Supreme Court No. _____
COA No. 87204-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DANIEL JONES,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Daniel Jones asks this Court to accept review of the Court of Appeals decision terminating review. Opinion (Mar. 10, 2025); Order Denying Reconsideration (Apr. 21, 2025). RAP 13.3(a)(1); RAP 13.4(b)(1)-(4).

B. ISSUES PRESENTED FOR REVIEW

1. When some evidence supports self-defense, the court must instruct the jury on it. Here, the jury asked if it should consider self-defense in determining whether the force used in the charged assault was unlawful. Mr. Jones requested the court answer the question by instructing the jury on self-defense, and some evidence supported such an instruction. However, the court refused to explain the law of self-defense to the jury or tell the jury the prosecution must prove the assault was not legally justified.

The Court of Appeals ruled that Mr. Jones was not entitled to self-defense instructions because it was "incompatible" with his duress defense. This decision conflicts

with (1) cases holding trial courts must give requested self-defense instructions when some evidence supports them, (2) cases holding the evidence supporting an instruction may come from any source, and (3) cases that permit contradictory defenses. This Court should grant review.

2. Article IV, section 16 prohibits courts from commenting on the evidence or instructing jurors that a factual issue is a settled matter of law. Whether Mr. Jones acted with "unlawful force" and whether his actions constituted an assault were questions of fact for the jury to decide, even without explicit instructions on self-defense. However, the court definitely instructed the jury "[n]o" when it asked whether it could consider self-defense in determining the lawfulness of the force. The court's answer impermissibly commented on the evidence and resolved a factual dispute that was the jury's to decide. Even without further instructions, the jury was required to find Mr. Jones used "unlawful force" and was entitled to decide whether it viewed the force as lawful under the

circumstances. This Court should grant review to address the trial court's express resolution of a factual question before the jury in its answer to the jury's question, contrary to the constitutional prohibition preventing courts from commenting on the evidence.

3. Courts must give the jury instructions that make the law manifestly apparent, including providing clarifying or supplemental instructions if necessary. Time and time again, the Court of Appeals parrots these principles, but it nonetheless affirms convictions where the trial court refused to do anything other than instruct jurors to re-read their instructions. This Court should grant review to address the opinion's conflict with other cases directing trial courts to offer supplemental instructions and to offer lower courts much needed guidance on this important constitutional issue of substantial public interest.

C. STATEMENT OF THE CASE

Steven Henry drove his sister's car home from work and parked it outside of his house around 2:30 a.m. RP 123. He

left the car unlocked and the car keys and his wallet inside of a bag in the car. RP 124-25. When Mr. Henry awoke around 7 a.m., the car was gone. RP 125. No one saw who took the car. RP 125, 155.

Mr. Henry began receiving notifications from his bank that one of his credit cards was being used in the area. RP 125-26. He walked to several stores, looking for the car, without success. RP 125-26, 140. Mr. Henry stopped receiving notifications around 9 a.m. RP 126.

When Mr. Henry received another bank notification at 6 p.m., Tasha Nugent, his girlfriend, picked him up in her minivan, and they drove to Safeway, where the card had been used recently. RP 126-27. They saw Mr. Henry's car parked in the parking lot. RP 127-28, 158. Ms. Nugent pulled her minivan in front of Mr. Henry's car "[t]o block it in." RP 158. Ms. Nugent positioned the minivan so the car could not have left the parking spot. RP 141-42. They got out of the minivan, and Mr. Henry approached his car. RP 128.

Mr. Jones was sitting in the car's driver's seat. RP 128-29, 158-59. Ms. Nugent, who had a direct view into the car, believed Mr. Jones was asleep or passed out because he was slumped over in the seat. RP 168. Mr. Henry believed he was trying to take the radio out of the car. RP 128.

Mr. Henry first "tapped on the window" and then "punched the window out." RP 128-29, 159, 169. In punching out the window, he made contact with Mr. Jones. RP 143-44. Mr. Henry then reached into the car, "trying to grab" Mr. Jones. RP 128-29, 159, 169. Mr. Jones slid across the seat to avoid being grabbed by Mr. Henry and got out through the passenger door. RP 160, 169.

After he got out of the car, Mr. Jones pulled out a gun and pointed it at Mr. Henry. RP 129, 160. Mr. Henry told Mr. Jones "to put it down and fight me like a man." RP 131. Ms. Nugent heard Mr. Henry say, "Shoot me. Go ahead. Shoot me," as Mr. Jones backed away from Mr. Henry and tucked the gun in his pants. RP 160. Then Mr. Jones shoved Ms. Nugent

out of the way, jumped into her minivan, and drove off. RP 131, 162.

Mr. Henry jumped into his car and drove after Mr. Jones. RP 132. Mr. Henry followed Mr. Jones until a police officer pulled Mr. Henry over. RP 132. Mr. Henry returned to Safeway with the officer. RP 133.

In going through the car, Mr. Henry and Ms. Nugent found recently purchased items, including clothing and food. RP 134-37. They did not find the credit card that had been used in Safeway. RP 148. They also found an identification card with an address near where the car had been stolen. RP 174-76. That night, Mr. Henry and Ms. Nugent went to the address, looking for the minivan, and approached the house. RP 174-76. They did not find the minivan or Mr. Jones. RP 177-78. The police found the minivan abandoned about two weeks later. RP 137, 148-49, 196.

The prosecution charged Mr. Jones with two counts of possession of stolen vehicles---one for Mr. Henry's car and one

for Ms. Nugent's minivan. CP 35-36. It also charged Mr. Jones with first-degree robbery and second-degree assault. CP 35.

