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COURT OF APPEALS
DIVISION II

10 APR 14 PM 1:25

STATE OF WASHINGTON

BY 
DEPUTY

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

v.

JAY CLIFFORD RUSSELL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01961-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF FACTS	1
II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1	1
III. RESPONSE TO ASSIGNMENT OF ERROR NO.2	5
IV. RESPONSE TO ASSIGNMENT OF ERROR NOS. 3, 4, AND 5 ..	13
V. RESPONSE TO ASSIGNMENT OF ERROR NO. 6	23
VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 7	26
VII. RESPONSE TO ASSIGNMENT OF ERROR NO. 8	29
VIII. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 9 AND 10 ...	32
IX. RESPONSE TO ASSIGNMENT OF ERROR NO. 11	37
X. RESPONSE TO ASSIGNMENT OF ERROR NO. 12	38
XI. CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases

<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).....	8
<u>Fletcher v. Weir</u> , 455 U.S. 603, 606-607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490 (1982) (<i>per curiam</i>).....	8
<u>Jenkins v. Anderson</u> , 447 U.S. 231, 239, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86 (1980).....	8
<u>People v. Lawton</u> , 196 Mich. App. 341, 353, 492 N.W.2d 810 (1992).....	7
<u>Portuondo v. Agard</u> , 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).....	9, 30, 31
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)....	29
<u>State v. Aho</u> , 137 Wn.2d 736, 745, 975 P.2d 512 (1999).....	15
<u>State v. Alexis</u> , 95 Wn.2d 15, 621 P.2d 1269 (1980)	28
<u>State v. Anderson</u> , 144 Wn. App. 85, 180 P.3d 885 (2008)	2
<u>State v. Arthur</u> , 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)	2
<u>State v. Barragan</u> , 102 Wn. App. 754, 762, 9 P.3d 942 (2000)	15, 16
<u>State v. Bowerman</u> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990)	14
<u>State v. Christopher</u> , 114 Wn. App. 858, 863, 60 P.3d 677, <i>review denied</i> , 149 Wn.2d 1034 (2003).....	28
<u>State v. Clark</u> , 83 Haw. 289, 301, 926 P.2d 194 (Haw. 1996).....	25
<u>State v. Craig</u> , 82 Wn.2d 777, 783, 514 P.2d 151 (1973).....	2
<u>State v. Daniels</u> , 87 Wn. App. 149, 155, 940 P.2d 690 (1997), <i>review denied</i> , 133 Wn.2d 1031 (1998)	36
<u>State v. Davis</u> , 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)	2, 3
<u>State v. DeVries</u> , 149 Wn.2d 842, 848, 72 P.3d 748 (2003)	25
<u>State v. Donald</u> , 68 Wn. App. 543, 551, 844 P.2d 447, <i>review denied</i> , 121 Wn.2d 1024 (1993).....	16
<u>State v. Easter</u> , 130 Wn.2d 228; 922 P.2d 1285; 1996 Wash. LEXIS 559. 6	
<u>State v. Elliott</u> , 114 Wn.2d 6, 17, 785 P.2d 440 (1990).....	38
<u>State v. Esters</u> , 84 Wn. App. 180, 183-84, 927 P.2d 1140 (1996), <i>review denied</i> , 131 Wn.2d 1024 (1997)	36
<u>State v. Freeman</u> , 118 Wn. App. 365, 371-372, 76 P.3d 732 (2003).....	38
<u>State v. Garrett</u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994)	14
<u>State v. Green</u> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	35
<u>State v. Grimes</u> , 92 Wn. App. 973, 978, 966 P.2d 394 (1998)	35
<u>State v. Hall</u> , 104 Wn. App. 56, 62, 14 P.3d 884 (2000), <i>review denied</i> , 143 Wn.2d 1023 (2001).....	36
<u>State v. Hermann</u> , 138 Wn. App. 596, 605, 158 P.3d 96 (2007)	23

<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	15
<u>State v. Holmes</u> , 43 Wn. App. 397, 400, 717 P.2d 766, <i>review denied</i> , 106 Wn.2d 1003, (1986)	24
<u>State v. Hughes</u> , 106 Wn.2d 176, 191, 721 P.2d 902 (1986).....	2, 3
<u>State v. Jones</u> , 33 Wn. App. 865, 872, 658 P.2d 1262, <i>review denied</i> , 99 Wn.2d 1013 (1983)	14
<u>State v. J-R Distribs., Inc.</u> , 82 Wn.2d 584, 590, 512 P.2d 1049 (1973).....	1
<u>State v. Keene</u> , 86 Wn. App. 589, 592, 938 P.2d 839 (1997).....	6
<u>State v. Kidd</u> , 57 Wn. App. 95, 100, 786 P.2d 847 (1990).....	2, 3, 25
<u>State v. King</u> , 24 Wn. App. 495, 501, 601 P.2d 982 (1979).....	15, 16
<u>State v. Lewis</u> , 130 Wn.2d 700, 705, 927 P.2d 235 (1996).....	6, 7
<u>State v. Lopez</u> , 105 Wn. App. 688, 694-95, 20 P.3d 978 (2001).....	35
<u>State v. Madison</u> , 53 Wn. App. 754, 763, 770 P.2d 662, <i>review denied</i> , 113 Wn.2d 1002, 777 P.2d 1050 (1989).....	14, 15
<u>State v. Martin</u> , 151 Wn. App. 98, 210 P.3d 345 (2009).....	9, 10, 30
<u>State v. McDaniels</u> , 39 Wn. App. 236, 240, 692 P.2d 894 (1984)	35
<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	13
<u>State v. McNeal</u> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	14
<u>State v. Miller</u> , 110 Wn. App. 283, 285, 40 P.3d 692 (2002).....	30
<u>State v. Myers</u> , 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).....	15
<u>State v. Piche</u> , 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), <i>cert. denied</i> , 390 U.S. 912 (1968).....	13
<u>State v. Powell</u> , 126 Wn.2d 244, 259-61, 893 P.2d 615 (1995)	26
<u>State v. Price</u> , 126 Wn. App. 617, 649, 109 P.3d 27, <i>review denied</i> , 155 Wn.2d 1018 (2005)	16
<u>State v. Riley</u> , 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).....	2
<u>State v. Romero</u> , 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).....	6, 7
<u>State v. Russell</u> , 69 Wn. App. 237, 246, 848 P.2d 743, <i>review denied</i> , 122 Wn.2d 1003 (1993)	36
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	35
<u>State v. Saunders</u> , 120 Wn. App. 800, 821, 86 P.3d 232 (2004)	38
<u>State v. Schneider</u> , 36 Wn. App. 237, 241, 673 P.2d 200 (1983).....	35
<u>State v. Sexsmith</u> , 138 Wn. App. 497, 504, 157 P.3d 901 (2007), <i>rev. denied</i> , 163 Wn.2d 1014 (2008)	29
<u>State v. Stenson</u> , 132 Wn.2d 668, 702-03, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998)	26
<u>State v. Tharp</u> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981)	28
<u>State v. Thomas</u> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987).....	14
<u>State v. Thompson</u> , 95 Wn.2d 888, 632 P.2d 50 (1981).....	28
<u>State v. Townsend</u> , 142 Wn.2d 838, 843, 15 P.3d 145 (2001)	13
<u>State v. Tunney</u> , 129 Wn.2d 336, 341, 917 P.2d 95 (1996).....	36

