IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAY CLIFFORD RUSSELL, Appellant.	No. 39744-7-II Consolidated with No. 40080-4-II UNPUBLISHED OPINION

Worswick, A.C.J. — Jay Russell appeals his convictions for first degree burglary, second degree assault, and felony harassment. He raises a series of errors, including (1) evidentiary error, (2) jury instruction error, (3) ineffective assistance of counsel, (4) prosecutorial misconduct, (5) insufficient evidence, (6) offender score miscalculation, and (7) failure to impose an exceptional downward sentence. We affirm Russell's felony harassment conviction, reverse Russell's assault

and burglary convictions, and remand for a new trial.

FACTS

Russell and Christina Russell, married since 1993, agreed to separate in 2005.[1] Christina and Russell both have two teenage daughters. Around the time Christina and Russell separated, she started dating Matt Higgins. Christina then moved into an apartment of her own in Vancouver. Russell and Higgins had met on previous occasions at various events for the daughters and their relationship was cordial.

Things changed in the days leading up to September 5, 2008 when Russell called Christina to express concerns when he found out Higgins was a convicted sex offender. Christina and Russell both agreed to discuss it further later, but did not set a specific time to do so.

Then on September 5, Christina, a substitute teacher, was called in to work. Because her car was not working, she borrowed Higgins' instead. Her own car remained at her apartment. On this same day, Higgins was staying at Christina's apartment.

There is disagreement as to what happened next. According to Higgins, he was awakened from a nap by the family dog barking and decided to go outside to smoke a cigarette. As soon as he opened the door, Russell pushed his way in to the apartment and threw Higgins against the wall. Higgins maintained that he did not invite Russell in and that Russell then began choking him, pushed him against a wall and threatened to kill him.

Russell on the other hand, describes the events differently. According to him, he arrived to visit Christina with hopes of discussing the sex offender details he uncovered, when he saw

[1] Because Jay Russell and Christina Russell share the same last name, we refer to Christina Russell by her first name. We intend no disrespect.

Christina's car in the driveway. Because he saw Christina's car out front, he assumed she was there. He then knocked on the door, after which Higgins opened the door. Russell then entered, to which Higgins responded with "Hey Bro!" Verbatim Report of Proceedings at 246. Russell then told Higgins that he wanted to talk to Christina about Higgins' criminal history and contact with the kids. Higgins then became angry and charged at Russell. Russell then had to restrain Higgins for several seconds.

After the encounter ended and Russell left, Higgins called 911. Russell did not. Officer Timothy Thomson of the Vancouver Police Department arrived at Russell's apartment. He took photos of damage to the apartment and photos of Higgins himself. He also opined that the injuries to Higgins looked "defensive" in nature. As Officer Thomson was leaving, Christina returned from work. Christina then told Officer Thomson that Russell did not have specific permission to be at the apartment.

The State charged Russell with one count of first degree burglary, one count of second degree assault, one count of felony harassment, and one count of third degree malicious mischief.

The trial court heard motions in limine before trial. The State moved to exclude evidence of Higgins' second degree theft conviction, which the trial court granted under ER 609(b). The court also heard whether to exclude evidence of prior threats allegedly made by Russell to Higgins directly and through Christina. The trial court excluded all threats, except one made directly by Russell to Higgins, that he would "snap [him] like a twig." RP at 93.

At trial, several witnesses testified, including Christina, Higgins, Russell, and Officer

Thomson. The State also introduced photos showing damage to the apartment, presumably from the altercation between Higgins and Russell. Several pieces of testimony are at issue in this appeal, including Higgins' description of events, Christina's testimony that Russell, while he did not have direct permission to be at her apartment on September 5, did know where the key was and would often come and go.

At closing argument, a series of statements by the State occurred that are relevant to Russell's appeal. First, the State argued, based on Russell's own testimony and that of Officer Thomson, that Russell had not contacted the police following the incident. The prosecutor specifically stated:

> And then afterwards – after – in the Defendant's own words – Matthew Higgins cried uncle, finally gave in to the pain, Defendant left. Didn't stick around. He left. What was the first thing Matthew Higgins did at that point in time? He called Chris Russell and then he called 9-1-1 to report it moments after it happened. And he was there when law enforcement arrived and he gave his side of the story. Defendant was nowhere to be found. Law enforcement said they attempted to contact him, nowhere to be found.
>
> Defendant never contacted 9-1-1. He claims he was came at, attacked, and in fear for his safety at a point that he had to throw someone through a wall. He never picked up the phone to call 9-1-1 or report that. Never went to law enforcement. Mr. Higgins – first thing he did after this attack was call the authorities. That's what a reasonable person would do in those circumstances.

