

FILED  
Court of Appeals  
Division III  
State of Washington  
7/30/2018 1:26 PM  
34943-8-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, RESPONDENT

v.

DEACON WALLETTE, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**Consolidated with 34991-8-III**

IN RE PERSONAL RESTRAINT OF DEACON WALLETTE

---

**BRIEF OF RESPONDENT**

---

LAWRENCE H. HASKELL  
Prosecuting Attorney

Gretchen E. Verhoef  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

**I. ISSUES PRESENTED ..... 1**

**II. STATEMENT OF THE CASE ..... 3**

Victim Cowan’s testimony, medical testimony, and law enforcement testimony..... 3

Witness Curran’s testimony..... 7

Walette’s police interview. .... 8

Procedural history and sentencing. .... 10

**III. ARGUMENT – DIRECT APPEAL..... 14**

**A. THE TRIAL COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE, OR IMPROPERLY LIMIT THE DEFENDANT’S ABILITY TO DEFEND AGAINST THE CHARGES. .... 14**

1. The court did not comment on the evidence; it ruled on an objection..... 15

2. The trial court did not deprive the defendant of his ability to put forth a defense. .... 17

**B. THE EVIDENCE SUPPORTS THE TRIAL COURT’S DECISION TO GIVE THE FIRST AGGRESSOR INSTRUCTION..... 20**

1. Standard of review. .... 20

2. Discussion..... 21

**C. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE THE NO DUTY TO RETREAT INSTRUCTION..... 23**

**D. THE COURT’S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FOURTH-DEGREE ASSAULT WAS NOT ERROR. .... 26**

E.	ALLEGED SENTENCING ERRORS. ....	28
1.	Same course of conduct. ....	28
2.	Prior deadly weapon finding. ....	31
3.	Alleged failure to recognize and exercise discretion with regard to statutory, mandatory deadly weapon enhancements. ....	36
a.	Standard of review. ....	36
b.	The court has no discretion to reduce or run deadly weapon enhancements concurrently to each other or to the standard range sentences imposed. ....	37
c.	Assuming, arguendo, that the sentencing court had discretion with regard to the enhancements, the record reflects that the court would not have imposed a different sentence had it exercised that discretion. ....	40
4.	Alleged failure to consider request for an exceptional sentence downward based on failed defense. ....	44
<b>IV.</b>	<b>ARGUMENT – PERSONAL RESTRAINT PETITION.....</b>	<b>46</b>
A.	STANDARD OF REVIEW.....	46
B.	FAILURE TO HOLD AN OMNIBUS HEARING.....	48
C.	ALLEGATIONS OF PERJURY. ....	49
D.	CLAIM OF PROSECUTORIAL MISCONDUCT BY LEADING THE WITNESS.....	52
E.	CLAIM OF PROSECUTORIAL MISCONDUCT BY MALICIOUS PROSECUTION.....	54
F.	CLAIM THAT THE METAL ROD AND MACHETE WERE NOT PROVEN TO BE DEADLY WEAPONS.....	55
G.	DEFENDANT’S CLAIM THAT HIS PRIOR CRIMINAL HISTORY WASHED OUT.....	58

H.	CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.....	59
1.	Failure to request a lesser included instruction for second degree assault.....	60
2.	Failure to introduce testimony of an expert regarding the lack of the victim’s blood on the machete.....	62
V.	<b>CONCLUSION.....</b>	<b>63</b>

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>City of Sunnyside v. Lopez</i> , 50 Wn. App. 786, 751 P.2d 313, review denied, 110 Wn.2d 1034 (1988).....	26
<i>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	31
<i>Dep't of Ecology v. City of Spokane Valley</i> , 167 Wn. App. 952, 275 P.3d 367 (2012).....	31
<i>In re Pers. Restraint of Brockie</i> , 178 Wn.2d 532, 309 P.3d 498 (2013).....	46
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	46
<i>In re Pers. Restraint of Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	47, 48
<i>In re Pers. Restraint of Martinez</i> , 171 Wn.2d 354, 256 P.3d 277 (2011).....	56, 57
<i>In Re Pers. Restraint of Moncada</i> , 197 Wn. App. 601, 391 P.3d 493 (2017).....	48
<i>In re Pers. Restraint of Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007).....	40, 43
<i>In re Pers. Restraint of Music</i> , 104 Wn.2d 189, 704 P.2d 144 (1985).....	47
<i>In re Pers. Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	48
<i>In re Pers. Restraint of Sims</i> , 118 Wn. App. 471, 73 P.3d 398 (2003).....	47
<i>In re Pers. Restraint of Yates</i> , 180 Wn.2d 33, 321 P.3d 1195 (2014).....	48

<i>State v. Allery</i> , 101 Wn.2d 591, 682 P.2d 312 (1984) .....	23
<i>State v. Anderson</i> , 144 Wn. App. 85, 180 P.3d 885 (2008).....	20
<i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000).....	57
<i>State v. Brooks</i> , 45 Wn. App. 824, 727 P.2d 988 (1986).....	56
<i>State v. Brown</i> , 139 Wn.2d 20, 983 P.2d 608 (1999) .....	38, 39
<i>State v. Brune</i> , 45 Wn. App. 354, 725 P.2d 454 (1986) .....	47
<i>State v. Cerny</i> , 78 Wn.2d 845, 480 P.2d 199 (1971) .....	16
<i>State v. Chiariello</i> , 66 Wn. App. 241, 831 P.2d 1119 (1992).....	56
<i>State v. Collins</i> , 110 Wn.2d 253, 751 P.2d 837 (1988).....	24, 25
<i>State v. Conover</i> , 183 Wn.2d 706, 355 P.3d 1093 (2015) .....	39
<i>State v. Crotts</i> , 22 Wash. 245, 60 P. 403 (1900).....	16
<i>State v. Davis</i> , 174 Wn. App. 623, 300 P.3d 465, <i>review denied</i> , 178 Wn.2d 1012, 311 P.3d 26 (2013).....	29
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	56
<i>State v. DeSantiago</i> , 149 Wn.2d 402, 68 P.3d 1065 (2003) .....	37
<i>State v. Duarte Vela</i> , 200 Wn. App. 306, 402 P.3d 281 (2017).....	17
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010) .....	32
<i>State v. Fernandez–Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	27
<i>State v. Friederich-Tibbets</i> , 123 Wn.2d 250, 866 P.2d 1257 (1994).....	36
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997).....	37
<i>State v. Gotcher</i> , 52 Wn. App. 350, 759 P.2d 1216 (1988) .....	57

<i>State v. Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013).....	29, 30
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	55
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	18
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	59, 60
<i>State v. Hassan</i> , 151 Wn. App. 209, 211 P.3d 441 (2009) .....	60
<i>State v. Hiatt</i> , 187 Wash. 226, 60 P.2d 71 (1936).....	24
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014) .....	55
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	38
<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	44
<i>State v. Kelley</i> , 168 Wn.2d 72, 226 P.3d 773 (2010).....	40
<i>State v. Kidd</i> , 57 Wn. App. 95, 786 P.2d 847 (1990) .....	21
<i>State v. Krup</i> , 36 Wn. App. 454, 676 P.2d 507 (1984).....	27
<i>State v. Kutch</i> , 90 Wn. App. 244, 951 P.2d 1139 (1998).....	24
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	16
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992) .....	30
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	15, 16
<i>State v. Lewis</i> , 6 Wn. App. 38, 491 P.2d 1062 (1971).....	24
<i>State v. Mandanas</i> , 168 Wn.2d 84, 228 P.3d 13 (2010) .....	39
<i>State v. McDaniels</i> , 39 Wn. App. 236, 692 P.2d 894 (1984).....	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	59
<i>State v. McFarland</i> , 189 Wn.2d 47, 399 P.3d 1106 (2017).....	40, 43
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	36, 37

<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	18, 19
<i>State v. Nguyen</i> , 134 Wn. App. 863, 142 P.3d 1117 (2006).....	40
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	30
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	23, 24
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	20, 21
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005) .....	35
<i>State v. Schilling</i> , 77 Wn. App. 166, 889 P.2d 948, <i>review denied</i> 127 Wn.2d 1006 (1995).....	57
<i>State v. Sharkey</i> , 172 Wn. App. 386, 289 P.3d 763 (2012) .....	26
<i>State v. Stark</i> , 158 Wn. App. 952, 244 P.3d 433 (2010).....	21, 22
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	59
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	23
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	60
<i>State v. Walden</i> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	29
<i>State v. Wasson</i> , 54 Wn. App. 156, 772 P.2d 1039 (1989).....	21
<i>State v. Williams</i> , 149 Wn.2d 143, 65 P.3d 1214 (2003).....	36
<i>State v. Williams</i> , 81 Wn. App. 738, 916 P.2d 445 (1996), <i>review denied</i> , 140 Wn.2d 1001 (2000).....	23
<i>State v. Wingate</i> , 155 Wn.2d 817, 122 P.3d 908 (2005).....	21
<i>State v. Witherspoon</i> , 180 Wn.2d 875, 329 P.3d 888 (2014).....	60
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	26

**FEDERAL CASES**

*Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038,  
35 L.Ed.2d 297 (1973) ..... 18

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781,  
61 L.Ed.2d 560 (1979) ..... 55

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,  
80 L.Ed.2d 674 (1984) ..... 59, 60

*Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837,  
51 L.Ed.2d 30 (1977) ..... 54

**OTHER STATE CASES**

*Jones v. State*, 292 Ark. 183, 729 S.W.2d 10 (1987) ..... 57

**CONSTITUTIONAL PROVISIONS**

Const. Art. IV, § 16 ..... 15

**STATUTES**

Laws of 1995 c 129 § 2 ..... 33

Laws of 1996 c 205 § 5 ..... 33

Laws of 1997 c 338 § 50 ..... 33

Laws of 1997 c 365 § 3 ..... 33

Laws of 1998 c 211 § 3 ..... 33

Laws of 1998 c 235 § 1 ..... 33

Laws of 1999 c 324 § 3 ..... 33

Laws of 1999 c 352 § 2 ..... 33

Laws of 2000 c 132 § 2 ..... 33

Laws of 2000 c 28 § 11 ..... 33

Laws of 2001 c 10 § 1 .....	34
Laws of 2002 c 290 (Preface) .....	34
RCW 1.12.020 .....	34
RCW 9.62.010 .....	54
RCW 9.94A.310.....	33
RCW 9.94A.310 (1995).....	33
RCW 9.94A.510 (2001).....	34, 35
RCW 9.94A.533.....	passim
RCW 9.94A.535.....	44
RCW 9.94A.585.....	36
RCW 9.94A.589.....	29
RCW 9A.04.110.....	27, 56
RCW 9A.36.011.....	27
RCW 9A.36.021.....	61
RCW 9A.52.010.....	24
RCW 9A.52.050.....	30