<u>State v. Varga</u> , 151 Wn.2d 179, 199, 86 P.3d 139 (2004)	13
<u>State v. Williams</u> , 149 Wn.2d 143, 67 P.3d 1214 (2003)	40
<u>State v. Womac</u> , 130 Wn. App. 450, 456, 123 P.3d 528 (2005).....	25
<u>State v. Woods</u> , 63 Wn. App. 588, 590-91, 821 P.2d 1235 (1991)	35
<u>State v. Yarbrough</u> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	16
<u>Strickland v. Washington</u> , 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13
<u>United States v. Miller</u> , 283 U.S. App. D.C. 9, 895 F.2d 1431, 1436 (D.C. Cir. 1990).....	25

Statutes

RCW 9.94A.585(1).....	40
RCW 9A.36.021(1)(a)	36
RCW 9A.52.010(3).....	35

Rules

ER 401	25
ER 404(b).....	16, 23, 24, 25
ER 609(a)(1)	28
ER 609	27

I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the appellant. Where additional information is needed it will be provided in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court erred in giving an “aggressor” instruction as it relates to the self defense claim by the defendant. As part of the court’s instructions to the jury (CP 69) was an instruction dealing with the concept of first aggressor. Instruction No. 18 to the jury reads as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, 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 is not available as a defense.

Whether the State produced sufficient evidence to justify the aggressor instruction is a question of law and the appellate review is therefore de novo. State v. J-R Distribs., Inc., 82 Wn.2d 584, 590, 512 P.2d 1049 (1973). The State need only produce some evidence that the

defendant was the aggressor to meet its burden of production. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); *see* State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986); State v. Anderson, 144 Wn. App. 85, 180 P.3d 885 (2008).

The aggressor instruction has been problematic and at least one case says there are few situations where it is warranted. State v. Arthur, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985). Citing Arthur, another case says that aggressor instructions are not favored. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). Nevertheless, it has long been the law that the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, "unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973), cited in State v. Riley, 137 Wn.2d at 909. The court reaffirmed its earlier holding that an aggressor instruction "is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." Riley, 137 Wn.2d at 910, *citing* State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor

instruction is appropriate. State v. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992).

As part of the evidence in this case, the prosecution called Matthew Higgins, the alleged victim of the assaultive behavior. He indicated that on the date in question that the defendant pushed his way into the residence and grabbed Mr. Higgins and threw him into a wall. (RP 94). Photographs introduced at the time of the trial showed body impressions damaging the sheetrock inside the residence.

QUESTION (Deputy Prosecutor): Okay. All right. Did you ever invite the Defendant in on that date?

ANSWER (Matthew Higgins): Absolutely not.

QUESTION: Okay. Did the Defendant ever specifically ask if he could come in?

ANSWER: No.

QUESTION: Okay. Okay. And what was going through your head when you saw the Defendant coming up to the doorway on that day?

ANSWER: Get the door closed.

QUESTION: Okay. Did you want him in the house at that point in time?

ANSWER: No I was there by myself.

QUESTION: Okay. All right. And had he ever been inside of the house when it – when you've been there?

ANSWER: No. Never.

QUESTION: Okay. So that was the first time he'd actually come inside Chris' house when you've been there?

ANSWER: When I was there, yes.

QUESTION: Okay. Had the two of you been alone together before that day?

ANSWER: Jay and I?

QUESTION: Yeah.

ANSWER: No.

QUESTION: No? Okay. And on – on that date, September 5th, you'd been together with Chris approximately you say for about two years? Year and a half to two years?

ANSWER: About that.

QUESTION: All right. And so once he got to the door and forced it open, what did he do at that point in time?

ANSWER: He – as he came in, shut the door behind him, grabbed me by the throat and put me up against the wall and cocked his fist back behind his head and said if he ever catches me around his wife and kids again, he will kill me.

-(RP 98, L6 – 99, L16)

Mr. Higgins also testified that the defendant put his hands around Mr. Higgins' neck for 10-15 seconds, prevented the person from breathing. Again, photos were introduced of the marks to the neck. (RP 101-103).

The State submits that there is sufficient evidence in the record of the defendant pushing his way into the residence and grabbing Mr. Higgins to allow the question of first aggressor to be given to the jury.

This matter also was part of a motion for new trial and at the end of those motions, the court entered its Findings of Fact and Conclusions of Law re: Defendant's Motion Under CrR 7.4 and CrR 7.5. (CP 153). A copy of those Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. The information in the Findings of Fact is consistent with the outline just provided of the testimony.

III. RESPONSE TO ASSIGNMENT OF ERROR NO.2

The second assignment of error raised by the defendant is a claim that the prosecutor violated the defendant's constitutional right to remain silent before arrest by commenting on his failure to call the police himself and by comments regarding the inability of the police to contact the appellant after they were investigating the incident.

The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. "Thus, 'a police witness may not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions.'" State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (*quoting* State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)).

In our case, the State argues the sum of the testimony merely related to unsuccessful attempts to make initial contact with the defendant. Officer Thomson attempted to contact him, but never did. The defendant cites no cases finding a violation of the right to pre-arrest silence under these circumstances. Instead, he cites cases distinguishable because the offending testimony concerned a defendant's silence after actual contact between law enforcement and the defendant. *See* State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997) (detective offered testimony that the defendant did not return phone calls or keep appointments after being warned that the case would be turned over to prosecutors unless he contacted the police); Romero, 113 Wn. App. at 785 (officer testified defendant would not waive Miranda rights or talk to investigators after arrest); State v. Easter, 130 Wn.2d 228; 922 P.2d 1285; 1996 Wash. LEXIS 559 (officer testified defendant "totally ignored" him when questioned after making contact with him at the scene of an accident). In

these cases, the comments clearly implicated the defendants' right to silence. Here, Officer Thomson's testimony merely revealed his unsuccessful attempts to make initial contact with the defendant. The majority of the testimony was made within the context of explaining his inability to reach anyone to assist him in locating the defendant during the course of his investigation. Further, the State did not ask the jury to consider this as evidence that the defendant was guilty.

Given all, the testimony does not implicate the defendant's right to remain silent. *See* People v. Lawton, 196 Mich. App. 341, 353, 492 N.W.2d 810 (1992) (finding the Fifth Amendment does not apply to testimony regarding a defendant's conduct prior to police contact); *see also* Lewis, 130 Wn.2d at 706 (declining to find a Fifth Amendment violation where no one testified the defendant refused to talk to police). Further, the State did not attempt to argue or exploit any inference of guilt based upon Officer Thomson's testimony. Romero, 113 Wn. App. at 790.

