

FILED  
COURT OF APPEALS  
2007-11

10 MAY -6 AM 11:30

STATE OF WASHINGTON

BY *[Signature]*  
CLERK

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

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

STATE OF WASHINGTON

Respondent

vs.

JAY CLIFFORD RUSSELL

Appellant

---

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY

The Honorable Diane Woolard  
Superior Court No. 08-1-01961-6

---

APPELLANT'S REPLY BRIEF

---

MARK W. MUENSTER, WSBA #11228  
1010 Esther Street  
Vancouver, WA 98660  
(360) 694-5085

*pm 5-7-10*

**TABLE OF CONTENTS**

I. ARGUMENT IN REPLY ..... 1

    A. Mr. Russell’s right to remain silent was violated, requiring a new trial..... 1

    B. Mr. Russell did not receive effective assistance of counsel..... 6

        1. Lesser included instruction ..... 6

        2. Limiting instruction..... 8

        3. “Defense injuries” testimony ..... 9

    C. The trial court erred in admitting the “threat” testimony under ER 404 (b)..... 10

    D. The trial court erred in excluding Mr. Higgins’ felony theft conviction..... 11

    E. Mr. Russell’s right to attend trial and testify were unfairly burdened by cross-examination and argument that his testimony could be tailored based on what he had heard..... 12

    F. There was insufficient evidence to convict Mr. Russell of second-degree assault, under the alternative charged in the information..... 13

    G. The trial court erred in computing Mr. Russell’s offender score..... 14

    H. The trial court erred in refusing to consider an exceptional sentence..... 16

II. CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### Federal Cases

<i>Douglas v. Cupp</i> , 578 F.2d 266, 267 (9th Cir. 1978) .....	4
<i>Jenkins v. Anderson</i> , 447 U.S. 213 100 S. Ct. 2124, 65 L.Ed. 2d 86 (1980).....	4

### Washington Cases

<i>State v. Alexis</i> , 95 Wn. 2d 15, 621 P.2d 1269 (1980) .....	11
<i>State v. Breitung</i> , ____ Wn. App. ____ (2010) .....	6, 7
<i>State v. Bunker</i> , 144 Wn. App. 407, 183 P.3d 1086 (2008).....	16
<i>State v. Burke</i> , 163 Wn.2d 204 181 P.3d 1 (2008) .....	3
<i>State v. Copeland</i> , 89 Wn. App. 492, 949 P.2d 458 (1998).....	12
<i>State v. Curtis</i> , 110 Wn. App. 6, 37 P.3d 1274 (2002) .....	4
<i>State v. Dunaway</i> , 109 Wn 2d 207, 743 P.2d 1237 (1987) .....	15
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	2, 4
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	10
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	10
<i>State v. Frawley</i> , 140 Wn. App. 713, 167 P.3d 593 (2007) .....	14
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997).....	16
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	16
<i>State v. Grier</i> , 150 Wn. App. 619, 208 P.3d 1221 (2009).....	7
<i>State v. Guloy</i> , 104 Wn. 2d 412, 705 P.2d 1182 (1985) .....	6
<i>State v. Johnson</i> , 92 Wn. 2d 671, 600 P.2d 1249 (1979).....	14
<i>State v. Keene</i> , 86 Wn. App. 589, 938 P.2d 839 (1997) .....	2
<i>State v. Lewis</i> , 130 Wn. 2d 700, 927 P.2d 235 (1996).....	2, 3
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	10
<i>State v. Martin</i> , 151 Wn. App. 98 (2009) .....	13
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	7
<i>State v. Romero</i> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	4
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	14

*State v. Thomas*, 109 Wn. 2d 222, 743 P.2d 816 (1987)..... 10  
*State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)..... 7, 8  
*State v. Yarbrough*, 151 Wn. App. 66, 210 P.2d 1029 (2009) ..... 8

**Statutes**

RCW 9.94A.589 (1)(a)..... 15, 19  
RCW 9A.36.021 (1)(a)..... 13  
RCW 9A.36.021(1)(e)..... 13

**Rules**

ER 404 (b) ..... 10  
ER 609..... 11, 19

**Constitutional Provisions**

Const. Article I, §9 ..... 4, 5  
Const. Art. I §22 ..... 12, 18  
United States Constitution, Fifth Amendment, ..... 3, 5  
United States Constitution, Sixth Amendment..... 18