At Mr. Jones's request, the court instructed the jury that duress is a defense to the charges of robbery, assault, and possession of a stolen vehicle for Ms. Nugent's minivan. CP 61; RP 113, 211-219, 234-35. The defense argued Mr. Jones was not charged with stealing Mr. Henry's car, did not know the car was stolen, and did not know it was Mr. Henry's car when Mr. Henry approached him. RP 250-53. In addition to contesting whether the State presented credible evidence to prove all the elements of the charged crimes, the defense argued Mr. Jones acted under duress when he pulled a gun on Mr. Henry and took Ms. Nugent's car. RP 253-63. The defense argued Mr. Jones only pulled out a gun and stole the minivan to get away after Mr. Henry punched through the window and hit him in the face. RP 253-63.

During deliberations, the jury asked, "With regard to instruction 13," which defined assault as an act done "with unlawful force," CP 53, "should the subject of self defense be considered when determining whether it was unlawful." CP 65.

Mr. Jones requested the court "provide them with an instruction related to self-defense." RP 274. He explained the State "ha[s] the obligation to prove that the assault was not the result of self-defense" because self-defense is "technically one of the elements that is involved." RP 273-74. Because Mr. Henry's action in punching the window, shattering the glass, and contacting Mr. Jones could be an assault, the jury was entitled to decide if Mr. Jones's response "was trying to prevent a further assault at that point." RP 276. Finally, if the court refused to instruct on self-defense, Mr. Jones requested the court tell the jury to "reread your instructions *as a whole*" to ensure the answer encompassed the duress instruction. RP 274 (emphasis added).

The State agreed the jury was "confused obviously on the law" but opposed giving a self-defense instruction. RP 273, 276 (agreeing there is "a clear confusion in the law"). Instead, it argued "because there's a confusion in the law, and based on that, I think they should probably be given an answer and really the answer is no." RP 273.

The court refused Mr. Jones's instruction on self-defense as well as his alternative request. Although the State must prove a person acted with *unlawful* force for the action to constitute an assault, the court responded to the jury's question about whether it could consider self-defense to determine whether force was unlawful with, "*No.* Please re-read the instructions." CP 65 (emphasis added). Shortly thereafter, the jury convicted Mr. Jones on all counts. CP 66-69. Mr. Jones appealed. 105-06.

The Court of Appeals rejected Mr. Jones's arguments that the trial court erred in refusing to give a self-defense instruction in response to the jury's question and in instructing

the jury it could not consider self-defense in determining whether Mr. Jones used unlawful force. The Court of Appeals agreed Mr. Jones's convictions for first-degree robbery and second-degree assault violated double jeopardy and must merge. Slip op. at 11-15. It also agreed Mr. Jones's conviction for possession of a stolen vehicle for the minivan must merge with the robbery conviction. *Id.* at 15-16. The court reversed the convictions for second-degree assault (count two) and possession of a stolen vehicle (count four). It remanded for resentencing on the remaining charges (count one: first-degree robbery; count three: possession of a stolen vehicle) and removal of the vacated convictions from the judgment and sentence. *Id.* at 11-18.

D. ARGUMENT

1. The Court of Appeals opinion conflicts with decisions holding a person is entitled to self-defense instructions when some evidence supports it, even when the accused also pursues another theory of defense.

When "some evidence," viewed as a whole in the light most favorable to the requesting party, supports a self-defense

instruction, a court must deliver it. *State v. Fisher*, 185 Wn.2d 836, 849, 851, 374 P.3d 1185 (2016). That evidence need not come from the defense. Instead, "some evidence" may come "from whatever source," so long as the evidence "tends to prove [the act] was done in self-defense." *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

The Court of Appeals did not properly review Mr. Jones's case under the some evidence standard. Instead, the opinion rejected Mr. Jones's claim that the trial court was required to instruct the jury on self-defense because it ruled self-defense contradicted Mr. Jones's duress defense. The opinion conflicts with decisions from this Court and the Court of Appeals establishing the some evidence standard and permitting contradictory defenses. This Court should accept review. RAP 13.4(b)(1)-(4).

More than "some evidence" tended to prove Mr. Jones acted in self-defense when he displayed a gun and took the minivan. Ms. Nugent parked her minivan "[t]o block" the car,

leaving Mr. Jones trapped with no ability to drive away. RP 142, 158. When Mr. Henry "punched out" the car window, he "contacted" Mr. Jones's person. RP 128, 143-44. After Mr. Henry "punched the window out," he reached into the car to grab Mr. Jones. RP 144, 159.

Mr. Henry also challenged Mr. Jones to "fight me like a man" and taunted him to "[g]o ahead." RP 131, 160. Mr. Henry is well over six feet tall and physically fit. RP 146, 173. He has worked as a professional athlete. RP 146. Mr. Henry is "considerably larger than" Mr. Jones. RP 146, 173. The State presented no evidence to suggest Mr. Jones knew Mr. Henry owned the car.

All this testimony, viewed in the light most favorable to Mr. Jones, provided "some evidence" that tended to prove Mr. Jones acted in self-defense. Therefore, Mr. Jones was entitled to receive the instruction once he requested it. *See Fisher*, 185 Wn.2d at 849-51 (party entitled to self-defense instruction if some evidence supports it). The belated timing of the request

does not defeat the some evidence standard, which Mr. Jones met. Courts should provide supplemental instructions to answer jurors' legal questions, as well as initial instructions. *See* CrR 6.15; *State v. Riker*, 123 Wn.2d 351, 366-69, 869 P.2d 43 (1994) (court may provide accurate legal instruction to answer jury question even without initial request for instruction).