**RULES**

CrR 4.5 ..... 48, 49

ER 401 ..... 18

ER 402 ..... 18

ER 602 ..... 18

ER 613 ..... 50

ER 614 ..... 50

ER 701 ..... 18, 19

LCrR 4.5 ..... 49

RAP 16.4..... 47

**OTHER**

WPIC 1.02..... 16

WPIC 17.05..... 10

## I. ISSUES PRESENTED

1. Whether the trial court commented on the evidence when ruling on the State's objection that defense counsel's questions mischaracterized earlier testimony?
2. Whether the trial court unconstitutionally limited defendant's ability to put forth a defense where the court's ruling on the form of the question had the effect of excluding improper opinion testimony for which there was no foundation?
3. Whether the trial court erred by instructing the jury with the first aggressor instruction where the instruction was supported by the evidence?
4. Whether the trial court erred by refusing the defense's requested no duty to retreat instruction, where any license the defendant had to be in the victim's home had been revoked?
5. Whether the trial court erred by refusing to instruct the jury on the lesser included offense of fourth-degree assault, where the evidence did not support the conclusion that the defendant had committed only a fourth-degree assault?
6. Whether the trial court abused its discretion in determining that the offenses of first degree assault, first degree burglary and felony

harassment were not the same course of conduct for purposes of determining the defendant's offender score?

7. Whether the trial court improperly doubled the sentence enhancement for each of the deadly weapon findings where the legislature has provided that such enhancements shall be doubled where a defendant has previously been found, after 1995, to have committed an offense while armed with a deadly weapon?
8. Whether the trial court had any discretion to impose an exceptional sentence downward with respect to the deadly weapon enhancements, where Washington law is clear that, for adult sentences, a trial court has no discretion to reduce or run enhancements concurrently to each other or the base sentence?
9. Even assuming the trial court had discretion with regard to the sentence enhancements, would it have imposed a different sentence had it recognized that discretion?
10. Whether the trial court failed to consider the defendant's request for a downward departure from the standard range based on the defendant's failed self-defense claim, where the court expressly indicated it considered the failed self-defense claim?
11. Whether this Court should dismiss the defendant's personal restraint petition, where his claims are unsupported in law or fact, and where

he has failed to demonstrate any prejudice from the errors he claims occurred below?

## II. STATEMENT OF THE CASE

On November 16, 2015, the State charged Deacon Walette in the Spokane County Superior Court with one count of first degree assault, one count of first degree burglary, one count of first degree robbery, one count of felony harassment, and two counts of possession of a controlled substance. CP 7-8. Each count, except for the controlled substances charges, contained a special allegation that the defendant committed the crime while being armed with a deadly weapon. CP 7-8. The matter proceeded to a jury trial.

*Victim Cowan's testimony, medical testimony, and law enforcement testimony.*

At approximately 3:15 a.m. on November 6, 2015, officers responded to an assault at 3008 East Wellesley in Spokane. RP 138-39. Michael Cowan, the victim, was already being treated by medics for a large cut over his eye and a large cut and swelling on his hand. RP 139.

Cowan and Walette knew each other socially and Cowan considered Walette a friend. RP 145-46. Earlier, on November 4, 2015, Cowan offered to drive Walette to the hospital because Walette's eye was injured. RP 146, 217. Cowan did not provide him a ride home. RP 147.

After Walette's release from the hospital, he went to Cowan's home, claiming that Cowan owed him \$40 for abandoning him. RP 147, 165. Initially, Cowan agreed to that amount because he did not want Walette to be mad; Walette then claimed that Cowan owed him \$100. RP 147-48, 165. Cowan told Walette he would not pay the \$100. RP 148.

Walette later, and unexpectedly, returned to Cowan's home in the early morning hours of November 6, again claiming that Cowan owed him money. RP 167. Cowan saw him approach on his bicycle, but because he knew Walette was angry with him, he went inside the house. RP 152. Cowan denied permitting Walette to enter his home. RP 152. Cowan then walked toward the bathroom, and out of the corner of his eye, saw Walette behind him. RP 152. He observed Walette flip out a "wand," later described to be a metal bar or expandable baton, and hit him on the head. RP 153, 232. Cowan lost consciousness, but when he "came to" he heard Walette say, "Get me the machete." RP 154.

Cowan observed Walette holding the machete, and "going toward [his] face." RP 154. Cowan blocked the blow with his hand and the machete cut his hand. RP 154, 155. Still wielding the machete, Walette told Cowan, "if you say anything, I'll kill you." RP 155. Cowan believed Walette would carry out his threat, although, at trial, he claimed Walette "don't scare me." RP 158. Cowan stated he was unarmed during the incident. RP 162.

Cowan was treated by an emergency room physician, who reported Cowan sustained a laceration and hematoma to his forehead. RP 180. Another laceration to Cowan's hand completely severed his extensor tendon,<sup>1</sup> resulting in mobility difficulty which necessitated surgical intervention. RP 182, 185, 206. Additionally, the physician noted that Cowan complained of knee pain, but could not recall providing treatment for that injury, other than ordering an x-ray.<sup>2</sup> RP 184-85.

After speaking with Cowan, Detective Brian Cestnik researched Walette on Facebook, locating defendant's open profile. RP 211. The Detective found several posts in which Walette mentioned "Mike." RP 212-13. The first, from November 4, 2015, stated he and "Mike" were

---

<sup>1</sup> The physician initially testified that the injury was to the victim's flexor tendon. RP 182. He later corrected himself, indicating that his notes reflected that the injury was to the victim's extensor tendon. RP 206. The physician demonstrated the location of these tendons for the jury. RP 206; *see also* Ex. P8, P9. The tendons on the top of the hand straighten the fingers and are known as extensor tendons. The tendons on the palm side of the hand bend the fingers and are known as flexor tendons. <https://orthoinfo.aaos.org/en/diseases--conditions/flexor-tendon-injuries/> (last accessed July 12, 2018).

<sup>2</sup> Cowan claimed he received stitches in his leg for his knee injury. RP 167. The emergency room physician's notes did not include any notes about suturing Cowan's knee, but the physician indicated, "The reason I quit Deaconness [Hospital] was I was terribly busy and things get crazy...so I'm seeing five patients an hour sometimes and so I'm just praying somebody doesn't, you know, die...So at the end of the day...I might dictate...30 charts... at 6:00 in the morning after not having slept for 30 hours and so conceivably, I wouldn't trust that something happened that wouldn't be in my report." RP 188.

at the emergency room because he had “messed up” his eye. Ex. P11(a)-(c).<sup>3</sup>

Cestnik located additional posts made by Walette on Facebook. Exhibit P12(a) and (b) were posted on November 6, 2015, at 4:16 a.m., approximately one hour after Walette assaulted Cowan. RP 219. Those messages indicated that Walette “did what needed to be done” because Cowan “tried to hot shot” him,<sup>4</sup> and that Cowan “was lucky to be breathing;” the posts also bragged that Walette “was nice” to only “break his leg and arm,” and “crack his skull.” Walette also posted a picture of himself holding a machete. Ex. P12.<sup>5</sup> RP 220.

---

<sup>3</sup> Exhibit P11(a) reflects a photograph of Walette’s eye when he went to the emergency room on November 4. RP 217. Exhibit P11(b) is a written description by Walette of how he injured his eye. RP 218. Exhibit P11(c) is a Facebook post written by Walette describing his lengthy wait in the hospital to be seen for his eye injury. RP 218.

<sup>4</sup> Cowan denied formulating a plan to give Walette a hot shot and denied knowing what a hot shot was at the time of the incident. RP 160-61. Cowan asked another individual what a hot shot was because another friend had used a hot shot, and Cowan wondered what was in it. RP 161. Cowan stated Walette did not confront him about his alleged plan to give Walette a hot shot during the attack. RP 162. He claimed that he may have jokingly referenced giving Walette a hot shot, but he did so before he knew what a hot shot was. RP 162. “I asked [Kevin], I said, what if he took one, you know, a hot shot, what would it do to him. That’s what I asked not, that I’d directly give him a hot shot.” RP 166. “I didn’t know if it was a lethal drug, that’s what I’m saying. I didn’t know what a hot shot was. It could have been a drink for all I knew.” RP 167.

<sup>5</sup> Plaintiff’s Exhibit 12(c) was a picture posted by Walette within hours of the assault in which Walette is wearing clothing described by the victim, holding a machete, and stating “He’s lucky to be still breathing.”

In a subsequent post from November 9, 2015, after the assault, Walette claimed Cowan tried to shoot him days after the assault had occurred.<sup>6</sup>

*Witness Curran's testimony.*

Christopher Curran was at the store in the early morning hours of November 6, 2015, when he was approached by Walette. RP 229. Walette told Curran that Cowan owed him money; he asked Curran to accompany him to Cowan's home. RP 230. Curran observed Walette had a backpack; protruding was a handle that appeared to belong to a machete. RP 230.

They went to Cowan's home; Cowan answered his door and let the men inside. RP 231. Walette and Cowan stood in the kitchen talking for two minutes, and "after that, they – Mike and Deacon started arguing and Deacon started beating him up." RP 231, 240. When asked if he "recalled" if Cowan had any weapons on him, Curran replied, "I believe Mike [Curran] did." RP 231. The prosecutor asked Curran if he had earlier reported to police that he was "sure that Cowan was not armed when Walette began hitting him with a club;" Curran conceded that is what he told police.

---

<sup>6</sup> The post claimed that on November 9, 2015, Cowan tried to shoot Walette. Ex. P13. Detective Cestnik confronted Cowan with this information, who adamantly denied having a gun, or having fired a gun at Walette. RP 221. Cestnik went to the location of the alleged shooting and could find no corroborative evidence that a shooting had occurred. RP 222.