I. ARGUMENT IN REPLY

A. Mr. Russell's right to remain silent was violated, requiring a new trial.

The prosecutor argues that Mr. Russell's right to remain silent was not violated by calling attention to his silence after the incident through the police officer's testimony, and then later during closing argument contrasting that silence with the conduct of the complaining witness, who did call 911 after the incident. Resp. Br at 7-8. The state argues that Washington cases that have prohibited comment and testimony on a defendant's silence do not apply if there was no actual contact between the police and the defendant. This argument should be rejected.<sup>1</sup>

First, there was no other basis for the officer's testimony that he had been unable to contact Mr. Russell other than to call attention to the fact that Mr. Russell had not sought out, or made a statement to the police after the incident. To drive the point home, the prosecutor asked whether he had *ever* had any contact from Mr. Russell and elicited a negative response.

Second, the prosecutor reemphasized this point during his closing argument by comparing the conduct of Mr. Higgins, who did call the police, to that of Mr. Russell, who did not. He labeled Mr. Higgins' conduct as reasonable, with the clear implication that Mr. Russell's failure to make a statement to the police was not.

---

<sup>1</sup> The relevant testimony from the police officer, the prosecutor's cross examination of Mr. Russell, and the relevant portions of the closing argument are included in the Appendix for the convenience of the court.

A similar situation occurred in *State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997). The testimony there was that the officer had attempted to contact Keene, but had been unable to interview him. The prosecutor then used this testimony during closing argument.<sup>2</sup> The Keene court reviewed *State v. Lewis*, 130 Wn. 2d 700, 927 P.2d 235 (1996) and *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), and concluded that there was an impermissible comment on the right to remain silent in *Keene* even though *Miranda* warnings were not involved. The court noted that in *Lewis*, the prosecutor had not commented on the failure to contact the police, and the police officer himself did not testify that Lewis had failed to contact him. In contrast, in *Easter*, the prosecutor used the silence argument in closing, taking up the officer's characterization of Easter as a "smart drunk" because he declined to answer questions at the scene.

In the present case, the testimony of the officer, and the use of the "silence" argument by the prosecutor during closing were similar to what was reversible error in *Keene* and *Easter*. The testimony concerning Mr. Russell's failure to initiate contact with the police, and the prosecutor's direct comment on that fact clearly attempted to use Mr. Russell's silence,

---

<sup>2</sup> During closing argument, the prosecutor argued, [ Detective Pea and the defendant] played phone tag for a little bit and Detective Pea had to leave several messages for him, finally leaving a message she would turn it over to the Prosecutor if she did not hear from him and she never heard from Terry Keene again. **It's your decision if those are the actions of a person who did not commit these acts.** 86 Wn. App at 592 (emphasis added)

---

protected by the constitution regardless of the provision of *Miranda* warnings, as substantive evidence of guilt.

The prosecutor also argues that the prosecutor's argument during closing that Mr. Russell's failure to contact the police was not reasonable was merely impeachment of Mr. Russell's testimony. While it is true that if the defendant testifies, he may be impeached by pre-arrest silence, that silence cannot be used as substantive evidence of guilt:

When defendants take the stand, their prearrest silence may be used to impeach their testimony, but their silence may not be used as substantive evidence of guilt.

*State v. Burke*, 163 Wn.2d 204 181 P.3d 1 (2008)

The *Burke* court did an extensive review of federal and state law regarding comments on the right to remain silent. It pointed out that the *Lewis* court had rejected the premise that if the defendant testifies, a comment on his pre-arrest silence is *always* transformed into impeachment:

We rejected the holding by the Court of Appeals that a defendant's testimony always transforms commentary on the defendant's pre-arrest silence into impeachment. *Id.* at 706 n. 2. We observed:

The Court of Appeals found that the evidence of silence was admissible because Lewis later testified; hence, the prior silence would have been admissible as impeachment evidence. We disagree. If evidence of silence comes in to show guilt in the State's case in chief, then a defendant may be forced to testify to rebut such an inference.

*Lewis* at 706 n.2, cited in *Burke* at 215-216.

The court concluded as follows:

In circumstances where silence is protected, a mere reference to the defendant's silence by the government is not necessarily a violation of this principle; however, when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and Article

I, section 9 of the Washington Constitution are violated.  
*Burke, supra* at 217.