Despite the evidence supporting self-defense, the trial court refused Mr. Jones's request to deliver a self-defense instruction in response to the jury's question asking whether it should consider self-defense to determine if the force allegedly constituting an assault was unlawful. CP 53, 65. The Court of Appeals affirmed this denial, citing Mr. Jones's duress defense. Slip op. at 5-11. The opinion relied on Mr. Jones's decision to challenge the prosecution's proof of a weapon and argue duress to conclude his duress defense "was incompatible with the use of that weapon for self-defense." *Id.* at 9. The opinion observed, "[Mr.] Jones never argued that he displayed a gun as

an act of self-defense." *Id.* at 8. The court concluded that "[Mr.] Jones chose to argue the evidence in a manner that does not support a claim of self-defense." *Id.* at 9.

What a person argues in closing does not control whether some evidence supports a legal instruction. A person is entitled to a legal instruction when "some evidence" supports it. *Fisher*, 185 Wn.2d at 849. Here, "some evidence" supported the self-defense instruction. Br. of Appellant at 19-21, 31-32; Reply Br. at 1-4. The Court of Appeals' reliance on Mr. Jones's closing argument to defeat his request for a self-defense instruction applied the wrong standard and conflicted with this Court's precedent.

It is true that Mr. Jones argued the prosecution did not prove beyond a reasonable doubt that Mr. Jones possessed a gun. Slip op. at 3, 8-9 (discussing defense closing argument). Mr. Jones also argued he took the car and drove away only to escape an unwarranted assault on him. *Id.* But Mr. Jones's

duress defense does not defeat self-defense or render a self-defense instruction unavailable to him.

Our law permits the accused to avail themselves of "incompatible" defenses, contrary to the opinion.[1] Slip op. at 9. It is true that "[Mr.] Jones challenged the existence of the deadly weapon that served as the means of assault" and disputed that he used any force in arguing his duress defense. Slip op. at 8. But Mr. Jones's reliance on a seemingly contradictory defense cannot be used to defeat the requested self-defense instruction.

This Court has held that the accused "is entitled to the benefit of all the evidence." *Fisher*, 185 Wn.2d at 849; *State v. Arbogast*, 199 Wn.2d 356, 367-70, 506 P.3d 1238 (2022). A person is entitled to consideration of a defense supported by

[1] Mr. Jones does not agree duress and self-defense are incompatible defenses. *See* Br. of Appellant at 25-29; Reply Br. at 3-4. However, even if they are, a person is entitled to incompatible or contradictory defenses when some evidence supports them.

some evidence even in cases where the accused testifies inconsistently with the requested instruction. *E.g.*, *Fisher*, 185 Wn.2d at 849.

Accused persons are also entitled to have inconsistent defenses considered when they are supported by some evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 460-62, 6 P.3d 1150 (2000) (defense entitled to consideration of both alibi defense and lesser degree offense); *Mathews v. United States*, 485 U.S. 58, 62, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (defense entitled to consideration of both general denial and entrapment).

The opinion contradicted controlling law when it relied on Mr. Jones's "incompatible" duress defense to reject his argument that he was entitled to a self-defense instruction. It improperly ruled some evidence did not support self-defense because Mr. Jones argued what it found to be an incompatible defense. But the Sixth and Fourteenth Amendment rights to present a defense and to a fair trial permit a person to argue the

prosecution failed to meet its burden to prove beyond a reasonable doubt every essential element *and* alternatively argue the person committed certain acts under duress. *State v. Frost*, 160 Wn.2d 765, 773-76, 161 P.3d 361 (2007).

The opinion conflicts with this Court's cases permitting contradictory defenses and requiring a court to deliver jury instructions when some evidence supports them. It also conflicts with the constitutional principles supporting those cases. This Court should grant review.

2. By expressly instructing the jury it could not consider self-defense, the court unconstitutionally commented on the evidence.

The trial court impermissibly commented on the evidence when it answered a jury question by resolving a key factual issue of whether Mr. Jones acted with unlawful force. The court told the jury "[n]o," it could not consider self-defense in determining whether the force used in the assault was unlawful. CP 65. This Court should accept review to address this important constitutional issue of substantial public interest.

The Washington Constitution prohibits judges from commenting on the evidence or instructing juries on the facts. Const. art. IV, § 16. Instead, our Constitution confines courts to declaring the law. *Id.* Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court's personal opinion of the evidence. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). "[A]ny remark that has the *potential* effect of *suggesting* that the jury need not consider an element of an offense could qualify as judicial comment." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (emphasis added).

The purpose of article IV, section 16 is to prevent the jury from being influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence. *State v. Eisner*, 95 Wn.2d 458, 461, 626 P.2d 10 (1981). Trial courts "should be extremely careful to confine their instructions solely to declaring the law. All remarks and observations as to the

facts before the jury are positively prohibited." *State v. Walters*, 7 Wash. 246, 250, 34 P. 938 (1893).

A court comments on the evidence when it instructs the jury on a matter of fact or "conveys the idea that the fact has been accepted by the court as true." *Levy*, 156 Wn.2d at 726. For example, in *State v. Jackman*, the defendant stood charged with several offenses requiring proof of the ages of the victims. 156 Wn.2d 736, 742-45, 132 P.3d 136 (2006). The court included their dates of birth in the to-convict instructions. *Id.* at 744. This Court held this conveyed to the jury that the court determined the dates had been established as a matter of law. *Id.* It held this constituted an unconstitutional comment on the evidence and reversed the convictions. *Id.* at 744-45.

Similarly, in *State v. Brush*, the court instructed the jury that "prolonged period of time," which was an element of an aggravating factor, meant "more than a few weeks." 183 Wn.2d 550, 557, 353 P.3d 213 (2015). This Court determined this instruction "incorrectly interpreted the law" and

"constituted an improper comment on the evidence because it resolved a contested factual issue for the jury." *Id.* at 558-59. By instructing the jury that "more than a few weeks" was a "prolonged period of time," the court conveyed to the jury this factual issue had been settled. *Id.*

Like in *Brush* and *Jackman*, here, the trial court's answer conveyed to the jury that a contested factual issue had been resolved as a matter of law. By telling the jury "[n]o," it could not consider self-defense in determining whether the force used was unlawful, the court conveyed that Mr. Jones acted with unlawful force as a settled matter of law.