RP 231-32. The prosecutor also asked if Curran ever saw Cowan with a knife; Curran stated he did not see Cowan with a knife. RP 234.

Curran described the bar used by Walette to assault Cowan as a police-style baton made of metal. RP 232. Curran saw Walette retrieve the police baton from his own back pocket. RP 232-33. Curran observed Walette strike Cowan in the arm, and continue to hit him until Curran left. RP 234. Curran estimated that Walette hit Cowan ten times with the baton. RP 234. While Walette hit Cowan, who was on the floor of the kitchen, Curran heard Cowan screaming. RP 235, 240. After the incident, Walette left the machete at Curran's home with Curran's girlfriend. RP 237, 241.

*Walette's police interview.*

Detective Cestnik interviewed Walette, after fully advising him of his *Miranda* warnings.<sup>7</sup> RP 222. The interview was recorded. Ex. P5. Walette claimed that the evening after Cowan had abandoned him at the hospital, at approximately 8:30 or 9:00 in the evening, he went to Cowan's home to tell him that he owed him \$100, but Cowan did not want to pay him. Ex. P5 9:25-10:40. Walette then went home, and Chris Curran came to his house at approximately 2:00 a.m., to tell him that Cowan told Curran he planned to "hot shot" Walette. Ex. P5 10:48-12:15. Angered by Cowan's

---

<sup>7</sup> At the CrR 3.5 hearing, the defendant stipulated to the admissibility of his recorded interview with Cestnik. RP 109-14.

apparent plan to kill him over \$100, Walette told Curran to meet him at the store, and the two would go to Cowan's home. Ex. P5 5:15, 12:40.

The two men arrived at Cowan's home, and saw him standing on his deck; Cowan invited the men inside. Ex. P5 13:30-13:40. Walette and Cowan sat at the dining room table where Walette confronted Cowan about his intention to kill him over \$100. Ex. P5 14:35-14:50. Cowan, who had his hands in his pocket, produced a kitchen knife and lunged at Walette. Ex. P5 14:58, 24:00. Walette grabbed a metal bar off the table and struck Cowan in the face with it; Walette denied bringing the bar with him to Cowan's residence. Ex. P5 15:20-15:40. The men then wrestled in the kitchen, Cowan cut himself with his own knife, and Walette again "cracked him" with the bar; Cowan fell to the ground. Ex. P5 15:40-16:20.

In Walette's estimation, the entire incident lasted approximately five minutes before he and Curran left the residence. Ex. P5 16:45-16:50, 18:40. He discarded the metal bar in an alley. Ex. P5 17:20. Walette twice denied having brought the machete to Cowan's home. Ex. P5 22:40-23:00. Ultimately, however, he admitted that he brought the machete with him, and after beating Cowan with the bar, threatened Cowan with it to scare him, but did not touch him with it. Ex. P5 24:15-24:57. He left the machete at Curran's home. Ex. P5 26:20. Walette explained that if Cowan's DNA was located on the machete, it was because Cowan had tried to slap it away.

Ex. P5 27:05. Ultimately, after the machete was tested, no blood or DNA was found on the machete matching Cowan's profile. RP 256.

*Procedural history and sentencing.*

The defendant requested the court instruct the jury on the law of self-defense as to both the assault and harassment charges. CP 35-36; RP 280. Additionally, the defendant requested the jury be instructed with the "no duty to retreat" instruction, WPIC 17.05. CP 38; RP 281. The defendant also requested that the jury be instructed on the lesser included offense of fourth-degree assault. CP 40; RP 280.

The State opposed an instruction on the lesser included offense of fourth-degree assault, as there was no testimony that anything but a first-degree assault occurred. RP 280-81. Additionally, the State objected to the use of the "no duty to retreat" instruction because the assault did not occur in Mr. Walette's home – and he had no interest in Mr. Cowan's home; thus, he did not have the right to be in Cowan's home. RP 283. The State additionally requested the court give a first aggressor instruction if it instructed the jury on the law of self-defense. RP 285.

The defense countered the State's arguments by claiming that an instruction for fourth-degree assault was supported by the evidence that the victim had only superficial injuries to his face (maintaining the hand wound was self-inflicted) and that only a police-type baton was used to commit the

assault. RP 285-86. The defense also argued that the “no duty to retreat” instruction was appropriate because Walette had been invited into Cowan’s home and had not been told to leave; thus, Walette had the right to be there. RP 286. The defense also opposed the use of the first aggressor instruction, arguing that “it takes more than words” on the part of the person claiming self-defense to be a first aggressor. RP 287.

After reviewing the issues overnight, the trial court ruled that, although the self-defense claim was tenuous – “Walette, in bringing a machete and a metal bar to a kitchen knife fight is pretty hard for the Court to reconcile” – the jury would be instructed on self-defense. RP 293. Regarding the first aggressor instruction, the court ruled “if I am going to give the self-defense instruction, under these circumstances the first aggressor instruction would certainly be appropriate to give to the State because the testimony from Mr. Cowan, the victim, does support that Mr. Walette was the first aggressor.” RP 294. The court ruled that the “no duty to retreat” instruction was inappropriate because:

even assuming that [there] was an invitation...it would have been revoked, that invitation, shortly thereafter under his own theory because the minute you assault someone or end up in an altercation with him in their own home where violent force is used, it goes without saying that your invitee standing is...revoked by operation of law.

RP 295.

Lastly, the court declined to instruct the jury on fourth-degree assault, because such an instruction was unsupported:

self-defense or not, however this pans out in the end with the jurors, Mr. Walette was armed ... there is no dispute that Mr. Cowan was seriously injured to the point where he required hospitalization and surgery on his hand and the Court saw, as counsel did, it appeared to be a serious laceration to his head ... Fourth assault just ... doesn't apply.

RP 297.

On May 11, 2016, the jury returned verdicts of guilty for the charges of first degree assault, first degree burglary, felony harassment, and the two controlled substances charges;<sup>8</sup> the jury also found the defendant to be armed with a deadly weapon during the commission of the assault, burglary, and harassment.<sup>9</sup> CP 103-06, 109-12.

The defendant was sentenced on November 23, 2016. RP 414, *et seq.* Because the defendant had previously been convicted of an offense which included a firearm enhancement, the State requested the court double the enhancements applicable to the current offenses, pursuant to RCW 9.94A.533. RP 417. The State argued that the burglary, assault and harassment did not constitute the same criminal conduct. RP 417-18. The State requested a midpoint sentence of 150 months for the first-degree

---

<sup>8</sup> Defendant has assigned no error to the two controlled substances convictions.

<sup>9</sup> The jury found the defendant not guilty of the first-degree robbery charge. CP 107.

assault. RP 418. The State agreed that the sentences for the burglary, assault and harassment should run concurrently to each other, but requested the court run the enhancements consecutive to those standard range sentences and to each other. RP 419.

The defense argued that the determination of whether the offenses constituted the same criminal conduct was discretionary with the court, and requested the court determine them to be the same criminal conduct based on the failed self-defense argument and based on the fact that the burglary furthered the commission of the assault and harassment. RP 420-22. The defendant additionally requested the court exercise whatever discretion it may have with regard to the deadly weapon enhancements. The defendant lastly requested the court to impose an exceptional downward departure from the standard range sentences based on the failed self-defense claim and the defendant's lack of serious or violent criminal history. RP 423-24. Thus, the defendant requested the court both "merge" the sentences and impose a sentence below the statutory guidelines. RP 424.

The court ruled that the crimes were not the same course of conduct. RP 434. With respect to the enhancements, the court indicated that it had reviewed the law, and was "absolutely satisfied" it had no discretion with

respect to the imposition of the aggravators.<sup>10</sup> RP 435. The court imposed the midpoint sentence requested by the State on the assault charge, 150 months, concurrent to the lesser sentences on the remaining charges, and imposed four-year enhancements for the assault and burglary special verdicts, and a one-year enhancement for the harassment special verdict; the enhancements were run consecutively to each other and to the standard range sentences. RP 437-38. The defendant timely appealed.

### **III. ARGUMENT – DIRECT APPEAL**

#### **A. THE TRIAL COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE, OR IMPROPERLY LIMIT THE DEFENDANT’S ABILITY TO DEFEND AGAINST THE CHARGES.**

During Curran’s direct testimony the following exchange occurred:

[Prosecutor] Do you recall if Mike [Cowan] had any weapons on him?

[Cowan] I believe Mike did.

[Prosecutor] Do you recall talking to the police in this particular case?

[Cowan] Yes.

[Prosecutor] Okay. Do you recall indicating to Detective Cestnik that you were sure that Cowan was not armed when Walette began hitting him with a club; do you remember that?

[Cowan] Yes.

RP 231-32.

---

<sup>10</sup> The court indicated it understood defendant’s request with respect to the enhancements to urge the court to use its “discretion and don’t add the enhancements.” RP 437.

[Prosecutor] And you never saw Mike with a knife, correct?  
[Cowan] Correct.

RP 234.

During cross-examination, defense counsel inquired:

[Defense counsel] Okay. And you said you believed that Mr. Cowan had a weapon?

[Prosecutor] Mischaracterization of his testimony.

[The Court] It is. Sustained.

[Defense counsel] Do you believe that Mr. Cowan had a weapon at that time?

[Cowan] I believe he did.

[Prosecutor] Objection your Honor. He indicated that Mr. Cowan did not have a weapon.

[The Court] That's true. Sustained.

[Cowan] I believe he did.

[Prosecutor] Objection. There is no question posed to this witness.

[The court] Next question, Counsel. Let's move on.

RP 244.

Based on this exchange, Defendant claims that the trial court improperly commented on the evidence and improperly limited his ability to defend against the charges.

1. The court did not comment on the evidence; it ruled on an objection.

A judge is prohibited by article IV, section 16<sup>11</sup> from “conveying to the jury his or her personal attitudes toward the merits of the case.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The touchstone of error

---

<sup>11</sup> Article IV, section 16 states that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The purpose of this prohibition is to prevent the court's opinion from influencing the jury. *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900).

Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. 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.