The prosecutor cites *Jenkins v. Anderson*, 447 U.S. 213 100 S. Ct. 2124, 65 L.Ed. 2d 86 (1980) for the proposition that the United States Constitution does not prohibit the use of a defendant's silence before arrest. However, as the *Burke* court noted, the *Jenkins* court went on to say that

[o]ur decision today does not force any state court to allow impeachment through the use of prearrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial.

*Jenkins* at 240, quoted in *Burke* at 214.

In *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002), the court attempted to synthesize rules for determining whether a comment on silence was direct or indirect, and the consequences of each classification. When direct, the error required application of the constitutional harmless error standard. If indirect, the court formulated three additional inquiries:

When a comment from a State agent, usually a law enforcement officer, is indirect, three questions should be considered before deciding whether the comment rises to constitutional proportions. First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? *State v. Curtis*, 110 Wn. App. 6, 13-14, 37 P.3d 1274 (2002). Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense. *Douglas v. Cupp*, 578 F. 2d 266, 267 (9th Cir. 1978). Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant? *State*

*v. Easter*, 130 Wn. 2d 228, 236, 922 P.2d 1285 (1996). Answering “yes” to any of these three questions means the indirect comment is an error of constitutional proportions meriting review using the constitutional harmless error standard, whether or not objection is first made at the trial court. See *Easter*, 130 Wn.2d at 241-42. On the other hand, if “no” is the answer to all three questions and appeal is taken, a non-constitutional error standard of review applies.

In the case at bar, it is clear that the officer’s response to the prosecutor’s question was purposeful and meaningful with the requisite prejudice to Mr. Russell’s right to remain silent. In addition, the comment was exploited by the state during closing argument in an apparent attempt to prejudice the defense. Under the *Romero* formulation a “yes” answer to either of these queries means that even an indirect reference to the defendant’s silence must be constitutional error, and reviewed using the standard of constitutional harmless error.

In the present case, the prosecutor’s argument went well beyond a passing reference to Mr. Russell’s silence. He argued, in essence, that Mr. Russell had a duty to come forward to talk with the police, and that it was unreasonable of him to fail to do so. This argument invited the jury to find guilt based on Mr. Russell’s failure to contact the police after the incident, and violated his right to remain silent, as guaranteed by the Fifth Amendment to the United States Constitution and Art. I §9 of the Washington Constitution.

The error was not harmless. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Watt*, 160 Wn. 2d 626, 635, 160 P.2d 640 (2007).

Only if the untainted evidence is so overwhelming that it *necessarily* leads to a finding of the defendant's guilt can the court determine the error to be harmless. *State v. Guloy*, 104 Wn. 2d 412, 426, 705 P.2d 1182 (1985).

The evidence in this case was not overwhelming. The jury had to determine whether Mr. Russell was acting in self-defense to decide the assault charge, whether he was acting with the specific intent to commit a burglary at the time of the assault, and whether he entered or remained unlawfully in his wife's apartment at all. All of these issues were contested. Since the error was not harmless, this court should reverse his conviction and remand for a new trial.

B. Mr. Russell did not receive effective assistance of counsel.

1. Lesser included instruction

The prosecutor's only response to Mr. Russell's argument that his trial counsel was ineffective for not asking for an instruction on the lesser-included offense of assault in the fourth degree is to suggest that this was an unreviewable tactical decision. Resp. Br. at 15-16. This argument should be rejected, for the reasons outlined in the opening brief at 26-27. A significant number of Washington cases hold that it can be ineffective assistance to rely on an "all or nothing" strategy. This line of cases has recently been lengthened by this court's decision in *State v. Breitung*, \_\_\_ Wn. App. \_\_\_\_; No. 38869-3-II, (decided April 20, 2010). *Breitung* applied the factors to gauge whether a tactical decision not to

request a lesser included offense instruction is sound or legitimate which were set out in *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010); *See also State v. Pittman*, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); and *State v. Ward*, 125 Wn. App. 243, 249-51, 104 P.3d 670 (2004). The *Breitung* court held that it was ineffective for trial counsel to pursue an “all or nothing” strategy in a second-degree assault case. The factors set out in *Grier* were as follows: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

The *Breitung* court found that even the four month difference in penalties which would have applied to *Breitung* supported the conclusion that it was ineffective to fail to ask for a lesser-included offense. The court noted that assault in the second degree was also a felony and a “three strike” offense, adding to the disparity in punishment. The court also noted that given *Breitung*'s testimony, which essentially admitted a fourth degree assault, there was a substantial risk in pursuing an “all or nothing” strategy.