But the unlawfulness of Mr. Jones's action was an element of the offense the prosecution was required to prove beyond a reasonable doubt. RCW 9A.36.021(1)(c); *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (assault is *unlawful* act); CP 52-53. The unlawfulness of the action was therefore a disputed issue of fact the jury was required to decide. By instructing the jury it could not consider self-

defense, the court effectively told the jury Mr. Jones's conduct was unlawful and resolved this key factual issue for the jury.

The jury was entitled to consider self-defense. "[T]he obligation to prove the absence of self-defense remains at all times with the prosecution." *McCullum*, 98 Wn.2d at 494. "Because self-defense is a lawful act, it negates the mental state and the 'unlawful force' elements of second degree assault." *State v. Tullar*, 9 Wn. App. 2d 151, 156, 442 P.3d 620 (2019). "[T]he State must disprove self-defense in order to prove that the defendant acted unlawfully." *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). The prosecution therefore bears the burden to disprove self-defense beyond a reasonable doubt. *Id.* at 623. The court's answer, telling the jury it could *not* consider self-defense in determining whether the force was unlawful, was an incorrect statement of the law that impermissibly resolved a factual dispute and commented on the evidence.

The Court of Appeals rejected Mr. Jones's argument, ruling the answer "was a correct statement of the law of the case." Slip op. at 10. It ruled "the jury should not consider a defense during its deliberations that was not argued or supported with evidence." Slip op. at 10. Finally, the court opined "in the absence of a self-defense instruction, the jury *could not* have deliberated on that particular legal theory as it had not received the *law* of self-defense from the court." Slip op. at 10. Therefore, it held the trial court did not comment on the evidence when it told the jury "No," it could not consider self-defense when determining whether the force used in the alleged assault was lawful. Slip op. at 9-11; CP 63, 65.

The Court of Appeals engaged in circular reasoning. The court held telling the jury it could not consider self-defense in determining whether the force employed during the purported assault was lawful did not comment on the evidence because no evidence or law supported self-defense. But some evidence did support self-defense, as explained above, and Mr. Jones asked

the court to deliver the instruction in response to the jury note. The court's refusal to do so does not save its response, instructing the jury it could not consider self-defense, from commenting on the evidence.

Moreover, the court's answer was incorrect as a matter of law. An assault is an unlawful touching, and when a person acts with *unlawful* force, they may commit an assault. *Elmi*, 166 Wn.2d at 215; *Acosta*, 101 Wn.2d at 617-18; RCW 9A.36.021. Conversely, when a person acts with *lawful* force, the person does not commit an assault. *Acosta*, 101 Wn.2d at 617-18; RCW 9A.16.020(3).

A person uses force lawfully when they are "about to be injured," they use that force "in preventing or attempting to prevent an offense against his or her person," and "the force is not more than necessary." RCW 9A.16.020(3). A person who acts in self-defense acts lawfully. *McCullum*, 98 Wn.2d at 495. By instructing the jury "No," it should not consider self-defense when determining whether Mr. Jones acted with unlawful force,

the court gave a legally incorrect answer. It also impermissibly removed this factual dispute—whether the force was lawful—from the jury's consideration.

This Court should accept review to address the trial court's improper comment on the evidence.

3. Lower courts' misunderstanding of the obligation to answer questions from a deliberating jury demonstrates the need for review.

Mr. Jones's case presents a larger issue this Court should address: trial courts' consistent refusal to respond to jurors' legal questions with anything other than "re-read your instructions." In this case, like in many others, the Court of Appeals purported to recognize the importance of ensuring the jury understands the law. Slip op. at 5. It dutifully cited CrR 6.15(f) and discussed cases encouraging courts to provide supplemental instructions when questions show the jury misunderstands the law. *Id.* But it yet again approved of the generic directions to "re-read the instructions" and affirmed the

trial courts refusal to do what it claims courts should. Slip op. at 5-9.

To achieve the constitutional guarantee of a fair trial, a court must provide the jury with legal instructions before deliberations begin. CrR 6.15(d). A court's duty to "accurately inform the jury of the relevant law" continues throughout deliberations. *State v. Sutton*, 18 Wn. App. 2d 38, 42, 489 P.3d 268 (2021). In recognition of this principle, the rules contemplate that courts will provide additional legal instructions during deliberations. CrR 6.15(f). This includes giving juries supplemental instructions in response to juror questions. CrR 6.15(f)(1); *State v. Becklin*, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008).

Courts not only *may* provide additional instructions in response to jury questions, they *should* provide additional instructions when the jury inquires. The Washington State Jury Commission recommends courts "should exercise their discretion to respond more fully to deliberating jurors'

questions," rather than merely refer jurors to the existing instructions. Wash. State Jury Comm'n, *Report to the Board for Judicial Administration* 71 (2000). Indeed, "The failure of trial judges to be of greater assistance to jurors during deliberations is a primary source of juror confusion." *Id.*

In *Sutton*, the Court of Appeals underscored the importance of answering jury questions, stating, "We take this opportunity to strongly encourage our trial courts to fulfill this responsibility and directly answer a jury's question of law even if it believes its instructions are correct and complete." *Sutton*, 18 Wn. App. 2d at 39. It held courts "should" provide additional instructions when questions suggest the jury does not understand the law. *Id.* at 43.

> When it is apparent the jury does not understand the law, the trial court may and should issue a supplemental written instruction. A failure to do so is inconsistent with its responsibility to ensure the jury understands the law and risks the jury rendering a verdict contrary to the evidence.