However, assuming for argument Officer Thomason's testimony implicated the Fifth Amendment, it would be, at most, an indirect comment. *See* Romero, 113 Wn. App. at 790-91. The State's questioning does not appear intended to draw out any comment on the defendant's silence. Romero, 113 Wn. App. at 790. Nor, does the answer discussing the officer's attempts to locate the defendant appear designed to inject a

comment on the defendant's right to remain silent. Finally, because the State did not exploit the assumed indirect comment, the defendant cannot show any prejudice. *Id.*

Part of this claim also was that the prosecutor violated the defendant's right to remain silent by arguing that the defendant's failure to contact the authorities was not what a reasonable person would have done. The claim is that comments by the deputy prosecutor were flagrant. No objections were made to the statements by the prosecutor in closing argument.

The Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86 (1980), or after arrest if no Miranda warnings are given, Fletcher v. Weir, 455 U.S. 603, 606-607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490 (1982) (*per curiam*). Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. *See* 447 U.S., at 239, 100 S. Ct., at 2129; Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

The prosecutor's closing argument sought to impeach the defendant's testimony. The defendant's testimony painted Mr. Higgins as the first aggressor and himself as the innocent victim. The State submits

that it was free to use the defendant's failure to contact the authorities to show that it was inconsistent with his trial testimony.

The defendant also maintains that the prosecutor violated the defendant's rights by arguing that he watched the entire trial and had an opportunity to tailor his testimony to the evidence. Counsel applies a Gunwall analysis.

This has recently been reviewed in detail by Division I in State v. Martin, 151 Wn. App. 98, 210 P.3d 345 (2009), *review denied*; State v. Martin, 168 Wn2d 1006, 2010 Wash. LEXIS 121 (2010). The Court went thru a detailed Gunwall analysis and determined that:

Without any reason under Gunwall to analyze article I, section 22 independently from the Sixth Amendment, Portuondo [Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)] is controlling. As the Court in Portuondo explained, it is both permissible and irresistible for the jury, in assessing a testifying defendant's credibility, to consider the defendant's opportunity to observe the evidence introduced at trial. Were we to hold, as Martin urges, that a prosecutor's questions about a defendant's opportunity to tailor testimony constitute a per se violation of a defendant's rights under article I, section 22, the logical next step would be to require trial courts to instruct members of the jury that they are not permitted to consider the defendant's access to the evidence introduced at trial. But such a rule would be at odds with the principle that a defendant, by testifying, exposes himself to credibility challenges as does any other witness. Because it is permissible for the jury to evaluate a defendant's credibility by considering his opportunity to tailor his testimony, a prosecutor may draw attention to the defendant's opportunity to do so on cross-examination in

order to impeach the defendant's credibility. Such questions do not constitute an improper comment on a defendant's exercise of his constitutional rights because they do not point to the exercise of his rights as evidence of guilt. Therefore, the prosecutor in this case did not engage in any misconduct by asking Martin about his opportunity to tailor his testimony to the evidence previously introduced at trial.

-State v. Martin, 151 Wn. App at 116

The defendant, in his direct examination in front of the jury, talked about a serious fight with Mr. Higgins in the residence. (Clearly, this is demonstrated by the photos of the damage to the property and drywall inside the residence). He further indicated that most of the contact was by the alleged victim towards him. (RP 250-253). In cross-examination he did acknowledge that he'd had an opportunity to review the police reports written in the case and that he had reviewed the statements prior to his testimony. (RP 254). He acknowledged that he had a good idea of what all the testimony was going to be from the witnesses prior to testifying in court. (RP 255). The State submits that given the nature of the testimony by the defendant, it was fair argument for the prosecutor to make concerning his unwillingness to contact police after this event. On cross-examination the defendant was asked why he didn't call the police. His answer was as follows:

QUESTION (Deputy Prosecutor): Okay. Okay. All right. All right. And so – it's your story that Mr. Higgins came at you and you were afraid he was going to attack you, correct?

ANSWER (Defendant): It's not my story, it's a fact, counselor.

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

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

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

ANSWER: No I did not.

QUESTION: 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?

ANSWER: Correct.

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

ANSWER: Correct.

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

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

-(RP 285, L5-24)

On re-direct examination of the defendant, his attorney asks him for further clarification concerning not calling the police:

QUESTION (Defense Attorney): You didn't feel it was necessary to call the police?

ANSWER (Defendant): No. Nobody was injured.

QUESTION: Nothing further.

ANSWER: It was a mistake.

-(RP 289, L3-7)

The defendant readily admitted that he was the only one who had heard and listened to all of the evidence in the case. (RP 286). It's interesting to note that when that question is answered they are also referencing that the investigating officer, Officer Thomson, was also present during the entire trial. (RP 286, L15-19). The State submits that there has been no evidence to support a proposition that the defendant's right to remain silent had been violated. The police were looking for him but had not talked to him at all. Further, he acknowledged he sat through the entire case and further acknowledged that he had not reported it to the police and gave an explanation to the jury as to why he didn't. The State submits that there has been no violation of the defendant's rights demonstrated.

IV. RESPONSE TO ASSIGNMENT OF ERROR NOS. 3, 4, AND 5

The next three assignments of error all deal with a claim of ineffective assistance of counsel. One of them is a claim that the trial lawyer should have requested the lesser included offense of Fourth Degree Assault, another claim is that he should have asked for limiting instructions regarding a prior inconsistent statement by a witness and that he failed to object to police testimony regarding “defensive” injuries and whether the marks on the neck were consistent with some type of choking.

The Appellate Court reviews an ineffective assistance of counsel claim de novo, based on the record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The Court gives great judicial deference to trial counsel's performance and Court begins its analysis with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001); McFarland, 127 Wn.2d at 335. Only “a clear showing of incompetence” will overcome this presumption of effectiveness. State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004) (*citing* State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912 (1968)). The Appellate Court will not find ineffective assistance of counsel if the action complained of is a

legitimate trial tactic, *id.* (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)), and does not fall below “an objective standard of reasonableness based on consideration of all the circumstances.” Garrett, 124 Wn.2d at 518 (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, “exceptional deference must be given when evaluating counsel's strategic decisions.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, *review denied*, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

If the defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of

ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In discussing the contention that a social worker improperly commented on a child's credibility in a statutory rape case, the court noted that "[t]he decision . . . to object is a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) The court then indicated that "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Madison, 53 Wn. App at 763.

A trial court need not give a limiting instruction absent a party's request. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (strategy to obtain an acquittal). State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979); State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). In King, a prosecution for Assault in the Second Degree, the Appellate Court held that counsel was not deficient in failing to request a lesser included instruction on simple assault because "[i]t was an all-or-nothing tactic that

well could have resulted in an outright acquittal.” King, 24 Wn. App. at 501.

Prior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. *See State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (“[w]e can presume that counsel did not request a limiting instruction” for ER 404(b) evidence to avoid reemphasizing damaging evidence), *review denied*, 155 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993); State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009).

The State submits that the nature of the defense being offered (self defense) would not necessitate the request for an Assault IV lesser, even if one were to be available. Clearly, this is an area of tactics and, as case law clearly indicates, it is not subject to ineffective assistance. Likewise the giving of limiting instructions regarding impeachment can also be considered a trial tactic. Oftentimes, the defense attorney may not wish to emphasize evidence in either the questioning, closing argument, or

instructions being given to the jury. This is something left to the sound tactical decision-making of the attorney. For example, the defendant is claiming ineffective assistance by not giving some type of limiting instruction regarding impeachment of Christina Russell related to a prior inconsistent statement to the police. Yet, it is obvious from the testimony of Ms. Russell that she not only was a reluctant witness, but, in many ways, favorable to the defense. It would be inconsistent with the theory of the case to try to impeach her credibility when she was acknowledging that he had permission to enter the residence.