Importantly, however, a trial court does not comment on the evidence simply by giving its reasons for an evidentiary ruling. *State v. Cerny*, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971). A trial court, in ruling upon objections to testimony, "has the right to give its reasons therefor and the same will not be treated as a comment on the evidence." *Id.* As in *Cerny*, the jury in this case was instructed that "the trial court can have no opinion on the facts of the case and that anything said by the court during the trial on objections must not be taken as an opinion of the court as to the facts of the case or as expressing any opinions thereon." *Id.*, CP 50 (WPIC 1.02).

Thus, in simply ruling on an objection, the court does not comment on the evidence, and the burden does not shift to the State to demonstrate the absence of any prejudice – because no comment on the evidence exists, no prejudice is presumed. Here, defendant takes issue with six words: “It is Sustained” and “That’s true. Sustained.” RP 244. These words constitute the trial court’s ruling on the objection, as to the form of defense counsel’s question, and do not indicate any personal opinion about the facts of the case or the “truth value” of any testimony. These rulings do not pass on the credibility of any witness or otherwise reflect the court’s attitude regarding the merits of the case. This claim fails.

2. The trial court did not deprive the defendant of his ability to put forth a defense.

Defendant also claims that the trial court’s rulings on the questions posed by defense unconstitutionally limited his ability to put on a defense. The Court reviews Sixth Amendment and art 1, § 22 claims de novo, but reviews evidentiary rulings for an abuse of discretion. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017). “When a trial court’s discretionary ruling excludes relevant evidence, the more the exclusion of that evidence prejudices an articulated defense theory, the more likely [the court] will find that the trial court abused its discretion.” *Id.*

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the accusations by the State. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). However, this right is not absolute; a defendant has only the right to present relevant evidence, with no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006).

Here, the evidence that defendant claims was excluded was Curran's "belief" that Cowan had a weapon. While a lay witness may give an opinion or inference based upon rational perceptions, a witness' belief, without some foundation for that belief, is speculative and irrelevant. ER 401, 402, 602, 701; *see also, State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008) (the phrases "I believe or it's possible" are indicative of speculation or improper expression of personal belief). Here, the prosecutor established during direct examination that Curran did not see Cowan with a knife. He also established that Cowan told police officers investigating the assault that he was "sure Cowan was not armed." Based on that testimony, there would be no foundation for Curran to have a rational perception that Cowan was armed at the time of the altercation, other than, perhaps, hearsay. Such an opinion would not be admissible under ER 701.

Had defense counsel thought it possible to establish Curran's personal knowledge that Cowan was armed, or a basis for Curran to have a rational perception that Cowan was armed, he could have asked for the court to conduct a hearing outside the presence of the jury. *See Montgomery*, 163 Wn.2d at 593 ("Occasionally issues arise, such as the foundation of an opinion, which must be explored outside the presence of the jury"). However, he declined to do so, thereby failing to provide any foundation for Curran's speculative belief that Cowan was actually armed. Thus, his questions about Curran's beliefs were improper, and the trial court rightly sustained the State's objections to those questions. Had defense counsel asked the appropriate foundational questions to establish that Curran's belief was based on personal knowledge, rather than speculation or hearsay, the testimony may have been admissible under ER 701.

Ultimately, however, none of Curran's testimony was stricken, and, although the court sustained the State's objections to the form of the questions asked by defense counsel of Curran, Walette was nonetheless free to use Curran's testimony during his closing argument. In fact, Curran testified three times that he "believed" Cowan had a weapon – the State failed to ask the court to strike that testimony. Thus, it remained available for the jury's consideration. Therefore, the defendant is unable to

demonstrate any prejudice – the jury heard Curran state, three times, that he believed Cowan to be armed.

**B. THE EVIDENCE SUPPORTS THE TRIAL COURT’S DECISION TO GIVE THE FIRST AGGRESSOR INSTRUCTION.**

As relevant here, the trial court instructed the jury on self-defense,<sup>12</sup> and, over the defendant’s objection, gave the “first aggressor” instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense or defense of another and thereupon kill or 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 (Instruction 19). Walette claims the trial court erred by instructing the jury in this manner.

1. Standard of review.

When the record includes credible evidence from which a reasonable juror could find that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Whether the State produced sufficient evidence to justify an aggressor instruction presents a question of law this court reviews de novo. *State v. Anderson*, 144 Wn. App. 85, 89,

---

<sup>12</sup> CP 68 (Instruction 18).

180 P.3d 885 (2008). When determining if there was sufficient evidence at trial to support the instruction, the court views the supporting evidence in the light most favorable to the party that requested the instruction – here, the State. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005). “[O]ne who provokes an altercation” cannot successfully invoke the right of self-defense. *Riley*, 137 Wn.2d at 909.

Although not favored, an aggressor instruction is proper where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant’s conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). The provoking act must be intentional conduct reasonably likely to provoke a belligerent response. *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). It cannot be words alone. *Riley*, 137 Wn.2d at 912-13. And, it cannot be the charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

## 2. Discussion.

Defendant’s memorandum to the trial court regarding the disputed jury instructions is probative in that it reflects the fact that the “evidence conflicts as to whether the defendant’s conduct provoked the fight,” one of

the considerations used to determine whether the first aggressor instruction was properly given. *Stark*, 158 Wn. App. at 959; CP 43.<sup>13</sup>

Under the facts presented, sufficient evidence existed for the court to instruct the jury with the first aggressor instruction. The defendant, after hearing rumor that Cowan asked about “hot-shotting” him, asked Curran to accompany him, uninvited, and armed with a machete (and according to Curran, a metal bar) to Cowan’s home, in the middle of the night, to confront him about his rumored plan. These facts, alone, are sufficient to establish that the defendant was the first aggressor.

Additionally, the evidence conflicts regarding whether Cowan *even* had a weapon, let alone produced a weapon during the verbal “discussion” between himself and Walette. While Cowan denied having a weapon, Walette claimed he had a steak knife, and Curran, who was present, did not see Cowan produce a weapon, but believed him to be armed.<sup>14</sup> Curran additionally testified that “Mike and Deacon started arguing, and Deacon started beating him up.” RP 231. Thus, as argued in even the defendant’s brief regarding the disputed jury instructions, the evidence conflicted as to

---

<sup>13</sup> The defense argued: “This case presents at least 3 different factual situations relevant to the question of whether a first aggressor instruction is proper.” CP 43.

<sup>14</sup> Notwithstanding the trial court’s ruling on the State’s objections to this testimony, the testimony itself was never stricken from the record, and the jury was never instructed to disregard it.

whether Walette or Cowan was the first aggressor in the altercation. Based on this dispute, it was not error for the trial court to instruct the jury with the first aggressor instruction.

**C. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE THE NO DUTY TO RETREAT INSTRUCTION.**

There is “no duty to retreat” when a person is assaulted in a place where he has a right to be. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). The trial court should instruct the jury to this effect when sufficient evidence supports it. *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). Thus, if the facts could lead a reasonable jury to conclude that the defendant could reasonably have fled instead of using force, the trial court should give the jury a “no duty to retreat” instruction. *State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996), *review denied*, 140 Wn.2d 1001 (2000).

The facts here, however, did not warrant this instruction. Even the defendant’s version of the events establishes he was a trespasser or that his limited license to be in Cowan’s home was revoked. Unlike this case, the cases upon which defendant relies contain undisputed facts establishing that the defendant was in a place the defendant had a *right* to be.

In *Allery*, *supra*, the defendant was in her *own* home. She was in a place where she had a right to be. In *State v. Redmond*, 150 Wn.2d 489, 491,

78 P.3d 1001 (2003), a fight occurred in a high school parking lot. Early in its analysis regarding the “no duty to retreat” instruction, our Supreme Court noted that the defendant’s “right to be in the Lindbergh High School parking lot is *not disputed*.” *Id.* 489 at 493 fn. 1 (emphasis added).<sup>15</sup> Here, Walette’s right to be in Cowan’s home *was* disputed.

Even under Walette’s version of the facts, once he decided to strike Cowan the first time with the baton or metal bar, any implied privilege he may have had to be in Cowan’s home was revoked, and his remaining was not lawful or rightful. A person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or privileged to so enter or remain. RCW 9A.52.010(3); *State v. Kutch*, 90 Wn. App. 244, 246-47, 951 P.2d 1139 (1998). By analogy, this Court can examine this trespass issue under burglary cases.

In *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988), two women invited Collins, a stranger, into their home to use the telephone. *Id.* at 254-55. After Collins used the telephone, he assaulted the women. *Id.* The Court held that Collins remained unlawfully on the premises because

---

<sup>15</sup> Other “no duty to retreat” cases also involve defendants who were in a place they had the right to be. In *State v. Hiatt*, 187 Wash. 226, 237, 60 P.2d 71 (1936), the appellate court found that “Hiatt and those with him were on the public streets and where they had the lawful right to be *at the time of the encounter*.” (Emphasis added.) In *State v. Lewis*, 6 Wn. App. 38, 491 P.2d 1062 (1971), the defendant claimed self-defense after stabbing the victim; the defendant was a lawful guest in a hotel room where the stabbing occurred. There was no issue as to whether she was in a place she had a right to be.

he exceeded the limited scope of his invitation – to use the telephone. *Id.* at 255. Importantly, the Court noted that the issue was not whether Collins had entered the premises unlawfully, but was whether he *remained* unlawfully:

Once Collins grabbed the two women and they resisted being dragged into the bedroom, any privilege Collins had up to that time was revoked. A case from Georgia illustrates the application of such a rule. In *Hambrick v. State*, 174 Ga. App. 444, 447, 330 S.E.2d 383, 385-86 (1985) the court wrote:

Although the disguised caller initially had Arrington’s authority to enter and remain for a friendly visit, there was sufficient evidence, including testimony of the victim’s struggle with Hambrick, to create a jury question regarding whether the authority to remain ceased at the time the offensive, aggressive behavior began. When Hambrick’s ulterior purpose beyond the bounds of a friendly visit became known to Arrington, who was the source of the authority, and he reacted against it, a reasonable inference could be drawn that the authority to remain ended. *Arrington did not have to shout “Get out!” for this to be so. Yet Hambrick remained until he got possession of the money, far beyond the time at which the scope of the permission ended.*

The same reasoning applies here.

*Id.* at 261 (emphasis added); *see also, State v. McDaniels*, 39 Wn. App. 236, 692 P.2d 894, 896 (1984) (evidence established defendant entered church for reasons other than for reasons consistent with the purpose for which a church is held open to the public).