Id. Yet the *Sutton* court affirmed the trial court's refusal to answer the jury's question and provide additional instructions,

despite its apparent encouragement that trial courts should do just that. *Id.* at 45.

This Court also encourages trial courts to answer jury questions. In *Becklin*, the deliberating jury asked several questions about whether a person could stalk another through a third party. 163 Wn.2d at 524. The court responded, "Yes." *Id.* This Court held the trial court properly responded because its answer "accurately reflected the law." *Id.* at 529. It rejected the suggestion that CrR 6.15 discourages supplemental instructions. *Id.* at 529-30.

Similarly, in *Riker*, the jury asked the court who bore the burden of proving duress. 123 Wn.2d 351, 358, 869 P.2d 43 (1994). The parties and the court had agreed not to inform the jury about the applicable burden of proof in its initial instructions. *Id.* Nonetheless, in response to the jury's evident confusion about the law, the court answered the question and instructed the jury the defense bore the burden by a preponderance of the evidence. *Id.* This Court held the court

properly delivered these additional instructions in response to the jury's question, even though no party requested the instruction initially, because it was an accurate statement of law. *Id.* at 366-69.

Some opinions have gone even further than encouraging courts to answer jury questions by providing supplemental instructions. Some courts have approved of supplemental instructions even *without* a jury question. *E.g.*, *State v. Watkins*, 99 Wn.2d 166, 179, 660 P.2d 1117 (1983); *State v. Gonzales*, 1 Wn. App. 2d 809, 817-18, 408 P.3d 376 (2017).

Here, the court should have helped the jury understand the State's duty to prove unlawful force by delivering the requested self-defense instructions. Providing additional instructions during deliberations helps achieve a court's due process obligation to clearly explain the law. However, trial courts too often refuse to do so and instead direct jurors to re-read their instructions—the very instructions that gave rise to their question in the first place. This Court should grant review

to offer lower courts much needed guidance on their duty to ensure jurors understand the law and to encourage trial courts to answer jurors' questions about the law.

E. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,735 words.

DATED this 20th day of May, 2025.

Respectfully submitted,

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APPENDIX A

March 10, 2025, Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL JOSEPH JONES, Appellant.	No. 87204-4-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Daniel Joseph Jones appeals from his conviction after jury trial for two counts of possession of a stolen motor vehicle, one count of assault in the second degree, and one count of robbery in the first degree. He argues that the failure to provide a supplemental jury instruction on self-defense in response to a question from the jury was erroneous and the court's response was an improper judicial comment on the evidence. Jones also raises two separate claims of double jeopardy as to his crimes of conviction. We reverse in part as to both double jeopardy claims and legal financial obligations, but otherwise affirm.

FACTS

Steven Henry had borrowed his sister's red Toyota Yaris, parked it in front of his house, and left it unlocked with the keys and his wallet in a bag inside the vehicle. The next morning, the car was gone. Henry reported the theft to his sister and the police. Henry began receiving notifications about charges on his credit card at

nearby stores, and later that day, he and his girlfriend,[1] Tasha Nugent, searched for the Toyota.

At approximately 6 p.m., Henry noticed a recent charge on his credit card at a nearby grocery store. Nugent drove Henry to the store and they found the missing vehicle in the parking lot. Henry told Nugent to park her minivan in front of the car. Henry exited the minivan and noticed a white male, later identified as Daniel Jones, inside the vehicle. Henry tapped on the driver's window. When he received no response, Henry punched through the window and, in doing so, physically "contacted" Jones. Jones then slid to the passenger side and exited through the other side of the car. Henry began moving around to the other side of the car and, upon arriving at the rear bumper of the passenger side, saw Jones pull a gun out of his waistband and point it at him. Henry told Jones to put the weapon down and "fight [him] like a man." Jones backed away and put the gun back in his waistband. Nugent, who had gotten out of the minivan, took a photograph of Jones. Jones pushed Nugent out of the way, jumped into her minivan, and drove away. Henry pursued in the Toyota until he was stopped by police. Neither Jones nor Nugent's minivan were located immediately.

The State initially charged Jones with one count of robbery in the first degree with Henry as the named victim, two counts of assault in the second degree with deadly weapon enhancements as to Henry and Nugent, and one count of possession of a stolen motor vehicle as to the Yaris. Shortly before trial, the State filed an amended information that set out the following charges: robbery in the first

[1] Nugent was alternately referred to as Henry's girlfriend and wife during trial; she identified herself as his fiancée during her testimony.

degree with Nugent as the named victim (count I), assault in the second degree with a deadly weapon enhancement as to the confrontation with Henry (count II), possession of a stolen motor vehicle as to the Toyota (count III), and a second count of possession of a stolen motor vehicle based on Nugent's minivan (count IV).

Jones' defense was premised on duress as laid out in his closing argument:

> So what can you envision were the choices that Mr. Jones had at that time? He could stand there and get physically beaten to the satisfaction of a man who described himself as being angry, agitated and a man who was obviously willing to already punch Mr. Jones through a tempered glass window or flee.
>
> How do you flee? Well, he could run. Is he going to outrun a guy that's 6'4", 6'5" and in shape to be playing professional ball? Ain't gonna happen. So he sees the opportunity. He sees the opportunity to flee in a vehicle that can outrun Mr. Henry, at least on foot.
>
> What can you envision would have been the likely outcome if Mr. Jones had accepted Mr. Henry's taunt to stand there and fight like a man?

Jones also argued that the State failed to produce evidence corroborating Henry and Nugent's testimony as to the existence of a gun.