As argued in Mr. Russell's opening brief, all three *Grier* factors are present here. First, the sentence disparity was even much higher than in *Breitung*, both because of the inherently higher standard range, but also because of the upward leveraging effect the assault conviction had on the

burglary sentence. Second, asking for a lesser-included offense was not incompatible with the affirmative defense of self-defense, as in *State v. Ward, supra*. Finally, as in *Breitung*, there was a substantial danger in pursuing an “all or nothing” strategy because it left the jury with no middle ground, even if it felt that the felony assault was not justified by the evidence. The court should hold that it was not a justifiable tactical decision to forego asking for a lesser included offense of assault in the fourth degree under the circumstances of this case, reverse Mr. Russell’s conviction, and remand for a new trial on this basis.

## 2. Limiting instruction

The prosecutor is correct that Washington courts have held under some circumstances that it is not ineffective assistance of counsel to forego asking for a limiting instruction in order to avoid emphasizing damaging evidence. See *State v. Yarbrough*, 151 Wn. App. 66, 210 P.2d 1029 (2009). However, requesting the instruction was absolutely necessary here. This case did not involve a situation where evidence of other prior acts might be reemphasized by an instruction. Here the evidence which needed to be limited was the impeachment by the prosecutor of Ms. Russell through her prior inconsistent statement to the investigating officer.<sup>3</sup>

---

<sup>3</sup> The prosecutor seems to suggest (Resp. Br. at 17) that it was defense counsel who was trying to impeach Ms. Russell, and therefore an instruction on the use of impeachment evidence would be contrary to the defense theory of the case. It should be clear that it was the prosecutor

Without a limiting instruction, there was a substantial danger that the jury would use these statements as substantive evidence, which it was not entitled to do.<sup>4</sup> The statements were otherwise inadmissible hearsay, but for their use as impeachment, a fact which the prosecutor used to get over Mr. Russell's trial lawyer's objection. Having already made an objection in the jury's presence, which led to the jury being excused while the evidentiary point was argued, there was no tactical advantage to be had in foregoing an instruction which would have assured the jury's proper and limited consideration of the officer's testimony. Under these facts, the failure to request a limiting instruction constituted ineffective assistance of counsel. This court should reverse the conviction for burglary and remand for a new trial.

3. "Defense injuries" testimony

The prosecutor did not establish a foundation for Officer Thomas' testimony about the nature and significance of Mr. Higgins' injuries from the scuffle. Defense counsel, however, did not object to this testimony. Had he done so, and the court excluded this testimony, there would have been no need for any cross-examination, however skillfully done. By the time the testimony about the "defensive" nature of the injuries had come

---

who was impeaching Ms. Russell, and who was trying to use the impeachment as substantive evidence.

<sup>4</sup> The prosecutor used this impeachment testimony in closing to argue the state had proven directly that Mr. Russell did not have his wife's permission to enter her house, and that therefore he had committed burglary. RP 333.

in, the damage was already done.

It is ineffective assistance of counsel for defense counsel to fail to investigate the credentials of an expert witness, for either side. See *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987). The failure to make a timely objection to “expert” testimony by the officer on the nature of the injuries in this case was not a viable tactical decision. This court should reverse the conviction and remand for a new trial on the assault charge.

C. The trial court erred in admitting the “threat” testimony under ER 404 (b).

A trial court considering the admissibility of evidence under ER 404 (b) must make several findings. The court must (1) find by a preponderance of the evidence that the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The prosecutor’s brief does not discuss the fact that the trial court did not make the preliminary determination that the misconduct had actually occurred, and did not make any of the required findings for admissibility on the record with the appropriate balancing test.

The trial court never clearly found by a preponderance that Mr.

Russell had actually threatened to “snap [Mr. Higgins] like a twig.” Given the equivocal nature of Higgins’ testimony on this point, this was understandable. See Opening Br. at 31. Even if it made this preliminary finding, the trial court never identified a purpose for admitting the evidence, did not determine its relevance, and did not weigh its probative value against its prejudicial impact. For all of those reasons, the trial court erred in admitting the evidence. This court should find the error had a reasonable possibility of affecting the outcome of the case, and reverse and remand for a new trial.