RP at 327. Additionally, the State argued, based on Christina's testimony, that Russell did not have permission to enter her home:

> You heard he took all those photographs and although Chris Russell said up on the stand that it – at some point that she had given permission, she told law enforcement I had never given him permission to be there on that date. And he – he never had permission to be there when I'm not here. So I think there's probably a bit of minimization, perhaps, on Chris Russell's part at this point in time

> given that Matthew Higgins is no longer in her life and the Defendant is someone who's going to be in her life for a very long time and that she's going to have to deal with.

RP at 333. And finally, the State suggested that Russell may have altered his testimony based on what he heard from other witnesses throughout the trial:

> And he was, again, the only witness who got to sit through and see all the other witnesses testify before him. Our officer got to sit through two witnesses beforehand. Defendant got to sit through everyone, including the officer. And so the Defendant had an opportunity to observe – observe all the witnesses. Observe all the evidence against him, look through all that and try and fit his story into there and make it sound reasonable.

RP at 335.

A jury found Russell guilty of burglary, assault, and harassment, but returned a verdict of not guilty on the malicious mischief charge.

At sentencing, the State requested a 36-month sentence and a lifetime no-contact order between Russell and Christina. Christina testified at sentencing and opposed the order. Russell's defense counsel at sentencing argued that under the merger doctrine or the "same criminal conduct" doctrine, a lower sentence was required. Counsel also requested an exceptional downward sentence. The trial court rejected Russell's arguments and sentenced Russell to 31 months. The court, however, declined to issue the no-contact order.

Following the sentencing hearing, Russell filed a post-trial motion for arrest of judgment and for a new trial. Russell raised several arguments, including the State's questioning of Officer Thomson about whether Russell contacted the police after the incident was an improper comment

on Russell's right to remain silent and that there was insufficient evidence to support the burglary conviction. The trial court denied Russell's motions.

Russell now appeals.

ANALYSIS

Sufficiency of the Evidence

We address Russell's sufficiency of the evidence arguments first. Russell contends that there was insufficient evidence to convict him of first degree burglary or second degree assault. We disagree.

When reviewing sufficiency issues, this court views the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

First Degree Burglary

Russell argues that his first degree burglary conviction is not supported by sufficient evidence. In order to find Russell guilty, the jury had to find the following elements 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 actions occurred in the State of Washington.

CP at 76. Russell refers to testimony by his former wife that he was welcome at her home at any time, and that if she had been home on the day in question, he would have been welcome to come in. This, however, is directly contrary to the testimony the State references, that there was no such agreement and Russell did not have specific permission to enter the apartment on the day at issue. Because this court admits the truth of the State's evidence and all inferences reasonably drawn therefrom, Russell's own story of the events that differs from Higgins' is not afforded much, if any, deference.

The State points to testimony by Christina and Higgins to demonstrate sufficient evidence for Russell's burglary conviction. For example, Christina testified, contrary to Russell, that she had not given him permission to freely enter her apartment on the day at issue. She also testified to the damage in the apartment and to Higgins' injuries. Higgins also testified that Russell pushed his way into the apartment and then attacked him. In light of this, sufficient evidence exists to support his first degree burglary conviction. Russell's argument fails.

Second Degree Assault

Russell also argues that his second degree assault conviction is not supported by sufficient evidence. In order to find Russell guilty, the jury had to find the following elements 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.

CP at 81. Russell also argues that because the jury was not instructed that it had to be unanimous as to which crime he had the intent to commit, this court must find substantial evidence supports each alternative predicate crime in order to sustain the conviction.[2]

State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) confirms Russell's unanimity argument. "A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt." *Smith*, 159 Wn.2d at 783. "It is well established, however, that when the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime or crimes should the jury be instructed on more than one of those means." *Smith*, 159 Wn.2d at 783. "But, in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented." *Smith*, 159 Wn.2d at 783.

[2] The State does not appear to address this argument directly.

Because there is sufficient evidence, based on the analysis above, to support Russell's burglary conviction, the remaining question is whether sufficient evidence supports his felony harassment conviction. The jury was instructed as follows on felony harassment:

> A person commits a crime of felony harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person or maliciously to do any act which is intended to substantially harm another person with respect to his or her physical health or safety and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.