The trial court instructed the jury on the defense of duress based on the defense theory of the case and evidence adduced during testimony. During deliberation, the jury asked the court a question concerning jury instruction 13, which defined assault, in part, as an act involving unlawful force. The jury inquired, "[w]ith regard to instruction 13, should the subject of self defense be considered when determining whether it was unlawful?"

The judge and the parties discussed possible responses to the jury's question. Jones requested that the court provide the jury with a supplemental instruction on self-defense, while the State opposed the supplemental instruction, noting that Jones had not argued self-defense. The trial court agreed with the State,

explaining "[s]elf-defense wasn't raised at all, so I don't think we're going to give them an extra instruction on something that was not even touched on at all. There was absolutely no evidence to rule on self-defense whether there should be an instruction or not." The trial court then suggested a response to the jury of "either no or self-defense was not raised in this case." Jones opposed both approaches, preferring that the trial court instruct the jury to reread the instructions as a whole. The trial court suggested a response of "no, please reread your jury instructions." Jones objected and explained that

> if the jury, themselves, see self-defense even if it was not raised in the arguments of counsel, I think that that is an issue that we can either address the definition of self-defense or simply leave it alone, but telling them to disregard self-defense if they've seen it and counsel did not, I think it would be an error.

After further discussion, the trial court determined that it would instruct the jury, "No. Please re-read the instructions," as "it answers that they are to be considering only the instructions that they have in front of them." According to the court, "they're adding in other things that they shouldn't be considering. They should only consider the evidence that they heard and the instructions of the [c]ourt."

The jury subsequently convicted Jones as charged. The State conceded in its sentencing memorandum that for sentencing purposes count IV, possession of a stolen motor vehicle pertaining to the minivan, merged with count I, robbery in the first degree for the taking of that same vehicle. Jones' judgment and sentence (J&S) states that the two counts "encompass the same criminal conduct and count as one crime in determining the offender score." The court imposed a standard range

sentence of 160 months of incarceration, followed by 18 months of community custody, and the then-mandatory $500 victim penalty assessment (VPA).

Jones timely appealed.

ANALYSIS

Jones argues that the trial court committed reversible error by failing to give a supplemental jury instruction on self-defense and its response to the jury's inquiry was an improper judicial comment on the evidence. He also asserts two separate claims of double jeopardy with regard to the crimes of conviction and seeks relief from the VPA based on indigency.

I. Supplemental Self-Defense Jury Instruction

Jones contends that the trial court erred by failing to provide a supplemental instruction on the law of self-defense in response to the jury's question. A trial court must ensure that the jury understands the law. *State v. Sutton*, 18 Wn. App. 2d 38, 45, 489 P.3d 268 (2021). "When it is apparent the jury does not understand the law, the trial court may and should issue a supplemental written instruction." *Id.* at 43. To that end, CrR 6.15(f)(1) allows a "trial court to provide the jury with supplemental written instructions on any point of law after deliberations begin." *Id.* at 42. "However, 'such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.'" *State v. Jasper*, 158 Wn. App. 518, 542, 245 P.3d 228 (2010) (quoting *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990)). A defendant is not entitled to an instruction "for which there is no evidentiary support." *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Whether to give further instructions to a deliberating jury is within the trial court's discretion. *State v. Sublett*, 176 Wn.2d 58, 82, 292 P.3d 715 (2012) (plurality opinion). Therefore, we review a trial court's decision on whether to give a supplemental jury instruction for abuse of discretion. *Sutton,* 18 Wn. App. 2d at 42-43. "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The issue of a supplemental instruction arose in response to the jury question concerning the instruction defining assault for count II. To convict Jones of assault in the second degree as alleged in count II, the jury was instructed that it must find beyond a reasonable doubt that Jones assaulted Harvey with a deadly weapon. *See* RCW 9A.36.021(1)(c). The court had instructed the jury on duress as follows:

> Duress is a defense to a charge of robbery, assault and possession of stolen motor vehicle (white minivan) if:
>
> (1) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant would be liable to immediate death or immediate grievous bodily injury;
>
> (2) Such apprehension was reasonable upon the part of the defendant; and
>
> (3) The defendant would not have participated in the crime except for the duress involved.
>
> Threat means to communicate, directly or indirectly, the intent to cause death or grievous bodily injury.
>
> The defense of duress is not available if the defendant intentionally or recklessly placed himself in a situation in which it was probable that he would be subject to duress.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to these charges.

The jury instructions defined assault as "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." Again, the jury's question was whether it should consider self-defense when determining whether Jones used unlawful force.

Self-defense is an affirmative defense to assault in the second degree. *See State v. Acosta*, 101 Wn.2d 612, 616-18, 683 P.2d 1069 (1984); *State v. Tullar*, 9 Wn. App. 2d 151, 156, 442 P.3d 620 (2019). Because the use of force is lawful "when used by a person about to be injured, provided that the force used is not more than necessary," self-defense negates the mental state and the "unlawful force" elements of assault in the second degree. *Tullar*, 9 Wn. App. 2d at 156; *see also* RCW 9A.16.020(3). In order to raise self-defense before a jury, the defendant bears the initial burden of producing some evidence that their actions occurred in circumstances amounting to self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Generally, a criminal defendant who produces such evidence is entitled to a jury instruction on self-defense. *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). Once properly raised by the defendant, the State bears the burden to disprove self-defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 618-19.

Here, Jones initially sought and secured a jury instruction on the defense of duress.[2] Prior to the jury's inquiry, Jones did not request a self-defense instruction

[2] Duress is an affirmative defense that excuses a defendant's otherwise unlawful conduct. *State v. Frost*, 160 Wn.2d 765, 773-74, 161 P.3d 361 (2007). "The duress defense, unlike self-

or argue a theory of self-defense to the jury. Despite this, Jones now argues on appeal that "more than 'some evidence' tended to prove that [he] acted in self-defense when he displayed a gun and took the minivan" and, therefore, he was entitled to a self-defense instruction. Jones cites to the evidence demonstrating that Nugent parked her minivan to block the Toyota such that Jones could not drive away, and Henry was a large, physically fit man who punched out the window, "contacted" Jones, and taunted him to fight once Jones was outside the vehicle.