From the evidence at trial, a rational trier of fact could have found that Walette knowingly entered and remained unlawfully within Cowan’s

private property; in fact, in order to find the defendant guilty of the attendant burglary charge, the jury necessarily made this finding. Thus, Walette was a trespasser. *See City of Sunnyside v. Lopez*, 50 Wn. App. 786, 795, n. 7, 751 P.2d 313, *review denied*, 110 Wn.2d 1034 (1988). Because Walette did not have the *right* to remain in Cowan's home under the circumstances presented, i.e., his license to remain did not include assaulting Cowan with a metal bar and machete, he was not entitled to the "no duty to retreat" instruction. The trial court did not err in declining this instruction.

**D. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FOURTH-DEGREE ASSAULT WAS NOT ERROR.**

A defendant is entitled to a lesser included instruction if two conditions are met:

(1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports an inference that *only the lesser crime was committed* (factual prong)." *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Under the legal prong, an offense is not lesser included "if it is possible to commit the greater offense without committing the lesser offense." *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

*State v. Sharkey*, 172 Wn. App. 386, 390, 289 P.3d 763 (2012) (emphasis added); *see also, State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

A defendant commits the crime of first degree assault when he, with intent to inflict great bodily harm, assaults another with a firearm or any

deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011. “Great bodily harm” is bodily injury which 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). In contrast, a person commits fourth-degree assault when he intentionally (1) attempts with unlawful force to inflict bodily injury upon another, (2) unlawfully touches another, or (3) puts another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *See e.g. State v. Krup*, 36 Wn. App. 454, 460, 676 P.2d 507 (1984). “Bodily injury” means physical pain or injury, illness or an impairment of physical condition. RCW 9A.04.110(4)(a).

For the defendant to be entitled to an instruction on the lesser included offense of fourth-degree assault, the evidence must support an inference that *only* the fourth-degree assault was committed, when viewing the evidence in the light most favorable to the defendant.<sup>16</sup> Here, the defendant was charged with using a metal bar and/or machete, to accomplish the assault. No evidence exists which would suggest that the

---

<sup>16</sup>An appellate court examines the evidence in the light most favorable to the party seeking the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). It is not enough that the jury might disbelieve the evidence pointing to guilt; the evidence must also affirmatively establish the defendant’s theory of the case. *Id.* at 456.

defendant did not use a deadly weapon – either the bar or the machete – to commit a battery on Cowan. Furthermore, the evidence suggests *only* that the defendant intended to inflict great bodily harm, and as a result of the assault, did so – Cowan’s hand required surgical repair and continued to sustain loss of function. Defendant’s intent, in his own words, was to cause great bodily harm – in Walette’s opinion, Cowan “was lucky to be breathing,” and Walette’s posts also bragged that Walette “was nice” to only “break his leg and arm,” and “crack his skull.” Ex. P12 (a)-(c).

The trial court properly found “Mr. Walette was armed ... there is no dispute that Mr. Cowan was seriously injured to the point where he required hospitalization and surgery on his hand and the Court saw, as counsel did, it appeared to be a serious laceration to his head ... Fourth assault just absolutely doesn’t apply.” RP 297. No error occurred in this regard.

#### **E. ALLEGED SENTENCING ERRORS.**

##### **1. Same course of conduct.**

Defendant claims the trial court erred by not treating the defendant’s convictions for first degree assault, first degree burglary, and harassment as the same criminal conduct. CP 103, 105, 109.

A trial court’s determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed

absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Because this finding favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme-and the burden-could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

*Id.*

Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013). Rather, it means the defendant's "objective criminal purpose in committing the crime." *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030,

793 P.2d 976 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540 (citing *Porter*, 133 Wn.2d at 181).

The burglary anti-merger statute, RCW 9A.52.050, allows the court discretion to punish a burglary separately from the crime(s) committed during the burglary, even if the offenses encompass the same criminal conduct.<sup>17</sup> *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992).

The State agrees that the defendant committed the offenses against the same victim, at the same time and place. As above, however, the anti-merger statute allows the first-degree burglary to be punished independently of the assault and harassment, even if the burglary and the other offenses

---

<sup>17</sup> “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor, as well as for the burglary and may be prosecuted for each crime separately.” RCW 9A.52.050.

encompass the same criminal conduct. The offenses of assault and harassment have different criminal intents, as discussed by the sentencing court – the criminal intent of the harassment in this case was to “induce” Cowan to refrain from reporting the assault,<sup>18</sup> whereas the criminal intent of the assault was to injure or “rough up” Cowan over money or his rumored plan to “hot shot” Walette. The trial court did not abuse its discretion in determining that each of the offenses should count separately toward the defendant’s offender score.

2. Prior deadly weapon finding.

The defendant claims that the “doubling” provisions of RCW 9.94A.533(3)(d) and (4)(d) do not apply to him because his prior deadly weapon enhancement was from a 1996 conviction. Defendant reads RCW 9.94A.533(3)(d) and (4)(d) as inapplicable to any prior enhancement not originally imposed under RCW 9.94A.533. However, defendant misapprehends the legislature’s intent.

The meaning of a statute is a question of law reviewed by the court *de novo*. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The court’s purpose in construing statutes is to ascertain and carry out the intent of the legislature. *Id.*; *Dep’t of Ecology v. City of*

---

<sup>18</sup> CP 120 (State’s Sentencing Memorandum); RP 434.

*Spokane Valley*, 167 Wn. App. 952, 961, 275 P.3d 367 (2012). “The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). In determining a provision’s plain meaning, the court looks to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.*

RCW 9.94A.533(4)(d) provides:

(d) 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, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;<sup>19</sup>

---

<sup>19</sup> RCW 9.94A.533(4) and (4)(a) – (c) provide:

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of

This statutory language was first codified in RCW 9.94A.310 when the legislature enacted the Hard Time for Armed Crime Act of 1995. Laws of 1995 c 129 § 2; former RCW 9.94A.310 (1995). With only a single, minor change,<sup>20</sup> this same statutory language was amended and reenacted several times, remaining codified in RCW 9.94A.310 along with the sentencing grid. Laws of 1996 c 205 § 5; Laws of 1997 c 338 § 50; Laws of 1997 c 365 § 3; Laws of 1998 c 211 § 3; Laws of 1998 c 235 §1; Laws of 1999 c 324 § 3; Laws of 1999 c 352 § 2; Laws of 2000 c 28 § 11; Laws of 2000 c 132 § 2.

In 2001, the legislature manifested its intent to reorganize RCW 9.94A, indicating that no provision of its enactments “may be construed as making a substantive change in the sentencing reform act.”

---

this section based on the felony crime of conviction as classified under RCW 9A.28.020:

- (a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;
- (b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;
- (c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

<sup>20</sup> In 2000, the legislature amended the last sentence of RCW 9.94A.310(3)(d) and (4)(d) to read “all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed” rather than, “*any and all* deadly weapon enhancements shall be twice the amount of the enhancement listed.”

Laws of 2001 c 10 § 1. The code reviser was directed by the legislature to recodify sections within RCW 9.94A and correct cross-references to any such recodified sections as “necessary to simplify the reorganization” of RCW 9.94A. As a result, RCW 9.94A.310 was renumbered as RCW 9.94A.510, but otherwise remained identical to RCW 9.94A.310. Former RCW 9.94A.510 (2001).

Then, in 2002, the legislature again “reenacted and amended” RCW 9.94A.510. Laws of 2002 c 290 (Preface). It also enacted RCW 9.94A.533, which mirrors the language of former RCW 9.94A.310 and former RCW 9.94A.510, with the exception that the sentencing grid, itself, remained codified in RCW 9.94A.510. RCW 9.94A.533(3)(d) and (4)(d) were taken verbatim from the 2001 version of RCW 9.94A.510(3)(d) and (4)(d).

It is a tenet of statutory construction and of legislative intent that the provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment must be construed as continuations thereof. RCW 1.12.020. At the time RCW 9.94A.533 was enacted, RCW 9.94A.510 also existed, and the language found in .510 was

simply moved to .533.<sup>21</sup> In that respect, RCW 9.94A.533 must be construed as a continuation of RCW 9.94A.510 and RCW 9.94A.310.

Additionally, “each word of a statute is to be accorded meaning” with no portion rendered meaningless or superfluous. *See, e.g., State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Here, the legislature has plainly indicated that, if the defendant is currently being sentenced under the doubling provisions of RCW 9.94A.533(3) or (4) and that defendant “has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b) or (c)” of either subsection (3) or (4) of the statute, then the enhancement is twice the amount. RCW 9.94A.533(4)(d). If, as the defendant asserts, one cannot receive a doubled-enhancement under this provision where the prior enhancement was imposed under an earlier version of the statute (either RCW 9.94A.510 or RCW 9.94A.310), then the language allowing for a doubled penalty for any defendant with a previous enhancement imposed after July 23, 1995 would be superfluous. Under defendant’s reading of the statute, no defendant could receive a doubled enhancement under RCW 9.94A.533 unless their prior deadly weapon enhancement had *also* been imposed under

---

<sup>21</sup> Furthermore, RCW 9.94A.510 as codified prior to the 2002 amendment was effective until July 1, 2004. It was not until July 1, 2004, that the statutory language found within RCW 9.94A.510 regarding the imposition of enhancements was effective under RCW 9.94A.533.

RCW 9.94A.533, which was not codified until 2002, and did not take effect until 2004. This is an absurd result, ignores the plain language of the statute, and fails to recognize that the doubling provision of RCW 9.94A.533 is substantially the same as its prior versions, and must be treated as a continuation of those prior statutes, as intended by the legislature. The doubling provisions of RCW 9.94A.533 were properly applied to the defendant's sentence.