Finally, was the area of the so-called expert testimony by Officer Thomson as it relates to the nature of wounds that he examined and documented on Mr. Higgins. The defendant's claim is that this should not have been allowed. Yet, the defense attorney ably cross-examined Officer Thomson regarding the nature of the injuries that he had seen and his report as it related to those injuries. The State submits that this was a tactical decision by the trial attorney to approach it in this manner.

QUESTION (Defense Attorney): Now you also took pictures of Mr. Higgins' injuries?

ANSWER (Officer Thomson): I did.

QUESTION: And let's see – they were a lightish pink color to the center and left of his throat?

ANSWER: I think it should have been –

QUESTION: Center to right I would say.

ANSWER: - center to right.

QUESTION: So his right side – this side over here?

ANSWER: Correct

QUESTION: You didn't notice any deep purplish bruising?

ANSWER: I did not.

QUESTION: So what we saw was a light pinkish color which was consistent with a fresh abrasion?

ANSWER: Correct.

QUESTION: Now you didn't observe any swelling?

ANSWER: No.

QUESTION: You didn't observe a hand print outline on his neck?

ANSWER: I did not.

QUESTION: That's something you would have noted in a report?

ANSWER: I would have if it would have been present.

QUESTION: Is – now again, you've been on the force seventeen years, if you see a slap or a grab is it uncommon to see actual fingerprints on a hand?

ANSWER: Not on a harsh grab and depending on the body part, no. You can definitely depict digits.

QUESTION: Now Mr. Higgins didn't seek medical attention?

ANSWER: He did not.

QUESTION: And did you feel it necessary to call an ambulance?

ANSWER: I did not.

QUESTION: Mr. Higgins wasn't crying?

ANSWER: No.

QUESTION: He wasn't hysterical?

ANSWER: No.

QUESTION: Now he seemed a little – was he – was he totally disoriented or was he just a little perturbed as well?

ANSWER: He was shook up.

QUESTION: Didn't have any difficulty swallowing?

ANSWER: I'm not sure I asked him that question. I should have if I didn't due to the grab around the throat area, yes.

QUESTION: He made no indication to you that that occurred?

ANSWER: No.

QUESTION: And you didn't include that in your report?

ANSWER: I did not.

QUESTION: And you would have done that when it was fresh in your head?

ANSWER: Yes.

QUESTION: Wasn't hyperventilating?

ANSWER: Not that I recall.

QUESTION: No gasping for air?

ANSWER: No.

QUESTION: No panting?

ANSWER: Not that I recall.

QUESTION: No coughing?

ANSWER: I think there might have been coughing.

QUESTION: Smoker?

ANSWER: Correct.

QUESTION: No signs of respiratory distress that you felt necessary to note in your report?

ANSWER: Correct.

QUESTION: No indicate that his ears were ringing?

ANSWER: Nope.

QUESTION: No indication that he was dizzy?

ANSWER: Not that I recall. That may have been mentioned.

QUESTION: No indication that there was – well we'll go back to that. At any point in your report did you indicate that he felt that he was dizzy?

ANSWER: Just as with everybody trying to write a paper, some details are left out. Not on human intention, but by error.

QUESTION: Okay. As far as your recollection, do you recall him telling you that today?

ANSWER: No.

QUESTION: Do you – did you put it in your report?

ANSWER: No I did not.

QUESTION: And you did your report the day of or the day after this incident while it was fresh in your memory?

ANSWER: It should have been the day of.

QUESTION: Okay. Sarge gets after you if you don't?

ANSWER: DV.

QUESTION: Okay. I'll – correct. Now what you observed essentially were fresh abrasions that were pinkness in color to the biceps and then to the right – right side to center of –

ANSWER: I think I might have made a mistake in my report – yes I did.

-(RP 208, L21 – 212, L22)

The nature of the injuries and wounds discussed by the officer was also agreed to by the defendant when he testified in his case in chief.

QUESTION (Defense Attorney): Okay. Now what do you do when he starts coming at you?

ANSWER (Defendant): I physically – as he’s coming at me I physically grabbed his arms – you know – in front of me – you know? I leaned forward and we both came backwards into the door. And then from there – from the door I turned sideways and we went into the wall.

QUESTION: Okay. When you turned sideways you kind of stepped back – you have a hold of his arms –

ANSWER: Right.

QUESTION: - then you twist your torso is that –

ANSWER: Correct.

QUESTION: - and then what happens?

ANSWER: Then we end up into the wall – you know – and a small scuffle broke out.

QUESTION: Okay. What happens then? Describe the scuffle.

ANSWER: Basically – you know – kind of arms floating around and – you know – trying to gain control. He tried to gain control. I tried to gain control. Basically – you know – defending myself.

-(RP 250, L18 – 251, L15)

The State submits that the examples provided by the defendant of ineffective assistance clearly show tactical decisions being made by the trial attorney. Further, the giving of any type of lesser offense dealing with Assault in the Fourth Degree was an acknowledgment of the overall

strategy of the defense that this was a self defense situation and that the defendant was in fact a totally innocent party.

As stated in State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007), “We accord deference to counsel’s performance in order to “eliminate the distorting effects of hindsight” and, therefore, we presume reasonable performance.” (cites omitted). A decision concerning trial strategy or tactics will not establish deficient performance. (cites omitted).” The State submits that there has been no showing of ineffective assistance in this case.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 6

The sixth assignment of error raised by the defendant is a claim that the trial court erred in allowing 404(b) evidence from the alleged victim that on an earlier occasion the defendant had threatened him. Specifically, at the time of trial the testimony was as follows:

QUESTION (Deputy Prosecutor): Okay. Did you have any negative feelings towards the Defendant on September 5th, 2008?

ANSWER (Matthew Higgins): No, I do not.

QUESTION: Okay. Okay. Had the Defendant made – I guess you say you had one phone conversation with him prior to that date. What was the – what are the details of that?

ANSWER: He just called the house. I answered the phone and he was upset. I don't know exactly why, but the only thing I do remember is he said he could snap me like a twig.

QUESTION: Okay.

ANSWER: And that was the end of the conversation.

-(RP 93, L2-13)

The defendant maintains that this is inappropriate evidence or testimony for the jury to have heard. This matter was the subject of motions outside the presence of the jury and the Judge, after hearing evidence, determined that this would probably be relevant and possibly important because of the nature of the defense: self defense and the potential of a first aggressor allegation. (RP 37). The State further submits that this goes to show animosity and anger directed towards the alleged victim by the defendant and would clearly help demonstrate why it is that the defendant would attack this particular individual.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *See State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), *review denied*, 106 Wn.2d 1003, (1986). But evidence of prior acts may be admitted for other limited purposes,

including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The permitted purposes listed in ER 404(b) are not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983). ER 404(b) "was intended not to define the set of permissible purposes for which bad-acts evidence may be admitted but rather to define the *one impermissible* purpose for such evidence." State v. Clark, 83 Haw. 289, 301, 926 P.2d 194 (Haw. 1996) (quoting United States v. Miller, 283 U.S. App. D.C. 9, 895 F.2d 1431, 1436 (D.C. Cir. 1990)). "[T]he range of relevancy outside the ban is almost infinite." Clark, 83 Haw. at 300 (quoting McCormick on Evidence §190, at 448 (Cleary ed. 1972)).