However, Jones never argued that he displayed a gun as an act of self-defense. Rather, he disputed that the State had produced evidence of a gun sufficient to carry its burden of proof beyond a reasonable doubt, asserting,

> The second claim of an offense as we chronologically go through what happened there is the claim of an assault on Mr. Henry. Although Ms. Nugent reported numerous bystanders and onlookers, the State did not produce a single corroborating eye witness to the existence of a gun. The only people who said that they actually saw a gun were Mr. Henry and Ms. Nugent.

Jones then continued on to highlight the inconsistencies, weaknesses, and problems with the testimony that Henry and Nugent provided as to his production of a gun from his waistband. Thus, Jones challenged the existence of the deadly weapon that served as the means of assault. He attempted to negate the element

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defense or alibi, does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law." *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). A claim of duress "admits the unlawful act or conduct, but not the crime itself." *Frost*, 160 Wn.2d at 776.

Duress requires that the "actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal [they] or another would be liable to immediate death or immediate grievous bodily injury." RCW 9A.16.060(1)(a). The apprehension must be "reasonable upon the part of the actor," and "the actor would not have participated in the crime except for the duress involved." RCW 9A.16.060(1)(b), (c). The defendant bears the burden of proving duress by a preponderance of the evidence. *Frost*, 160 Wn.2d at 773.

of use of unlawful force by denying that any force happened, rather than arguing that the force was lawful. Jones' strategy of questioning the existence of the deadly weapon that was the basis for the assault charge was incompatible with the use of that weapon for self-defense.

Jones chose to argue the evidence in a manner that does not support a claim of self-defense. Moreover, providing a self-defense instruction would have resulted in the State acquiring the burden to disprove the defense, which may have required the prosecutor to approach its case-in-chief with a different strategy. In briefing on this assignment of error, Jones fails to address the implications of the unique procedural posture, the State's evidentiary burden as to self-defense, and the fact that both parties had rested. Additionally, while he now argues the court could or should have reopened the case for further testimony in response to the jury question, Jones made no such request at the time that the court took up the issue of its response here. As such, Jones has failed to demonstrate that the trial court abused its discretion by declining to issue a supplemental self-defense instruction to the jury.

II. Judicial Comment on the Evidence

Jones further argues that the trial court's response to the jury question was an impermissible comment on the evidence because it resolved a key factual issue of whether he used unlawful force. In briefing, he asserts that, "[b]y telling the jury '[N]o,' it could not consider self-defense in determining whether the force used was unlawful, the court conveyed that Mr. Jones acted with unlawful force as a settled matter of law."

Article IV, section 16 of the Washington Constitution prohibits a judge from "'conveying to the jury [their] personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *Id.* The constitutional prohibition on such comments "forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Here, in answer to the jury's question as to whether it should consider self-defense in the context of unlawful force for the assault charge, the court answered "No. Please re-read the instructions." Rather than an opinion, the trial court's response was a correct statement of the law of the case. Jones had not put forth a claim of self-defense, therefore, the jury should not consider a defense during its deliberations that was not argued or supported with evidence. Perhaps more critically, in the absence of a self-defense instruction, the jury *could not* have deliberated on that particular legal theory as it had not received the *law* of self-defense from the court. As the judge stated in conveying the initial instructions, the jury had a duty "to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions." The trial court's response foreclosed the jury's

consideration of law outside the provided instructions and was not error. Finally, the jury instructions informed the jury that any statement that could be possibly construed as a comment on the evidence by the judge was unintentional and should be disregarded. We presume that juries follow the instructions of the court. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Because this was not an improper comment on the evidence, Jones has failed to establish entitlement to relief on this assignment of error.

III. Double Jeopardy

Jones next raises two claims of double jeopardy. He contends that his convictions for assault in the second degree in count II and robbery in the first degree in count I violate the prohibition on double jeopardy and should merge. He also argues, and the State concedes, that his conviction for possession of the stolen minivan in count IV also merges with count I. We agree with Jones as to both of these claims.

"Double jeopardy is a constitutional limitation on the power of the court to place a person in jeopardy multiple times for the same offense." *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 813, 383 P.3d 454 (2016). The State may impose separate punishments for different offenses, but both the federal and state constitutions prevent multiple convictions and punishments for the same offense. *State v. Arndt*, 194 Wn.2d 784, 817, 453 P.3d 696 (2019); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine

whether, in light of legislative intent, the charged crimes constitute the same offense." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

"Because the legislature has the power to define criminal conduct and assign punishment, the first step in determining whether a defendant has suffered multiple punishments for the same offense is to determine what punishments the legislature has authorized." *Arndt*, 194 Wn.2d at 815. Double jeopardy is not offended when the legislature has authorized cumulative punishments for both crimes. *Id.* We engage in the following four-step analysis to determine whether the legislature intended to authorize cumulative punishment: "(1) consideration of any express or implicit legislative intent, (2) application of the *Blockburger*,[3] or 'same evidence,' test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense." *Id.* at 816 (quoting *State v. Freeman,* 153 Wn.2d 765, 771, 108 P.3d 7583 (2005)). When considering whether convictions violate double jeopardy, we look to how the offenses were both charged and proved. *Freeman*, 153 Wn.2d at 777; *State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016). A claim of double jeopardy is an issue of law that we review de novo. *Arndt,* 194 Wn.2d at 815.