3. Alleged failure to recognize and exercise discretion with regard to statutory, mandatory deadly weapon enhancements.

a. *Standard of review.*

Generally, a defendant cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Likewise, a party generally cannot appeal a trial court's refusal to impose an exceptional sentence, which necessarily results in a standard-range sentence. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). If a trial court has exercised its discretion, its decision is not reviewable if it has "considered the facts and concluded there is no legal or factual basis for an exceptional sentence." *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Notwithstanding the general prohibition against review of standard range sentences, appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies,

which includes constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *Id.* at 147. While no defendant is entitled to challenge a sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; every defendant is entitled to have an exceptional sentence actually considered. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).<sup>22</sup>

*b. The court has no discretion to reduce or run deadly weapon enhancements concurrently to each other or to the standard range sentences imposed.*

Our Supreme Court has held: "The plain language of [9.94A.533] not only anticipates the imposition of multiple enhancements under a single offense but clearly insists that all firearm and deadly weapon enhancements ... must be served consecutively." *State v. DeSantiago*, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003).<sup>23</sup> The deadly weapon sentencing enhancement statute, in relevant part, provides:

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

---

<sup>22</sup> 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." *Garcia-Martinez*, 88 Wn. App. at 330.

<sup>23</sup>The *DeSantiago* court analyzed RCW 9.94A.510. The language at issue there has now been recodified in RCW 9.94A.533.

....

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement...

[4](e) *Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter...*

RCW 9.94A.533 (emphasis added).

Mr. Walette's claim was foreclosed in *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999). In *Brown*,<sup>24</sup> the State argued that the trial court had no discretion to deviate from the mandatory minimum sentence for the weapon enhancement under former

---

<sup>24</sup> Our Supreme Court recently overruled the holding of *Brown* as it applies to juveniles. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). This recent decision, however, does not undermine the applicability of *Brown* for an adult. The *Houston-Sconiers* court based its rejection of *Brown* entirely on the Eighth Amendment prohibitions against cruel punishment. Mr. Walette was born in 1974; the juvenile rule does not apply to him. The court's holding in *Brown* controls this appeal.

RCW 9.94A.310(4)(e).<sup>25</sup> *Id.* at 26. The defendant argued that if compelling reasons exist, and once the total range was calculated, the sentencing court could depart from the sentencing range without impediment. In rejecting this claim, the Supreme Court held:

RCW 9.94A.310(4) [recodified as RCW 9.94A.533] begins by providing that deadly weapon enhancements “shall be added to the presumptive sentence[.]” The more specific language within RCW 9.94A.310(4)(e) requires that “[n]otwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, [and] shall be served in total confinement.” This language clearly dictates a reading by the average informed lay voter that deadly weapon enhancements are mandatory and must be served.

*Id.* at 28; *see also*, *State v. Mandanas*, 168 Wn.2d 84, 87-90, 228 P.3d 13 (2010), (the enhancement statute is unambiguous and “a sentencing court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses that amount to the same criminal conduct under the sentencing statute”).

Thus, in *Brown*, the court held that sentencing courts do not have the discretion to depart from mandatory weapon enhancements because of the legislature’s “absolute language.”<sup>26</sup> 139 Wn.2d. at 29. In effect, the trial court is precluded from imposing a downward departure from the fixed punishment imposed by the legislature.<sup>27</sup>

---

<sup>25</sup>Recodified as RCW 9.94A.533.

<sup>26</sup> Firearm and deadly weapon enhancement statutes under RCW 9.94A.533(3)(e) and 4(e) are *clear*, whereas the school bus zone enhancement under RCW 9.94A.533(6) is unclear, and, therefore ambiguous. *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015).

<sup>27</sup>The meaning of RCW 9.94A.533 is plain and the statute unambiguously states that firearm enhancements are mandatory: “[n]otwithstanding any other provisions of law, all

Defendant claims that *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), and *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017) control the question. *Mulholland* involved the imposition of an exceptional sentence request to run six serious violent offenses concurrently with each other under RCW 9.94A.589(1)(b); it did not involve the ability of the court to run deadly weapon enhancements concurrently with each other or with the base sentence. *McFarland* likewise involved the imposition of consecutive sentences for 10 counts of theft of a firearm, imposed under RCW 9.94A.589(1)(c); no enhancements were involved. Thus, *Mulholland* and *McFarland* do not control the issue; the Supreme Court’s decisions in *Brown* and *Mandanas* control. Here, the trial court had no discretion to modify the fixed term of incarceration for the firearm enhancements. There was no error.

*c. Assuming, arguendo, that the sentencing court had discretion with regard to the enhancements, the record reflects that the court would not have imposed a different sentence had it exercised that discretion.*

Even if the court had discretion to deviate from the statutory requirements applicable to deadly weapon enhancements, the defendant did

---

firearm enhancements under this section are mandatory.” *State v. Kelley*, 168 Wn.2d 72, 79, 226 P.3d 773 (2010); *see State v. Nguyen*, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006) (legislative intent in adopting the firearm enhancement statute and in mandating additional punishment for the use of a firearm is “unmistakable”).

not unambiguously request the court to do so, and the court would not have imposed a different sentence, even recognizing its discretion.

The defendant's request for the trial court to exercise its imposition in imposing an exceptional sentence as to the enhancement was unclear. For instance, the written brief, filed by Walette's original trial counsel, only requested the imposition of an exceptional sentence as to the standard range sentence on the assault (the offense with the greatest standard range sentence), based on the failed defense of self-defense. CP 151. The brief did not advocate for the trial court to exercise any discretion with regard to the imposition of the weapon enhancements. CP 151.

At Walette's sentencing hearing, defendant's new lawyer generally advocated for the court to exercise its discretion with regard to the enhancements, but never specifically argued what that discretion entailed:

Now, as to the enhancements, your Honor, Counsel has cited a statute that doesn't come up very often in that if there is a prior enhancement, enhancements are doubled. *Now I don't know if the Court has discretion in that respect, but if the court does, I would ask that the court exercise that discretion.*

RP 422-23.

At the outset, we would ask that the offenses merge and that the Court use the 102- to 136-month range and that the Court sentence Mr. Walette to the low end of that range.

Now...there is also a request that the court go below the guidelines in this case and I think that where the

failed...defense comes in...this was done [because of] Mr. Walette's belief that the victim was going to do serious bodily harm to him, if not kill him. So I think that this is the *ideal case for the court to sentence below the guidelines...I would ask the court to exercise its discretion and sentence below the guidelines.*

RP 424-25.

The trial court understood defendant's request regarding the enhancements, as a request to not impose them at all or to refrain from doubling them.

I'm going to adopt with those respective scores that I've advised, the midpoints on all of those counts. The assault would provide for a sentence of midpoint 150 months...

...

Now, you know why we're really here and spending a lot of time talking about this is again because the enhancement which I mentioned before and I think, frankly, Mr. Perry, your recitation of the law is correct. Although, if I was in your shoes arguing on Mr. Walette's behalf, I would make the same argument you would, *which would be that perhaps the Court has discretion, so please adopt that discretion and don't add the enhancements.* But I don't think I have the discretion as I indicated. I have a mandate the legislature has provided that I have to impose four years on the first assault for the special verdict jurors returned and four years on the first burg. Again, which the jurors returned, and one year on the harassment.

So, again, everything here would be concurrent except the weapon enhancements, which would be consecutive and it does make obviously the most sense with Mr. Walette

having been in custody for some time for the jail to calculate any credit he's entitled to.

RP 437-38.

Because the defendant never directly or indirectly requested the court run the enhancements concurrently to each other, the trial court should not be expected to *sua sponte* do so.

Even if the sentencing court had discretion to provide the defendant some relief with regard to the mandatory deadly weapon enhancements, it would not have done so. *Mulholland* and *McFarland* were remanded back to the sentencing court because “the sentencing court erroneously believed it could not impose concurrent sentences and *the record demonstrates that it might have done so had it recognized its discretion...*” *McFarland*, 189 Wn.2d at 56 (emphasis added); *see also, In re Mulholland*, 161 Wn.2d at 333-34.

In this case, however, the sentencing court indicated that in a *prior, unrelated* trial court case, *Burton*,<sup>28</sup> it was frustrated by the legislative mandate that provided the court “no ability to go left or right...and impose the aggravator which means a very extensive sentence that I was otherwise feeling that I shouldn't have to impose. *That's not Mr. Wallette's case.*”

---

<sup>28</sup> *State v. Burton*, 2017 WL 5195175, 1 Wn. App. 2d 1015 (2017) (unpublished).

RP 435 (emphasis added). Thus, the trial court was not concerned with the imposition of the enhancements in Walette's case, as it had been in *Burton*.

As evidenced by the sentence imposed, the trial court was not inclined to impose a lesser sentence. Had the trial court truly been inclined to do so, or felt as though the doubled and consecutive enhancements were unjust, it could have adjusted the *standard range sentences* to the low end (or even lower based on the imposition of an exceptional sentence on the standard range portion of the sentences), rather than the mid-point of 150 months. It did not do so. Therefore, this Court may infer that there is no likelihood that the sentencing court would have imposed a lesser sentence with respect to the enhancements even if it had the discretion to do so.

4. Alleged failure to consider request for an exceptional sentence downward based on failed defense.

A sentencing court may impose an exceptional sentence downward based upon a failed self-defense claim if it finds that the claim is established by a preponderance of the evidence. RCW 9.94A.535(1)(a) and (1)(c) (exceptional sentence may be imposed if victim was willing participant or aggressor or defendant committed crime under duress or coercion); *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997). To impose an exceptional sentence downward, the trial court must find that substantial and compelling reasons exist to do so. RCW 9.94A.535.

As noted above, defendant initially asked the trial court to impose a low-end, standard range sentence, and then further asked the court to deviate from the standard range by imposing an exceptional sentence downward based on the failed self-defense claim. The trial court declined both requests and imposed a mid-point standard range sentence on the assault, and ran the other standard range sentences concurrently to that sentence.

During the jury instruction conference, the trial court expressed its opinion that Walette's self-defense claim was dubious. "Walette, in bringing a machete and a metal bar to a kitchen knife fight is pretty hard for the Court to reconcile." RP 293. At sentencing, the court noted that it had "studied the law in detail and in particular here that would include a review of the law as it pertains to same course of conduct and merger and *failed defense* which, of course, in this case as counsel both reminded me was self-defense. The jury didn't agree with that but they did nevertheless hear that position provided by Mr. Walette at the time of trial." RP 433. Thus, the court considered the failed defense before imposing sentence.

A trial court need not articulate the reasons why it opts not to impose an exceptional sentence – its ruling however, must reflect that the court actually considered the request, rather than categorically failed to consider the request. Here, the trial court did so, and imposed a standard range sentence. That sentence is not appealable absent a showing that the court

categorically refused to consider an exceptional sentence, or failed to understand its discretion. Neither of those conditions exist. There was no abuse of discretion at Walette's sentencing, and therefore, this claim fails.