The true test for admitting prior acts under ER 404(b) is whether "the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effect." State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003); accord State v. Womac, 130 Wn. App. 450, 456, 123 P.3d 528 (2005). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. The Appellate Court reviews a trial court's decision to admit ER 404(b) evidence for abuse of discretion. Womac, 130 Wn. App. at 456.

Trial courts have properly admitted evidence of past abuse by the defendant against the current alleged victim in a variety of circumstances. Evidence of ill will and prior beatings has been properly admitted to show malice, intent, and motive. State v. Stenson, 132 Wn.2d 668, 702-03, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); State v. Powell, 126 Wn.2d 244, 259-61, 893 P.2d 615 (1995).

The State submits that there has been no violation of the rules of evidence in this matter.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 7

The seventh assignment of error raised by the defendant is a claim that the trial court erred by excluding evidence of the alleged victim's conviction for Second Degree Theft. Apparently, the conviction for Second Degree Theft occurred in 1999, 10 years and several months before testimony in this case.

This matter was brought before the trial court in motions in limine and the court, having previously been apprised of the nature of the allegations in the case herein, determined that this really wasn't particularly probative of the issues as she understood them. However, she did leave it open if for some reason it were to become relevant or important in the case.

JH (Deputy Prosecutor): And – and Your Honor, just – our booking records show that he was booked in on January 8th, 1999. He was released on January 12th, 1999. So as far as actually being released from custody, he was released on January 12th, 1999.

Judge: Okay. I'm going to grant the Motion to Exclude –

JH: Thank you, Your Honor.

Judge: - because I'm not so sure it's particularly relevant. If there is something that comes up later that makes it more relevant let's come back to it. But again, if there's also something that's opening the door to it. Okay.

-(RP 23, L21 – 24, L7)

Rule 609. Impeachment by evidence of conviction of crime

(a) *General rule* For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) *Time limit* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old

as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Admission of prior conviction under ER 609(a)(1) is discretionary with the court, State v. Alexis, 95 Wn.2d 15, 621 P.2d 1269 (1980), and will not be disturbed absent a clear showing of abuse. State v. Thompson, 95 Wn.2d 888, 632 P.2d 50 (1981).

Some other factors that may be considered in weighing probative value of credibility against potential prejudice include: (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

State v. Alexis, *supra* at 19. State v. Thompson, *supra*, stated it was not necessary for the trial judge to state reasons for admission of prior convictions. An erroneous evidentiary ruling is not grounds to reverse unless, within reasonable probabilities, it changed the outcome of the trial. State v. Christopher, 114 Wn. App. 858, 863, 60 P.3d 677, *review denied*, 149 Wn.2d 1034 (2003); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The Appellate Court reviews a trial court's decision to admit evidence for abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007), *rev. denied*, 163 Wn.2d 1014 (2008). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court felt that, given the nature of the case and the allegations and the presentations being made by the parties pre-trial, this had very little probative value. However, the trial court did leave the question open if it were to develop fully later on. Apparently, it did not develop later on and was not raised again by the defense.

VII. RESPONSE TO ASSIGNMENT OF ERROR NO. 8

The eighth assignment of error raised by the defendant is a claim again that the defendant's attendance for the full trial was improperly emphasized by the prosecution.

The Gunwall analysis undertaken by the defendant has previously been done in this state. The State submits that there is no reason to modify or change what has previously been done.

State v. Martin, 151 Wn. App. 98, 116, 210 P.3d 345 (2009)

discussed in detail Gunwall in a situation identical to ours. The conclusion:

Without any reason under Gunwall to analyze article I, section 22 independently from the Sixth Amendment, Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) is controlling. As the Court in Portuondo explained, it is both permissible and irresistible for the jury, in assessing a testifying defendant's credibility, to consider the defendant's opportunity to observe the evidence introduced at trial. Were we to hold, as Martin urges, that a prosecutor's questions about a defendant's opportunity to tailor testimony constitute a per se violation of a defendant's rights under article I, section 22, the logical next step would be to require trial courts to instruct members of the jury that they are not permitted to consider the defendant's access to the evidence introduced at trial. But such a rule would be at odds with the principle that a defendant, by testifying, exposes himself to credibility challenges as does any other witness. Because it is permissible for the jury to evaluate a defendant's credibility by considering his opportunity to tailor his testimony, a prosecutor may draw attention to the defendant's opportunity to do so on cross-examination in order to impeach the defendant's credibility. Such questions do not constitute an improper comment on a defendant's exercise of his constitutional rights because they do not point to the exercise of his rights as evidence of guilt. Therefore, the prosecutor in this case did not engage in any misconduct by asking Martin about his opportunity to tailor his testimony to the evidence previously introduced at trial.

In an earlier case, State v. Miller, 110 Wn. App. 283, 285, 40 P.3d

692 (2002) the reasoning in Martin is further explained:

The United States Supreme Court has now held that comments virtually identical to those at issue in Johnson and Smith do not violate or infringe upon any rights guaranteed by the United States Constitution. Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). In closing argument, over defense objection, the trial court in Portuondo allowed the prosecutor to state that the defendant, "unlike all the other witnesses," had a benefit--"he gets to sit here and listen to the testimony of all the other witnesses before he testifies." Portuondo, 529 U.S. at 64. The Supreme Court rejected the argument that such comments violated the defendant's Fifth and Sixth Amendment rights to be present at trial and confront his accusers, and his Fourteenth Amendment right to due process:

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate – and indeed, given the inability to sequester the defendant, sometimes essential – to the central function of the trial, which is to discover the truth. Portuondo, 529 U.S. at 73.

Portuondo effectively overrules Johnson and Smith insofar as they state a different rule. Miller has offered no reason for characterizing the argument as misconduct in his case except for the rationale rejected in *Portuondo*. Therefore, it is not a basis for reversal.

The State submits that there is nothing that has been demonstrated by this defendant to indicate that this is bad case law or that it needs to be re-examined in our situation.

VIII. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 9 AND 10

The ninth and tenth assignments of error deal with a claim of insufficient evidence to establish the elements of the crimes of First Degree Burglary and Second Degree Assault.

The jury was instructed in the Court's Instructions to the Jury (CP 69) on the elements of Burglary in the First Degree and Assault in the Second Degree.

