The 2002 law did not amend or recodify a prior provision.

Because RCW 9.94A.533 did not exist in 1996, Walette could not have been sentenced to a deadly weapon enhancement under “this section” of the SRA. In fact, the 1996 judgment and sentence indicates Walette’s enhancement was authorized by RCW 9.94A.125 and RCW 9.94A.310.⁸ CP 127. Therefore, Walette could not be sentenced to twice the amount of time for the current deadly weapon enhancement.

The enhancements should be stricken, and the matter remanded for resentencing.

⁸ Neither of the provisions cited in the 1996 judgment and sentence is incorporated in RCW 9.94A.533. RCW 9.94A.125 (1996) has since been recodified as RCW 9.94A.825, the definition of a deadly weapon special verdict. Laws 2001, ch. 10, § 6; Laws 2009, ch. 28, § 41. RCW 9.94A.310 (1996) has since been recodified as RCW 9.94A.510, the sentencing grid. Laws of 2001, ch. 10, § 6.

- c. The matter should be remanded for resentencing because the court incorrectly believed it lacked discretion to run the sentences concurrently.

Because the court failed to recognize its discretion to impose a mitigated concurrent sentence under RCW 9.94A.535, the matter should be remanded for resentencing. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007); *State v. McFarland*, 189 Wn.2d 47, 51, 53-59, 399 P.3d 1106 (2017). This issue can be raised and addressed for the first time on appeal, as it was in *Mulholland*, 161 Wn.2d at 325-26, and *McFarland*, 189 Wn.2d at 49, 56-57.

In *Mulholland* and *McFarland*, our Supreme Court held that despite the “shall” run consecutively directive in provisions of the Sentencing Reform Act, such provisions are subject to the exceptional sentencing statute at RCW 9.94A.535. *Mulholland*, 161 Wn.2d at 327-28; *McFarland*, 189 Wn.2d at 47. This latter provision provides a sentencing court discretion to impose an exceptional sentence whereby the serious violent offenses or sentencing enhancements run concurrently instead of consecutively. *Mulholland*, 161 Wn.2d at 327-28; *McFarland*, 189 Wn.2d at 53-55; see *State v. Houston-Sconiers*, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J. concurring in result only) (noting opinion shows infirmity of court’s prior decision, in *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), that deadly weapon enhancements must be run

consecutively). Where a sentencing court that imposes consecutive sentences under the mistaken belief that the provisions are mandatory indicates a “possibility” that it “would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option,” the matter should be remanded for resentencing. *Mulholland*, 161 Wn.2d at 334-35; *McFarland*, 189 Wn.2d at 55-59.

Like the individuals remanded for resentencing in *Mulholland* and *McFarland*, Walette’s sentence should be reversed and remanded for the court to consider mitigating evidence. The sentencing court here believed it was required to run the deadly weapon enhancements for each count consecutively. RP 435, 437-38. The State emphasized that the court’s duty was mandatory. CP 121; Supp. CP ____ (State’s memo to amend judgment and sentence, p.4). Therefore, under RCW 9.94A.533, the court ran three deadly weapon enhancements consecutively for a total of 108 months. This was error. As *Mulholland* and *McFarland* make plain, the court had discretion to impose an exceptional concurrent sentence. *Mulholland*, 161 Wn.2d at 327-28; *McFarland*, 189 Wn.2d at 53-55. While those cases considered the sentencing provisions at RCW 9.94A.589, the operative “shall” run consecutive language at issue there is identical to the language in RCW 9.94A.533 on which the trial court relied here. The same discretion to run an exceptional concurrent sentence should apply here.

Mulholland and *McFarland* also make plain that the proper remedy is to remand for resentencing if the sentencing court indicated any possibility it would consider a mitigated sentence if it believed it had the authority to do so. *Mulholland*, 161 Wn.2d at 334-35; *McFarland*, 189 Wn.2d at 55-59. The sentencing court here indicated it wished it had some discretion to consider a lesser sentence: “I do wish I had some discretion but I’m satisfied I’m absolutely satisfied that as the law stands today I do not.” RP 435. Thus, remand for resentencing is necessary.

Because the court misunderstood its discretionary authority to consider a mitigated concurrent sentence, the Court should remand for resentencing. *Mulholland*, 161 Wn.2d at 334-35; *McFarland*, 189 Wn.2d at 59.

- d. The matter should be remanded for resentencing because the court completely failed to consider Walette's request for an exceptional sentence below the standard range based on his failed defense.

Every defendant is entitled to have the sentencing court actually consider an exceptional sentence request. *McFarland*, 189 Wn.2d at 56. “When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law.” *McFarland*, 189 Wn.2d at 56 (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). “A trial court errs when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances’ or when it operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *Id.* (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *Mulholland*, 161 Wn.2d at 333).

Walette requested the court consider an exceptional sentence below the standard range based on the failed defense of self-defense. CP 148-51; RP 420-21; RCW 9.94A.535(1). The sentencing court mentioned the failed defense argument. RP 433. But the record shows no indication the court actually considered an exceptional sentence, except to the extent the court indicated its belief that it could not exercise discretion on the

deadly weapon enhancements. RP 433-38. The court's sentencing ruling does not explain its decision whether to enter an exceptional sentence below the standard range. *Id.* The court's failure to articulate any basis for denying the exceptional sentence coupled with its comments that it lacked discretion to impose anything other than the doubled deadly weapon enhancements show the court categorically refused to consider the statutorily authorized exceptional sentence. *See Grayson*, 154 Wn.2d at 342 (treating court's failure to articulate any lawful basis for denying an alternative sentence along with other comments to be a categorical refusal).

Because the trial court failed to give any meaningful consideration to Walette's request for an exceptional sentence based on his failed defense, this Court should remand for a new sentencing hearing. *See Grayson*, 154 Wn.2d at 336.

F. CONCLUSION

Because the trial court's comment on the evidence and erroneous instructional rulings deprived Walette of a fair trial and right to present his defense, the Court should reverse and remand for a new trial. In the

alternative, the Court should vacate the sentence and remand for resentencing.

DATED this 1st day of June, 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

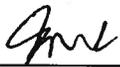
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34943-8-III
)	
DEACON WALLETTTE,)	
)	
APPELLANT.)	

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