- D. The trial court erred in excluding Mr. Higgins’ felony theft conviction.

The prosecutor is correct that the trial judge’s decision to exclude Mr. Higgins’ theft conviction is reviewable for an abuse of discretion. Mr. Russell submits that the trial court did abuse its discretion in excluding evidence of the state’s star witness’ conviction for a crime of dishonesty.

Much of the prosecutor’s discussion of this issue is devoted to the standards which govern a trial court’s decision to admit a prior conviction under ER 609 against a testifying *defendant*. See Resp. Br. at 28, citing to *State v. Alexis*, 95 Wn. 2d 15, 621 P.2d 1269 (1980). While the *Alexis* factors are relevant to that type of decision, this was not the situation facing the trial court here.

Crimes involving dishonesty or false statement are automatically admissible, without regard to any balancing test, because ER 609 deems

them to be probative. The issue here was the fact that the conviction was more than 10 years old. Under ER 609 (b) the trial court could then admit the conviction in the interests of justice, provided that the party offering the conviction (here, the defense) had given sufficient notice of its intent to offer the conviction. The state never argued that notice had not been given, and thus the court's terse decision appears to have been made primarily, if not solely, because the conviction was just over 10 years old.

The state's case depended in large part on the jury's acceptance of Mr. Higgins as a credible witness. Had the trial been held a few months earlier, the prior conviction for theft would have been automatically admissible, thus giving the jury important information to assess the state's star witness' credibility.<sup>5</sup> It was not in the interest of justice to exclude the prior conviction. As in *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), the exclusion of evidence affecting the credibility of the state's star witness in a close case had a reasonable likelihood of affecting the outcome of the trial. This court should hold that the trial court abused its discretion in excluding Mr. Higgins' prior felony conviction for theft.

- E. Mr. Russell's right to attend trial and testify were unfairly burdened by cross-examination and argument that his testimony could be tailored based on what he had heard.

Mr. Russell argued in his opening brief that this court should interpret Const. Art. I §22 to prohibit prosecutors from burdening

---

<sup>5</sup> If we consider the jury to be like an employer, it would certainly want to have a "background check" on the witness which disclosed his prior theft conviction.

defendants’ rights to attend and participate in their trial by allowing cross-examination and argument concerning “tailoring” of their testimony. See Opening Br. at 34-41. As the prosecutor points out, this issue has been decided by Division One of this Court in *State v. Martin*, 151 Wn. App. 98 (2009). The Supreme Court has now granted review in *Martin*. *State v. Martin* #83709-1 (rev. granted 2/9/10.)<sup>6</sup> As an alternative basis for prohibiting this type of unfair conduct, this court may also exercise its supervisory powers. See Opening Br. at 41-47.

F. There was insufficient evidence to convict Mr. Russell of second-degree assault, under the alternative charged in the information.

The state’s brief discusses the elements of an assault charged under RCW 9A.36.021 (1)(a), and argues that the evidence was sufficient to convict Mr. Russell under this prong of the statute.<sup>7</sup> Resp. Br. at 36. However, this was not the form of assault charged in this case. The state alleged that Mr. Russell violated RCW 9A.36.021(1)(e), assault with the specific intent to commit another specified felony. Here the specified felony was also charged in the alternative, burglary in the first degree, or harassment. Since the jury was not instructed that it had to be unanimous

---

<sup>6</sup> The prosecutor’s brief incorrectly asserted that review had been denied. Resp. Br at 9.

<sup>7</sup> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm;

as to which of the predicate felonies was intended, this court must determine whether there was sufficient evidence to support both alternatives. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007). The state's brief does not discuss this requirement.

While the evidence would support a conviction for fourth degree assault, assuming the jury rejected the proposition that Mr. Russell was acting in self-defense, it would not support a second degree assault conviction under the alternative charged here. Mr. Higgins' testimony was that the scuffle happened after Mr. Russell had already entered the house. Any assault that occurred was not with the intent to commit a burglary. Similarly, Higgins' testimony was that Mr. Russell threatened him during the course of their scuffle, which lasted only a short period of time. There was no evidence that the assault was committed with the intent of committing the crime of felony harassment. Given the absence of a unanimity instruction, and the failure to prove both alternatives, this court should vacate the conviction for assault in the second degree.