Instruction No. 5 set out the elements of Burglary in the First Degree. It reads as follows:

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 5, 2008, Jay Clifford Russell entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person.
- (4) That the acts were not justified as defined elsewhere in these instructions; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury was instructed in No. 10 dealing with the elements of Assault in the Second Degree:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 5, 2008, the defendant assaulted Matthew Higgins;
- (2) That the assault was committed with intent to commit the felony offense of Felony Harassment or Burglary in the First Degree; and
- (3) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Matthew Higgins, the alleged victim herein, testified that he and Christina Russell had moved into an apartment and lived there for about six months. (RP 90-91). On the date in question he testified that the defendant pushed his way into the residence and grabbed him and threw

him into a wall, causing damage to the sheetrock. (RP 94). He further testified that there was no notice given that the defendant was coming over. (RP 95). He further testified that the defendant had his hands around his neck and prevented him from breathing. Photographs were admitted showing the marks on his neck. (RP 101-103).

Christina Russell also testified for the State. She indicated that on September 5, 2008 that she was in a relationship with the alleged victim, Mr. Higgins. (RP 124). She further testified about the apartment that she and Mr. Higgins lived in and that the defendant never lived there and that this was her place and not the defendant's. (RP 130-133). She further testified that there was no agreement or understanding that she and the defendant were going to be getting together that day at the apartment or anywhere else. (RP 140). She further testified that there was no express permission given to the defendant to come over and that he had no previous permission to enter the apartment. (RP 141). She testified further that she saw the damage to the wall that was done in the apartment and saw the red marks on the neck of Mr. Higgins after the alleged assault inside the apartment. (RP 153). She further indicated that in discussions with the defendant that he denied having any contact with Mr. Higgins. (RP 145).

The defendant's challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The unlawful entry element of burglary may be proved by circumstantial evidence, as may any other element. State v. McDaniels, 39 Wn. App. 236, 240, 692 P.2d 894 (1984). A person enters or remains unlawfully if he does so without license, invitation, or privilege. RCW 9A.52.010(3); State v. Lopez, 105 Wn. App. 688, 694-95, 20 P.3d 978 (2001). Only the person who resides in or otherwise has authority over the property may grant permission to enter or remain. State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998). The evidence concerning his activity inside and his manner of exit can support an inference that his entry and presence was not "licensed, invited, or otherwise privileged." RCW 9A.52.010(3); see McDaniels, 39 Wn. App. at 240; State v. Woods, 63 Wn. App. 588, 590-91, 821 P.2d 1235 (1991); State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983).

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.” This crime is defined by an act (assault) and a result (substantial bodily harm). *See, e.g., State v. Tunney*, 129 Wn.2d 336, 341, 917 P.2d 95 (1996). And the mens rea of intentionally relates to the act (assault), while the mens rea of recklessly relates to the result (substantial bodily harm).

Although assault requires the mens rea of intent, assault by battery does not require specific intent to accomplish some further result, such as inflicting substantial bodily harm. *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031 (1998); *State v. Esters*, 84 Wn. App. 180, 183-84, 927 P.2d 1140 (1996), *review denied*, 131 Wn.2d 1024 (1997). The Courts have defined common-law assault by battery as “an unlawful touching with criminal intent.” *State v. Russell*, 69 Wn. App. 237, 246, 848 P.2d 743, *review denied*, 122 Wn.2d 1003 (1993). In other words, assault by battery simply requires intent to do the physical act constituting assault. *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), *review denied*, 143 Wn.2d 1023 (2001). Thus, under RCW 9A.36.021(1)(a), a defendant could intend to assault another without thereby intending to inflict substantial bodily harm. (CP 69, Instruction #12).

The State submits that there is sufficient evidence of the elements of Burglary in the First Degree and Assault in the Second Degree to allow these matters to go to the jury.

IX. RESPONSE TO ASSIGNMENT OF ERROR NO. 11

The eleventh assignment of error raised by the defendant is that the trial court miscalculated the offender score and should have considered all of this as “the same criminal conduct”.

The defendant was convicted at this jury trial of Burglary in the First Degree – Domestic Violence; Assault in the Second Degree; and Felony Harassment – Threat to Kill. On August 28, 2009 the defendant was sentenced by use of a Felony Judgment and Sentence – Prison. (CP 122). A copy of the Judgment and Sentence is attached hereto and by this reference incorporated herein. The trial court considered all of this to be separate conduct and gave the defendant a standard range sentence of 31 months. In the situation dealing with Burglary in the First Degree, the anti-merger statute would apply. This would treat as separate conduct the Burglary and any underlying felony committed also. This would include, in this situation, the Assault in the Second Degree and the Felony Harassment.

The courts consider the merger doctrine on a case by case basis and determine if the predicate offense is so intertwined with the charged offenses to warrant its application. State v. Saunders, 120 Wn. App. 800, 821, 86 P.3d 232 (2004). The merger doctrine does not apply when the offenses committed have independent purposes and effects. State v. Freeman, 118 Wn. App. 365, 371-372, 76 P.3d 732 (2003). Even though the crimes in our case may have been committed at and about the same time, there were different criminal purposes involved in the execution of each. That, plus the anti-merger statute dealing with the Burglary should allow the trial court to exercise its discretion at the time of sentencing. An Appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). The State submits that there has been no showing of misapplication of the law to the facts and that the trial court properly exercised its discretion.

X. RESPONSE TO ASSIGNMENT OF ERROR NO. 12

The twelfth assignment of error raised by the defendant is that the trial court abused its discretion at sentencing by not ordering a sentence below the standard range.

The State has no problems with the case law cited but does question how that case law applies to the facts in this case. For example, on page 53 of the Appellant's Brief, the attorney for defendant indicates there is no apparent predisposition on the defendant's part to commit an offense. He argues that the sole purpose in going to the apartment on that day was to have a discussion with his wife about extremely disturbing news. Yet, there was evidence produced at the time of trial that indicated there were hard feeling between the defendant and the alleged victim (the defendant claimed he would snap him like a twig) and, further, that the attack against Mr. Higgins, looking at it in a light most favorable to the State, certainly appears to be unprovoked, intentional, and malicious.

The defendant also claims that the court should consider going below the standard range because of a failed affirmative defense. However, the self defense was an element that the State had to disprove beyond a reasonable doubt. The jury obviously felt that the recitation of facts by the defendant were not accurate and that this was an unprovoked assault and attack on Mr. Higgins. It is interesting to note that all the aspects of this argument being raised in the Appellate Brief deal with the facts from the defendant's point of view only. It does not take into consideration the State's case in chief, the witnesses, or the physical evidence there at the scene.

The State submits that there is no justification for the court to go below a standard range sentence.

Finally, it is to be remembered that this defendant cannot appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 67 P.3d 1214 (2003). There simply is nothing in this record to justify going outside the standard range, nor is there anything to justify the concept of same criminal conduct.

XI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 19 day of April, 2010.

Respectfully submitted:

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By:

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3

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NOV 18 2009
@ 9:18am
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,

v.

JAY CLIFFORD RUSSELL,
Defendant.