#### **IV. ARGUMENT – PERSONAL RESTRAINT PETITION**

Separately, in a personal restraint petition, originally filed as a motion for a new trial, and subsequently transferred to this Court pursuant to CrR 7.8(c)(2), defendant alleges numerous errors, including, among others, that he was provided ineffective assistance of counsel, that the prosecutor engaged in misconduct, the jury should have been instructed on the lesser included offense of second degree assault, and that his offender score was improperly calculated.

##### **A. STANDARD OF REVIEW.**

A personal restraint petition (PRP) is not a substitute for a direct appeal and the availability of collateral relief is limited. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013). "Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before [the] court will disturb an otherwise settled judgment." *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

An appellate court will grant substantive review of a personal restraint petition only when the petitioner is under restraint and makes a

threshold showing of either constitutional error from which he has suffered actual prejudice, or nonconstitutional error establishing a fundamental defect that inherently resulted in a complete miscarriage of justice. RAP 16.4(a); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986) (in a personal restraint petition, the petitioner bears the burden of showing prejudicial error). Actual prejudice must be determined in light of the totality of circumstances. *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985). The ultimate question in determining whether actual prejudice exists is whether the error “so infected petitioner’s entire trial that the resulting conviction violates due process.” *Id.* An error warrants relief when the reviewing court has a “grave doubt as to the harmlessness of an error.” *In re Pers. Restraint of Sims*, 118 Wn. App. 471, 477, 73 P.3d 398 (2003) (quoting *In re Pers. Restraint of Smith*, 117 Wn. App. 846, 860, 73 P.3d 386 (2003), *overruled on other grounds by In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005)).

Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain the petitioner’s burden of proof. *Brune*, 45 Wn. App. at 363. “Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies on conclusory allegations, a court should decline to determine the validity

of a personal restraint petition.” *In re Cook*, 114 Wn.2d at 814. If a petition is based on matters outside the appellate record, a petitioner must show that he has “competent, admissible evidence” to support his arguments. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *see also In Re Pers. Restraint of Moncada*, 197 Wn. App. 601, 391 P.3d 493 (2017). This court can disregard a defendant’s self-serving assertions included in a personal restraint petition. *See In re Pers. Restraint of Yates*, 180 Wn.2d 33, 43-44, 321 P.3d 1195 (2014) (Stephens, J., concurring).

As a threshold matter, the defendant’s petition is largely crafted upon bare, conclusory allegations, without citation to the record or any outside source supporting those allegations, and without citation to any persuasive legal argument or reasoning. For this reason alone, the petition should summarily be dismissed.

**B. FAILURE TO HOLD AN OMNIBUS HEARING.**

CrR 4.5(a) states: “When a plea of not guilty is entered, the court shall set a time for an omnibus hearing.” At an omnibus hearing, the court ensures that counsel has been provided to a defendant, ascertains whether the parties have completed discovery, rules on motions and other issues, determines whether any constitutional or procedural questions should be considered, sets a time for a pretrial conference if necessary, and permits a defendant to change his plea if desired. CrR 4.5(c). Spokane County has

adopted separate local rules governing when criminal motions may be heard by the court. Spokane County LCrR 4.5.

The State agrees with the defendant that the trial court did not hold an “omnibus hearing.”<sup>29</sup> However, the defendant has failed to demonstrate that the court did not provide him the opportunity to have any potential motions heard and considered, and has likewise failed to demonstrate that discovery was not completed. Thus, he is unable to demonstrate (and has not even alleged) any prejudice flowing from the lack of an omnibus hearing. Because this issue involves the violation of a court rule, rather than a constitutional rule, the defendant must demonstrate a fundamental defect in the proceedings resulting in a complete miscarriage of justice. He cannot do so, and therefore, this claim necessarily fails.

### **C. ALLEGATIONS OF PERJURY.**

The defendant claims the prosecutor led Curran to change his story while testifying: “The prosecuting attorney Mr. Cruz, was leading the whitness [sic] in cort [sic] to change his story...Chris [Curran] admitted [sic] on the stand that he had a knife then Cruz leads him to say he did not.” PRP at 7.

---

<sup>29</sup> The State disagrees with the defendant that it was prosecutorial misconduct or “state mismanagement,” PRP at 2, that resulted in the lack of an omnibus hearing. CrR 4.5 provides, “the *court shall* set a time for an omnibus hearing;” thus, it is the *court’s* obligation to comply with the court rule, or otherwise ensure that discovery and other pretrial procedures have been complied with by the parties.

The prosecutor did nothing but clarify the witness' testimony. Curran testified initially that he "believed" Cowan had a "weapon."<sup>30</sup> RP 231-32. The prosecutor simply asked Curran about his prior inconsistent statement to law enforcement, which was that Cowan was unarmed at the time of the altercation. *See* ER 613, 614. Curran admitted he had made that prior statement, and subsequently admitted he never saw Cowan with a weapon. RP 231-32, 234. Additionally, Curran never gave any testimony which would support his speculative "belief" that Cowan was armed, notwithstanding his own testimony and prior statement to police that he never saw Cowan with a weapon. The prosecutor properly used the Rules of Evidence to clarify the witness' testimony for the jury.<sup>31</sup> This claim fails.

Additionally, Walette claims that the State offered perjured testimony when Cowan testified that "Mr. Walette stuck a machete into his leg and twisted it, severing an artearil [sic] vane [sic]." PRP at 4. Mr. Cowan testified that the defendant did touch his knee with the machete and twisted it. RP 155. He also testified that the injury to his head was "pretty bad. My memory is really bad...I just remember the incident because of, you know,

---

<sup>30</sup> Curran's response to the prosecutor's question, which was "Do you recall if Mike had any weapons on him?" was nonresponsive, as it did not reflect the witness' recollection, but rather a "belief" for which there was a lack of any foundation. RP 231.

<sup>31</sup> The State never sought to admit extrinsic evidence of a prior inconsistent statement. *See* ER 613(b).

I mean who can forget a machete and stuff.” RP 159. It was not until cross-examination, Cowan testified:

[Cowan] He stuck it in my leg. He twisted it in my leg.

[Defense counsel] Put it in your leg and twisted it around?

[Cowan] Yeah.

[Defense counsel] Did it cause a lot of damage to your knee?

[Cowan] Yeah. Yes it did.

[Defense counsel] Do you have any trouble walking after that?

[Cowan] Sometimes. I mean sometimes it will lock up a little bit but that’s about it.

[Defense counsel] Did you have to have surgeries on it?

[Cowan] No. I had stitches down on my leg. Just a little opening like damage to my, *like the main artery thing, you know, how its pumping blood.*

[Defense counsel] *It cut the main artery?*

[Cowan] *Like when your leg goes a certain way and it bends and when it goes straight, anyways, blood just started squirting out of it. That’s all I know.*

RP 168-69 (emphasis added).

The jury was later informed by the emergency room doctor that his notes did not reflect ever suturing Cowan’s leg, but that he had no independent recollection of Cowan, other than the injury to his hand, and did not necessarily trust his own medical charts. RP 188.

Contrary to Walette’s claim, the prosecutor did not offer perjured testimony – the testimony at issue was given during cross-examination. From Cowan’s own testimony, it is clear he did not know whether the machete had actually severed an artery or vein. He testified that all he knew was that he received sutures and that the wound was bleeding. Perhaps

recognizing that Cowan was confused, and in an attempt to clarify the testimony, the prosecutor asked him on re-direct whether he was “a trained medical professional” and whether his injuries would “be better discussed by a doctor who treated” him. RP 172.

Ultimately, the prosecutor did not rely on the injury to the defendant’s leg to support the assault. Therefore, the defendant has failed to demonstrate how Cowan’s testimony, when it was clarified not only by Cowan himself, but also by the emergency room doctor, prejudiced him when that injury was not the basis for the charged assault. This claim fails.

**D. CLAIM OF PROSECUTORIAL MISCONDUCT BY LEADING THE WITNESS.**

During direct examination, Curran testified that he and Walette were inside Cowan’s home for approximately two minutes before Walette began to assault Cowan. RP 233. On cross-examination, he claimed instead that Walette and Cowan “talked for a good 15 minutes” before Walette “pulled out this baton and started hitting Mike with it.” RP 243-44. On redirect examination, the prosecutor asked:

[Prosecutor] And then you indicated you were only in the house for about two minutes before you started seeing Mr. Walette pull out that police baton and started striking Mike with it?

[Curran] Correct.

[Prosecutor] Not fifteen minutes?

[Curran] Well, they were talking, I didn’t know what time. I just knew that they were talking for a good minute.

[Prosecutor] A good minute?

[Curran] A good minute.

RP 247.

Defendant claims that the prosecutor engaged in misconduct by leading the witness to say that the altercation lasted only a minute, rather than the fifteen minutes he claimed on cross-examination, and two minutes he originally claimed on direct examination.<sup>32</sup> However, Curran's testimony that the altercation lasted "a good minute" was not an answer provided as a result of a leading question. The prosecutor's question, "not fifteen minutes?" did not imply the answer to the question within the question itself; it was therefore, not leading. Curran explained his answer to that question, by elaborating that he did not know how long the altercation lasted, but that it was a "good minute." The prosecutor did not engage in misconduct, and, given the defendant's own version of events, that the altercation lasted only five minutes, he is unable to demonstrate any prejudice resulting from the prosecutor's questions which resulted in Curran recanting his statement that the altercation lasted fifteen minutes.

---

<sup>32</sup> In his interview with police, the defendant, himself, estimated the entire interaction only lasted five minutes. Ex. P5 at 16:45.

**E. CLAIM OF PROSECUTORIAL MISCONDUCT BY MALICIOUS PROSECUTION.**

Defendant claims a “fear” of malicious prosecution and requests his claim be “looked into.” PRP at 6. These bare assertions are insufficient to support relief in a personal restraint petition. Defendant has made no showing that Deputy Prosecutor Cruz’ prior alleged prosecution of Walette’s brother, Jody Walette, in any way constitutes a malicious prosecution or conflict of interest. Even assuming Mr. Cruz had previously prosecuted Walette’s brother, there is no rule of professional conduct preventing a deputy prosecutor from prosecuting members of the same family. It also does not constitute malicious prosecution.<sup>33</sup> Defendant’s claims that he was not offered any plea negotiations because of Mr. Cruz’ prior involvement with Jody Walette’s case<sup>34</sup> are speculative, unsupported, and, in any event, a defendant does not have a constitutional right to plea bargain. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). This claim fails.