A. Assault in the Second Degree and Robbery in the First Degree

Where, as here, the alleged double jeopardy violation involves convictions for robbery in the first degree and assault in the second degree, "a case by case approach is required to determine whether [the crimes] are the same for double jeopardy purposes." *Freeman*, 153 Wn.2d at 780. However, "[g]enerally, it appears

[3] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

that these two crimes will merge unless they have an independent purpose or effect." *Id.*

The merger doctrine is a rule of statutory construction that is applicable "where the degree of one offense is elevated by conduct that constitutes a separate offense." *Id.* at 777-78; *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). Applicable here, "[t]he merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation." *Kier*, 164 Wn.2d at 806.

In this case, the State charged Jones with assault in the second degree, with Henry as the named victim, based on an allegation that the crime was committed with a deadly weapon (a gun). As noted herein, to convict on that crime, the jury was instructed that the State was required to prove beyond a reasonable doubt that with a deadly weapon Jones acted "with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury." The State also charged Jones with the robbery of Nugent which was elevated to first degree by his use of the firearm. *See* RCW 9A.56.190, .200(1)(a). The trial court provided a to-convict instruction that included that the theft of property "was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another," "[t]hat force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking," and the defendant was armed with

a deadly weapon or displayed what appeared to be a firearm or deadly weapon. The two crimes, as charged and instructed, required proof of a deadly weapon and apprehension or fear of harm.

While the State alleged separate victims for each count, both crimes relied on Jones producing and pointing his gun at Henry. As to the assault, the State argued in closing, "I would submit to you that the State has proved assault in the second degree beyond a reasonable doubt when Mr. Jones chose to point his firearm at Steven Henry." In arguing the robbery charge to the jury, the State again focused on Jones pointing a gun at Henry as follows:

> Element number three, that the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or *fear* of *injury* to *that person* or to *the person* or property of *another*.
>
> Again, once Mr. Jones decided to brandish that firearm, Ms. Nugent, as well as Steven Henry, became afraid. She wasn't going to do anything when the defendant ran at her. He had a gun on him. She was well aware of that, and I asked her were you afraid when he was running at you? Were you going to do anything to stop him? She said no. So yes, that fear, that threat of fear was present, and that's how he got into that car and drove off.
>
> . . . .
>
> Element number four, that the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance of the taking. Element three and four kind of are intertwined, but, again, I asked Ms. Nugent based on the fact that you knew Mr. Jones was armed with a firearm and that he had pointed it at your husband, were you going to do anything to stop him? No. Were you afraid? Yes, I was.
>
> Element number four has been proven beyond a reasonable doubt, and I've been saying this the entire time in terms of the firearm.

(Emphasis added.) The facts and argument put forth by the State clearly relied on the single act of Jones pointing a gun at Henry to satisfy both the fear and deadly weapon elements of assault in the second degree and the fear and deadly weapon

elements of robbery in the first degree. That act was both the conduct amounting to assault and the basis for elevating the robbery to first degree. "[T]he degree of one offense is elevated by conduct constituting a separate offense," thus triggering the merger doctrine. *Kier*, 164 Wn.2d at 804. As our Supreme Court has identified "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery," these two convictions must merge. *Freeman*, 153 Wn.2d at 776.

When an individual is charged with two crimes, a double jeopardy violation is avoided when the lesser included offense merges into the more serious offense. *State v. Muhammad*, 194 Wn.2d 577, 618, 451 P.3d 1060 (2019) (plurality opinion). Because robbery in the first degree is a class A felony and assault in the second degree is a class B felony, the assault conviction on count II merges into the robbery conviction for count I. RCW 9A.56.200(2); RCW 9A.36.021(2)(a); *see also Kier*, 164 Wn.2d at 814. We reverse the conviction for assault in the second degree and remand to the trial court for resentencing.

B. Possession of Stolen Minivan and Robbery

Jones contends that his convictions for robbery in the first degree on count I and possession of a stolen vehicle pertaining to the minivan on count IV also violate double jeopardy and should merge. In the trial court, the State conceded that these two convictions merged. While the court confirmed and appeared to accept this concession, the J&S does not reflect merger of the two convictions. The J&S includes the conviction for possession of stolen vehicle and notes that the two counts "encompass the same criminal conduct" and are treated as one crime for the sole

purpose of determining the offender score. On appeal, the State acknowledges the error and concedes that remand is necessary for the trial court to vacate both the finding of same criminal conduct and the conviction for count IV. We agree. Because the two convictions violate double jeopardy, the less serious conviction must be removed from the J&S. *See State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

IV. Victim Penalty Assessment

Finally, Jones requests remand for the trial court to strike the VPA from his J&S. The State agrees that recent amendments to the VPA statute that prohibit imposition of the assessment on indigent defendants apply to Jones. The new J&S entered after resentencing should reflect this change in the law.

Affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

Hazelrigg, ACJ

WE CONCUR:

Díaz, J.

Chung, J.

APPENDIX B

April 21, 2025, Order Denying Motion for Reconsideration

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

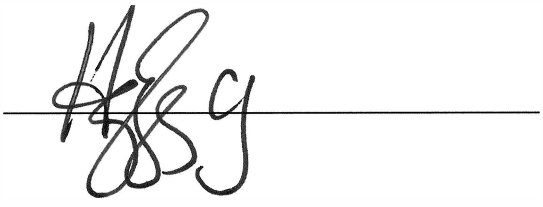
STATE OF WASHINGTON, Respondent, v. DANIEL JOSEPH JONES, Appellant.	No. 87204-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration on March 28, 2025. A panel of the court called for an answer which respondent filed on April 17, 2025. After consideration of the motion and the response the panel has determined that the motion for reconsideration shall be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



WASHINGTON APPELLATE PROJECT

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