No. 08-1-01961-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION UNDER
CrR 7.4 AND CrR 7.5

THIS MATTER having come regularly before the above entitled court on the 11th day of September, 2009; the State of Washington represented by the undersigned Deputy Prosecutor and the defendant represented by David H. Schultz, attorney for Mr. Russell, ~~the~~ Mr. Russell being present; and the Court having reviewed the defendant's motion under CrR 7.4 and CrR 7.5 for Arrest of Judgment and for a New Trial, the Court hereby makes the following:

FINDINGS OF FACT

1. Matthew Higgins testified at trial that he lived at Ms. Christina Russell's residence on the date of the charged crimes.
2. Matthew Higgins testified at trial that on the date of the charged crimes, he told the defendant to leave the property, and told him he was not welcome there.
3. Matthew Higgins testified at trial that the defendant forced his way into the residence by pushing the door open.
4. Matthew Higgins testified once inside the residence, the defendant assaulted him and threatened to kill him.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Clark County Prosecuting Attorney
Domestic Violence Prosecution Center
210 E. 13th Street
Vancouver, WA 98668
(360) 735-8862

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LJM

- 1 5. Matthew Higgins testified that he was in fear for his life at that point in time due to
2 the defendant's actions.
- 3 6. Matthew Higgins testified the defendant caused damage to the interior wall of Ms.
4 Russell's residence.
- 5 7. Christina Russell testified at trial, and gave testimony relating to transcripts from an
6 earlier defense interview.
- 7 8. Christina Russell testified Matthew Higgins had permission to be at her residence on
8 the date of the charged offense.
- 9 9. Christina Russell testified that Jay Russell had permission to be at her residence on
10 the date of the charged offense.
- 11 10. Christina Russell also testified that she had not invited Jay Russell over to her
12 residence on the date in question, and that she was surprised when she heard he had
13 shown up at her residence.
- 14 11. Jay Russell chose to testify at his trial, and chose to assert a self defense claim.
- 15 12. Jay Russell testified that he acted in self defense, and had permission to be at
16 Christina Russell's residence.
- 17 13. In response to the State's cross examination, the defendant testified that he never
18 sought out police assistance after having to defend himself.
- 19 14. In response to the State's cross examination, the defendant testified he had reviewed
20 all the transcripts and police reports prior to trial.
- 21 15. The prosecution made arguments in closing that were related to the facts presented at
22 trial, and those arguments were not objected to by defense counsel.

23 Based on the foregoing Findings of Fact the Court makes its:

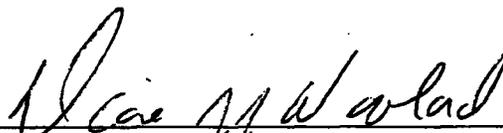
24 CONCLUSIONS OF LAW

- 25 1. The Court has proper venue and jurisdiction to hear the above entitled matter.
- 26 2. With all reasonable inferences from the evidence being drawn in favor of the
27 State and interpreted most strongly against the defendant, the evidence presented
at trial was legally sufficient to support a guilty verdict as a rational trier of fact

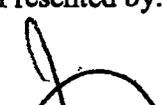
1 could find the essential elements of Burglary in the First Degree beyond a
2 reasonable doubt.

- 3 3. The prosecutor did not commit misconduct in closing arguments as the defendant
4 chose to testify, and he placed his credibility at issue. Therefore, the Prosecutor
5 did not act improperly in impeaching a testifying defendant's credibility in the
6 same manner as any other witness. Furthermore, statements read from transcripts
7 in closing had been properly introduced into evidence. *Portuondo v. Agard*, 529
8 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000); *State v. Martin*, 151 Wn. App.
9 98; 210 P.3d 345 (Div. II, 2009).

10
11
12 DATED this 18 day of Nov, 2009.

13
14 
15 JUDGE OF THE SUPERIOR COURT

16
17 Presented by:

18
19 
20 Deputy Prosecuting Attorney
21 WSBA # 37901

22 Agreed as to Form: *copy read*

23
24 
25 Defense Counsel
26 WSBA# 35716
27

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Clark County Prosecuting Attorney
Domestic Violence Prosecution Center
210 E. 13th Street
Vancouver, WA 98668
(360) 735-8862

13.
cc TO: David Schultz
and fail
SF.

FILED

AUG 28 2009

Sherry W. Parker, Clerk, Clark Co.

9:17 am

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

JAY CLIFFORD RUSSELL,
Defendant.

SID: _____
If no SID, use DOB: 10/22/1965

No. 08-1-01961-6 ✓

Felony Judgment and Sentence --
Prison
(FJS)

Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2,
5.3, 5.5 and 5.7

Defendant Used Motor Vehicle 09-9-06301-9

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea <<gp date>> jury-verdict on August 19, 2009 bench trial <<bt date>>:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
I	BURGLARY IN THE FIRST DEGREE – DOMESTIC VIOLENCE	10.99.020/9A.52.020(1)(b)	FA	9/5/2008
II	ASSAULT IN THE SECOND DEGREE	9A.36.021(1)(e)	FB	9/5/2008
III	FELONY HARASSMENT – THREAT TO KILL	9A.46.020(1)(a)(i) 9A.46.020(2)(b)(ii)	FC	9/5/2008

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant used a **firearm** in the commission of the offense in Count _____, RCW 9.94A.602, 9.94A.533.

The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____, RCW 9.94A.602, 9.94A.533.

Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school

Felony Judgment and Sentence (FJS) (Prison)(Nonsex Offender)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))

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SV

grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of unlawful possession of a firearm and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed vehicular homicide vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves attempting to elude a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count 1 involve(s) domestic violence. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv	Type of Crime
1	See attached criminal history					

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525)
- The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	3	VII	31 months – 41 months		31 months – 41 months	LIFE	\$50,000
02	3	IV	13 months – 17 months		13 months – 17 months	10 years	\$20,000
03	2	III	4 months – 12 months		4 months – 12 months	5 years	\$10,000

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____.

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

31 months on Count 1, 17 months on Count 2, 12 months on Count 3
 The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
 The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon VUCSA in a protected zone manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: _____.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein: _____.

Confinement shall commence immediately unless otherwise set forth here: _____.

(b) **Credit for Time Served:** The defendant shall receive 0 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures

(c) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count(s) _____ 36 months for Serious Violent Offenses
Count(s) 1, 2 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition;

(7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol.
- have no contact with: _____
- remain within outside of a specified geographical boundary, to wit: _____
- not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
- participate in the following crime-related treatment or counseling services: _____
- undergo an evaluation for treatment for domestic violence substance abuse
 mental health anger management, and fully comply with all recommended treatment. _____
- comply with the following crime-related prohibitions: _____
- Additional conditions are imposed in Appendix 4.2, if attached or are as follows: _____

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

<i>RTN/RJN</i>	\$ _____	Restitution to: <u>Christina Russell</u> (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
<i>PCV</i>	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
<i>PDV</i>	\$ <u>100.00</u>	Domestic Violence assessment	RCW 10.99.080
<i>CRC</i>	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u> FRC	
		Witness costs \$ _____ WFR	
		Sheriff service fees \$ _____ SFR/SFS/SFW/WRF	
		Jury demand fee \$ _____ JFR	
		Extradition costs \$ _____ EXT	
		Other \$ _____	
<i>PUB</i>	\$ _____	Fees for court appointed attorney	RCW 9.94A.760
	\$ _____	Trial per diem, if applicable.	