---

<sup>33</sup> Malicious prosecution requires a person to “maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent.” RCW 9.62.010. A judicial officer independently made a finding that probable cause existed for the defendant’s numerous offenses charged by the State. CP 222-23 (a designation of clerk’s papers is being filed contemporaneously herewith for court’s sub no. 5 along with exhibits to be transferred for the record). And, defendant has failed to demonstrate any malice on the part of the prosecutor.

<sup>34</sup> *See* PRP at 6.

**F. CLAIM THAT THE METAL ROD AND MACHETE WERE NOT PROVEN TO BE DEADLY WEAPONS.**

The defendant claims the State failed to prove the metal rod was a deadly weapon. Dec. in Support of PRP at 7. He claims that, because police batons are considered a “less than lethal weapon,” they cannot be “deadly weapons”; he additionally claims that because no DNA belonging to the victim was found on the machete, it could not be a deadly weapon. Dec. in Support of PRP at 8. This is a sufficiency of the evidence claim.

Evidence is sufficient to convict if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency of evidence challenge is reviewed de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The standard of review for a sufficiency of the evidence claim in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Homan*, 181 Wn.2d at 106. A defendant challenging the sufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. *Id.* at 106. In a sufficiency challenge, an appellate

court's review is "highly deferential to the jury's decision." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

The State may establish the elements of a crime by either direct or circumstantial evidence and both are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). In addition, this Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Martinez*, 171 Wn.2d at 364.

As charged, the State was required to prove, among other elements, that the defendant was armed<sup>35</sup> with a deadly weapon. The statutory definition for "deadly weapon" provides:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.<sup>36</sup>

RCW 9A.04.110(6).

---

<sup>35</sup>"Armed" means the "weapon is readily available and accessible for use." *State v. Chiariello*, 66 Wn. App. 241, 243, 831 P.2d 1119 (1992).

<sup>36</sup>"Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Where the weapon in question is neither a firearm nor an explosive, its status as a deadly weapon “rests on the manner in which it is used, attempted to be used, or threatened to be used.” *In re Martinez*, 171 Wn.2d at 366. A totality of the circumstances approach is utilized when evaluating the evidence as to whether a non-per se weapon is deadly. *Id.* at 367-68. The *Martinez* court concluded that a weapon’s potential for harm is alone insufficient for a deadly weapon finding under the statute. *See id.* at 368 n. 6; *cf.*, *State v. Gotcher*, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988) (the mere possession of a knife does not satisfy the statutory definition of a deadly weapon; there must be some manifestation of a willingness to use the knife before it can be found to be a deadly weapon).

In the present case, the circumstances in which Walette used the metal bar and used or threatened to use the machete demonstrate the State presented sufficient evidence for a rational jury to properly find beyond a reasonable doubt that those items were deadly weapons. A closer look at the totality of the circumstances shows that the metal bar was readily capable of causing substantial bodily harm.<sup>37</sup> By his own words, Walette used it in

---

<sup>37</sup>*See, e.g., State v. Barragan*, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000) (a pencil can be considered a “deadly weapon” when used in attempt to stab fellow prison inmate in the eye); *State v. Schilling*, 77 Wn. App. 166, 171-72, 889 P.2d 948, *review denied* 127 Wn.2d 1006 (1995) (a glass was a “deadly weapon” when smashed against the backside of a patron’s head); *Jones v. State*, 292 Ark. 183, 184-85, 729 S.W.2d 10 (1987) (“[i]t can hardly be doubted that a five foot length of iron pipe is capable of causing death or serious injury”).

an attempt to break Cowan's bones, and that, after the attack, Cowan was "lucky to be breathing." And, regarding the machete, defendant's use and threatened use of that implement was sufficient for the jury to find it to be a deadly weapon as well. When Walette wielded the machete, he threatened to kill Cowan if Cowan reported the assault.

It is wholly within the province of the jury to determine the persuasiveness and significance of the evidence. Here, the jury believed Walette was armed with a deadly weapon, and that finding should not be disturbed because substantial evidence supports that finding. Mr. Walette's claim of insufficiency fails.

**G. DEFENDANT'S CLAIM THAT HIS PRIOR CRIMINAL HISTORY WASHED OUT.**

The defendant additionally asserts his criminal history was improperly calculated for purposes of determining his offender score. He claims that his prior convictions washed out because they were from offenses in 1995. PRP at 8. The State agrees, and previously agreed at sentencing. CP 118-19 (indicating that the prior class C felonies from 1995 should not be included in the defendant's offender score). In his PRP, the defendant has failed to demonstrate that the convictions from 1995 were used in his offender score calculation. While the prior deadly weapon enhancement from 1995 was considered at sentencing pursuant only to the

“doubling” provisions applicable to sentencing enhancements under RCW 9.94A.533, it was not used to increase his offender score. As explained above, no error occurred in this regard.

#### **H. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court’s scrutiny of defense counsel’s performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36. To rebut this presumption, the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent

counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

1. Failure to request a lesser included instruction for second degree assault.

Whether to request a lesser included offense instruction is a tactical decision, for which the court grants counsel considerable deference. *Grier*, 171 Wn.2d at 39; *see also State v. Witherspoon*, 180 Wn.2d 875, 886, 329 P.3d 888 (2014). Counsel, in consultation with the defendant, may decide to take the “all or nothing” approach and forgo a lesser included offense instruction. *Id.* at 886. However, this approach exposes the defendant to the risk that the jury will convict on the only option argued by the defense. *Id.*

In *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009), the court held that an “all or nothing” strategy was a legitimate trial tactic because a lesser included offense instruction would have weakened the defense's claim of innocence. And in *Grier*, our Supreme Court rejected *Grier's* ineffective assistance claim because “[a]lthough risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal.” 171 Wn.2d at 42.

While arguably it could be possible that the court *would* have instructed the jury on second degree assault, which requires the defendant to, under circumstances not amounting to assault in the first degree, (1) intentionally assault another and thereby recklessly inflict substantial bodily harm, or (2) assault another with a deadly weapon, RCW 9A.36.021, the defendant cannot demonstrate that counsel was deficient for failing to request such an instruction, or that, under the circumstances, the result of the trial would have been different if counsel had made such a request.

If it is a valid tactical decision to not request a lesser included instruction at all, then it is also must be a tactical decision to request a lesser included instruction for a misdemeanor offense, rather than a lesser, but still violent, felony offense. Here, counsel requested a lesser included instruction for the gross misdemeanor offense of fourth-degree assault, rather than the lesser included offense of second degree assault. Had the jury been instructed on, and convicted the defendant of a misdemeanor, rather than a felony offense, the defendant's offender score for current offenses would have been reduced by a full point, and the deadly weapon enhancement would not apply;<sup>38</sup> the same cannot be said to be true had the defendant been

---

<sup>38</sup> Deadly weapon enhancement under the SRA does not apply to misdemeanor offenses. See RCW 9.94A.533(4): "The following additional times shall be added to the standard sentence range for *felony* crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon..." (Emphasis added.)

convicted of second degree assault. Counsel's decision to request an instruction for fourth-degree assault, rather than for second degree assault was clearly strategic and the defendant has failed to demonstrate any prejudice. Therefore, this claim fails.

2. Failure to introduce testimony of an expert regarding the lack of the victim's blood on the machete.

The defendant claims counsel was ineffective for failing to call an expert witness to testify regarding the lack of the victim's blood on the machete. Dec. in Support of PRP at 7. However, defendant has failed to demonstrate how counsel's decision not to call an expert witness was either deficient or prejudicial. The State's own law enforcement officer testified that the victim's blood was not found on the machete. RP 256. The defendant has failed to demonstrate how the cumulative testimony of an "expert" would have changed the result of the trial.

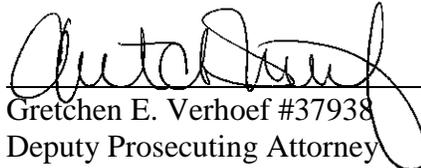
The amended information alleged that the crime of first degree assault was committed with a machete and/or a metal bar. CP 20. Thus, the lack of blood on the machete is immaterial – the defendant agreed that he utilized the machete to accomplish the felony harassment, and admitted to beating the victim with the metal bar. This claim fails.

## V. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court affirm the verdict and sentencing in Mr. Walette's case and dismiss his personal restraint petition.

Dated this 30 day of July, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



\_\_\_\_\_  
Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,  Respondent,  v.  DEACON WALLETT,  Appellant.	NO. 34943-8-III Consolidated w/34991-8-III  CERTIFICATE OF SERVICE
In Re Personal Restraint of:  DEACON WALLETT,  Petitioner.	

I certify under penalty of perjury under the laws of the State of Washington, that on July 30, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Gregory Link  
wapoffice@washapp.org

and mailed a copy to:

Deacon Wallett, DOC #756707  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

7/30/2018  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

# SPOKANE COUNTY PROSECUTOR

July 30, 2018 - 1:26 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34943-8  
**Appellate Court Case Title:** State of Washington v Deacon James Wallette  
**Superior Court Case Number:** 15-1-04306-5

### The following documents have been uploaded:

- 349438\_Briefs\_20180730132509D3656490\_1100.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Wallette Deacon - 349438-349918 - Resp Br - GEV.pdf*
- 349438\_Designation\_of\_Clerks\_Papers\_20180730132509D3656490\_4360.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was Desig CP - 3d Supp 0730218 - 349438.pdf*
- 349438\_Motion\_20180730132509D3656490\_1342.pdf  
This File Contains:  
Motion 1 - Waive - Page Limitation  
*The Original File Name was Overlength Br Mn - GEV.pdf*

### A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- greg@washapp.org
- wapofficemail@washapp.org

### Comments:

---

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

**Filing on Behalf of:** Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:  
1100 W Mallon Ave  
Spokane, WA, 99260-0270  
Phone: (509) 477-2873

**Note: The Filing Id is 20180730132509D3656490**