G. The trial court erred in computing Mr. Russell's offender score.

Contrary to the state's argument at 37 and 38 of Respondent's brief, the present case does not involve the merger doctrine, which is used to prevent the state from "pyramiding" crimes. See *State v. Johnson*, 92 Wn. 2d 671, 600 P.2d 1249 (1979). That doctrine attempts to assess

whether or nor the Legislature intended to punish multiple crimes separately. Mr. Russell's does not argue for the application of the merger doctrine, but rather for the application of the statutory doctrine of "same criminal conduct" to determine the correct offender score.

The state concedes, as it must, that the crimes found by the jury were at the same time, same place, and involved the same victim. The only other issue in this case that is required for the application of the "same criminal conduct" statute, RCW 9.94A.589 (1)(a), is that the crimes were committed with the same intent. To determine this, courts look objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal objective. *State v. Dunaway*, 109 Wn 2d 207, 215, 743 P.2d 1247 (1987).

To commit a burglary, Mr. Russell would have to enter or remain unlawfully with the intent to commit a crime against a person or property. Although the information did not specify the intended crime, under the state's theory of the case, the intended crime was assault. Similarly, under the charging alternative used by the state, the assault was committed with the intent to commit either burglary or harassment.<sup>8</sup> While the state now argues that the crimes had different purposes, Resp. Br. at 38, it makes no argument why this would be true, and completely ignores

---

<sup>8</sup> In finding "same criminal conduct" in one of the three companion cases in *Dunaway*, the court noted that "Indeed, it was Dunaway's very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping." The same is true in the present case, with respect to both the assault and burglary charge.

the interlocking nature of its own charging document. Moreover, there is no indication from the state's trial evidence that there was any substantial change in the nature of the criminal objective as alleged in the information. This court should find that all the requirements for the application of the "same criminal conduct" statute are present, vacate the sentences, and remand for resentencing with an offender score of zero for the burglary charge.

H. The trial court erred in refusing to consider an exceptional sentence.

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative *actually considered*." *State v. Grayson*, 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005)(emphasis added); *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008). A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. *State v. Garcia-Martinez*, 88 Wn. App 322, 329, 944 P.2d 1104 (1997).

In *Grayson, supra*, the court determined not to use the DOSA alternative "mainly" because it thought that there was insufficient funding for the program. The Supreme Court reversed, "on the limited grounds that the trial judge did not appear to *meaningfully* consider whether a sentencing alternative was appropriate." 154 Wn. 2d at 343. (Emphasis

added). The court reversed despite acknowledging that there were ample grounds to find that Grayson may *not* have been a good candidate for DOSA. 154 Wn. 2d at 342.

The trial judge in the present case listened to the prosecutor's presentation at sentencing, and as defense counsel was beginning his presentation, pointedly told defense counsel that she had to preside over the juvenile docket at nine o'clock. The hearing had been scheduled to begin at 8:30. RP 391. Defense counsel indicated twice during his subsequent presentation that he was trying to shorten his presentation. RP 400, 403.

Defense counsel presented several valid grounds for an exceptional sentence downward, as argued in the Opening Brief at 52-54. While the trial judge did compare the facts of the present case to a second-degree assault where she had imposed a standard range sentence of 17 months on more egregious facts, the trial judge appeared to feel that her hands were tied:

... And I have – as I said, I have a hard time reconciling that with the seventeen months I gave somebody two days ago. That was the high end of the standard range for something that could have been charged as an attempted murder. *But I'm not here to legislate the Sentence Reform Act nor legislate how the prosecutor's office does. I've got to impose what there is.* I don't know that there are mitigating circumstances to impose a – mitigating circumstances sentencing range down. RP 413-14 (emphasis added).

Significantly, the court did not articulate any reasons for rejecting any of the offered bases for an exceptional sentence.

Mr. Russell submits that he was entitled to have the court give “meaningful consideration” to whether a sentence below the standard range was appropriate. The trial court did not appear to give any meaningful consideration to the legal grounds for an alternative sentence that defense counsel laid out, and her comments suggest she was pressed for time due to her other duties that morning. Accordingly, this court should vacate the sentence, and remand for a new sentencing hearing at which the trial court could give meaningful consideration to the possibility of a sentence below the standard range dictated by the Sentencing Reform Act.