WFR _____ Court appointed defense expert and other defense costs RCW 9.94A.760
 \$ _____ DUI fines, fees and assessments
FCM/MTH \$ 500.00 Fine RCW 9A.20.021; VUCSA chapter 69.50 RCW, VUCSA additional
 fine deferred due to indigency RCW 69.50.430
CDF/LDI/PCD \$ _____ Drug enforcement Fund # 1015 1017 (TF) RCW 9.94A.760
NTF/SAD/SDI
 \$ 100.00 DNA collection fee RCW 43.43.7541
CLF \$ _____ Crime lab fee suspended due to indigency RCW 43.43.690
FPV \$ _____ Specialized forest products RCW 76.48.140
RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI
 only, \$1000 maximum) RCW 38.52.430
 \$ _____ Other fines or costs for: _____
 \$ _____ **Total** RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.
 is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____.
RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with MATTHEW WAYNE HIGGINS, CHRISTINA DEANNE RUSSELL including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

MATTHEW WAYNE HIGGINS, CHRISTINA DEANNE RUSSELL (name of protected person(s))'s

home/ residence work place school

(other location(s)) _____

other location _____

for _____ years (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: Domestic Violence Perp. Program to be completed

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your

offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

5.9 Persistent Offense Notice

The crime(s) in count(s) 1, 2 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030(32) and (37), 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030(37)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: 8/28/09

Dore M. Warley
Judge/Print Name:

[Signature]
Deputy Prosecuting Attorney
WSBA No. 37904
Print Name: Jeffrey W. Holmes

[Signature]
Attorney for Defendant
WSBA No. 33796
Print Name: David Schultz

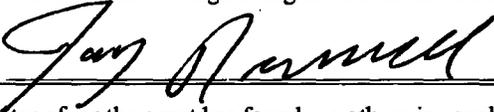
[Signature]
Defendant
Print Name:
JAY CLIFFORD RUSSELL

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____



I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, Sherry Parker, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

JAY CLIFFORD RUSSELL

08-1-01961-6

SID No: _____
(If no SID take fingerprint card for State Patrol)

Date of Birth: 10/22/1965

FBI No.

Local ID No.

PCN No. _____

Other _____

Alias name, DOB:

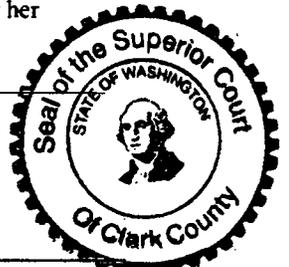
Race: W

Ethnicity:

Sex: M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, Carlo Vignali Dated: 8-28-09



The defendant's signature:

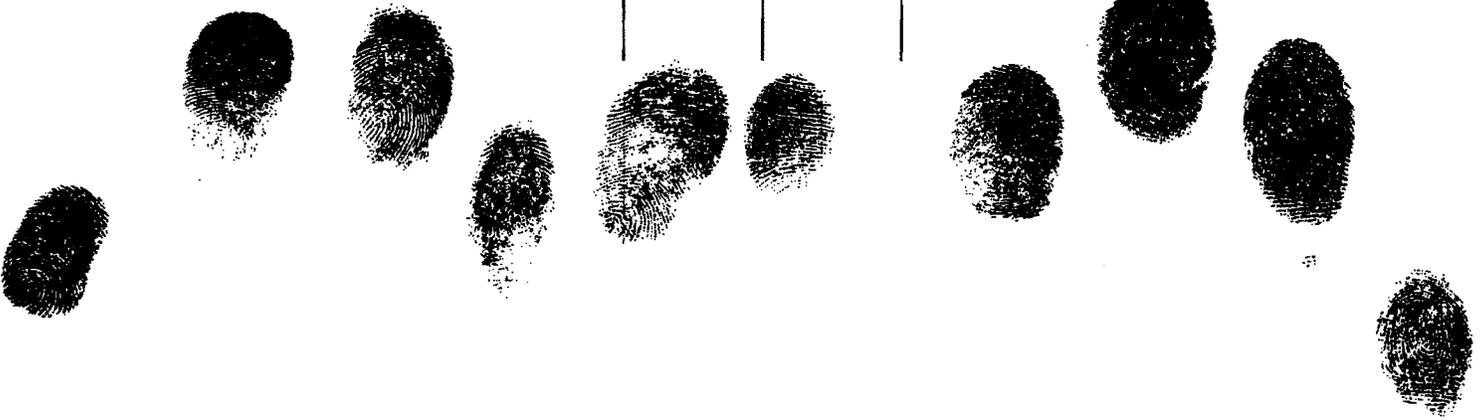
Jay Russell

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



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4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

5 STATE OF WASHINGTON,
6 Plaintiff,
7 v.
8 JAY CLIFFORD RUSSELL,
Defendant

No. 08-1-01961-6

APPENDIX 2.2

DECLARATION OF CRIMINAL HISTORY

9 COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.100 that to the best of
10 the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the
defendant has the following undisputed prior criminal convictions:

11

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	PTS.
DUII	CLATSOP/OR TC90361	8/17/1990		

12
13

14 The defendant committed a current offense while on community placement (adds one
15 point to score). RCW 9.94A.360.

16 DATED this 28 day of August, 2009.

17
18 Defendant

19
20 David Schultz, WSBA#33796
Attorney for Defendant

21
22 Jeffrey W. Holmes, WSBA#37904
Deputy Prosecuting Attorney

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29 **DECLARATION OF CRIMINAL HISTORY**
Revised 9/14/2000

DOMESTIC VIOLENCE PROSECUTION
CENTER
210 EAST 13th STREET
PO BOX 1995
VANCOUVER WA 98668-1995
(360) 487-8530
(360) 487-8531 (FAX)

SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

JAY CLIFFORD RUSSELL,

Defendant.

SID: WA24935187

DOB: 10/22/1965

NO. 08-1-01961-6

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	BURGLARY IN THE FIRST DEGREE - DOMESTIC VIOLENCE	10.99.020/9A.52.020	9/5/2008
02	ASSAULT IN THE SECOND DEGREE	9A.36.021(1)(e)	9/5/2008
03	HARASSMENT (FELONY - DEATH THREATS)	9A.46.020(1)(a)(i)/9A.46.020(2)(b)(ii)	9/5/2008

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of:

COUNT	CRIME	TERM
01	BURGLARY IN THE FIRST DEGREE - DOMESTIC VIOLENCE	31 Days /Months
02	ASSAULT IN THE SECOND DEGREE	17 Days /Months
03	HARASSMENT (FELONY - DEATH THREATS)	12 Days /Months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 0 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

HEREIN FAIL NOT.

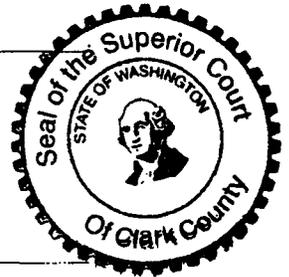
WITNESS, Honorable

Robert Flann

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE:

8-28-09

SHERRY W. PARKER, Clerk of the
Clark County Superior Court



By:

Sarah Vignati
Deputy