## II. CONCLUSION

Mr. Russell did not receive a fair trial. The prosecutor branded him as “unreasonable” because he did not call the police himself after his scuffle with Mr. Higgins, thus unfairly commenting on his right to remain silent. The prosecutor also unfairly exploited the fact that Mr. Russell exercised his right to confront the witnesses against him face to face before testifying at his trial by suggesting that this gave him the unique opportunity to falsify his testimony.

Mr. Russell did not receive the effective assistance of counsel guaranteed by the Sixth Amendment and Art. I §22 of the Washington Constitution. His trial lawyer failed to ask for an instruction on the lesser-included offense of fourth degree assault, did not ask for an instruction limiting the use of impeachment testimony, and did not move to exclude

“expert” testimony by the investigating officer on the topic of “defense injuries.” All of these constituted deficient performance under current Washington case law, and all three resulted in prejudice to Mr. Russell.

Mr. Russell’s trial was also rendered unfair by the trial court’s evidentiary rulings. The trial court failed to find that Mr. Russell had actually made a threat to Mr. Higgins, and then failed to conduct the balancing test on the record to determine whether the threat evidence met the standards for admissibility before allowing the state to introduce this evidence. The trial court erred in excluding Mr. Higgins’ felony theft conviction which would have been automatically admissible under ER 609 had the trial taken place a few months earlier. Since the jury’s assessment of Mr. Higgins as a credible witness was crucial to the state’s case, these errors had a reasonable possibility of affecting the outcome of the trial.

Even if the court affirms the convictions in this case, it should nevertheless vacate the sentence. The trial court failed to correctly calculate the offender score in this case because it apparently confused the common law concept of merger with the statutory concept of “same criminal conduct” under RCW 9.94A.589 (1)(a). Since the three charges here involved the same victim, time, place, and intent, Mr. Russell’s offender score should have been zero. The trial court also erred by failing to give meaningful consideration to an exceptional sentence, given the mitigating circumstances present in the case.

For all of the above reasons, and the reasons set forth in Appellant's opening brief, the court should reverse and remand to the trial court.

Dated this 4 day of May, 2010

LAW OFFICE OF MARK MUENSTER

*Mark W. Muenster*

MARK W. MUENSTER, WSBA 11228

Attorney for Appellant Jay Russell

1010 Esther Street

Vancouver, WA 98660

APPENDIX

DIRECT EXAMINATION (RP 195-96.)

Q: ( by the prosecutor) Okay. Did you attempt to contact the Defendant on that date?

A: That date or shortly thereafter with follow-up.

Q: Were you ever able to personally get in contact with the Defendant with regard to this case?

A: I was not.

CROSS EXAMINATION (RP 285)

Q: Okay. So after you left, how long did you wait to call 9-1-1 to report that someone had came at you and attacked you?

A: I did not call 9-1-1.

Q: You didn't call 9-1-1?

A: No I did not.

Q: Okay. All right. So you chose not to call 9-1-1 and just to leave after someone came at you and tried to attack you?

A: Correct.

Q: Correct. And you chose not to call 9-1-1 after putting a hole in your wife's wall correct?

A: Correct.

Q: Okay. All right. So when did you decide to go on la – to law enforcement and report this incident?

A: I didn't feel there was a need to.

CLOSING ARGUMENT: (RP 327)

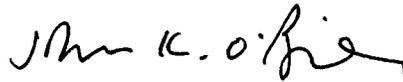
What was the first thing Matthew Higgins did at that point in time? He called Chris Russell and then he called 9-1-1 to report it moments after it happened. And he was there when law enforcement arrived and he gave his side of the story. *Defendant was nowhere to be found. Law enforcement said they attempted to contact him, nowhere to be found.*

*Defendant never contacted 9-1-1. He claims he was came at, attacked, and in fear for his safety at a point that he had to throw someone through a wall. He never picked up the phone to call 9-1-1 or report that. Never went to law enforcement. Mr. Higgins – first thing he did after this attack was call the authorities. That's what a reasonable person would do in those circumstances.*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 4<sup>th</sup> day of May ,2010 with postage fully prepaid, or by hand delivery (prosecutor's copy)

DATED this 4 th day of May ,2010



John K. O'Brien

Mike Kinnie  
Deputy Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666

Jay Russell  
9152 Washougal River Road  
Washougal, WA 98671

FILED  
COURT OF APPEALS  
10 MAY -6 AM 11:30  
STATE OF WASHINGTON  
BY Kor  
TESTIMONY