CP at 89. Higgins testified at trial that in the midst of the assault, as Russell had his hands around Higgins' neck, Russell said that if he ever caught Higgins around his wife and kids again, he would kill him. Higgins went on to testify that his response to this threat was to get his things together and get out of the apartment as fast as possible. He also testified that he "absolutely" believed Russell would possibly carry out his threat. RP at 101. This testimony, when viewed in the light most favorable to the State, supports the underlying felony harassment conviction.

Higgins provided extensive testimony regarding the assault itself, including how Russell pushed his way into the apartment, grabbed him by the throat, and pushed him up against a wall. Higgins also testified that Russell held him up against the wall for ten to fifteen seconds in such a way that made it hard to breathe. The State introduced photos showing neck injuries as well. All of this is sufficient evidence to support Russell's second degree assault conviction. Thus, his argument on this point also fails.

Aggressor Instruction

Russell also contends that the trial court erred by giving an aggressor instruction over defense counsel's objection.[3] On this point, we agree with Russell.

In general, we review a trial court's choice of jury instructions for abuse of discretion. *State v. Douglas*, 128 Wn.App. 555, 561, 116 P.3d 1012 (2005). But we review an alleged error of law in jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). A trial court may give a jury instruction only when substantial evidence supports it. *Douglas*, 128 Wn. App. at 561. Where there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999) (citing *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986)). 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)). But to give an aggressor instruction based solely on words alone is improper. *Riley*, 137 Wn.2d at 910-11.

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[3] The trial court gave the following aggressor instruction:

> 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.

CP at 88.

When determining if the evidence at trial was sufficient to support giving an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). But Washington courts have also expressed reservations with the aggressor instruction. "While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction." *Riley*, 137 Wn.2d at 910, n. 2.

Russell argues that there was an insufficient basis to support the instruction because no provocation occurred before his fight with Higgins. The State counters that the evidence of Russell pushing his way into Higgins' residence and grabbing him is sufficient to support the instruction. The State references the following testimony by Higgins to support its position:

> [STATE]: Okay. All right. Did you ever invite the Defendant in on that date?
> [HIGGINS]: Absolutely not.
> [STATE]: Okay. Did the Defendant ever specifically ask if he could come in?
> [HIGGINS]: No.
> [STATE]: Okay. Okay. And what was going through your head when you saw the Defendant coming up to the doorway on that day?
> [HIGGINS]: Get the door closed.
> [STATE]: Okay. Did you want him in the house at that point in time?
> [HIGGINS]: No I was there by myself.
> [STATE]: Okay. All right. And had he ever been inside of the house when it – when you've been there?
> [HIGGINS]: No. Never.
> [STATE]: Okay. So that was the first time he'd actually come inside Chris' house when you've been there?

> [HIGGINS]: When I was there, yes.
> [STATE]: Okay. Had the two of you been alone together before that day?
> [HIGGINS]: Jay and I?
> [STATE]: Yeah.
> [HIGGINS]: No.
> [STATE]: 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?
> [HIGGINS]: About that.
> [STATE]: All right. And so once he got to the door and forced it open, what did he do at that point in time?
> [HIGGINS]: 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 at 98. Russell's own testimony disputes Higgins' characterization of events, however. Russell stated that he simply entered the home and greeted Higgins and said that he wanted to talk to Christina about Higgins' criminal history. According to Russell, Higgins became very angry and lunged at him, after which Russell defended himself.

Contrary to the State's contention, Higgins' testimony does not demonstrate a provocative act that supports the aggressor instruction; it is evidence of the assault itself. *See State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (aggressor instruction is improper when the defendant never initiated any act toward the victim until the final assault). When we view the evidence in the light most favorable to the party that requested the instruction, the State in this case, there is insufficient evidence to support the instruction. The trial court erred in giving the aggressor instruction in this instance and Russell's argument prevails. Based on this, we reverse Russell's assault conviction and remand for a new trial.

Ineffective Assistance of Counsel

Russell next contends that he received ineffective assistance of counsel when his attorney failed to ask for a limiting instruction on the use of prior statements to impeach Christina. Russell specifically argues that his defense counsel was ineffective in failing to ask for a limiting instruction under ER 105 on the use of prior statements to impeach Christina.[4] We agree.[5]

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *Powell*, 150 Wn. App. at 153 (internal quotation marks omitted) (quoting *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 930, 158

[4] ER 105 states that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

[5] Russell also contends that he received ineffective assistance of counsel when his attorney failed to ask for a lesser included instruction of fourth degree assault and failed to object to patrol officer testimony regarding the nature of Higgins' injuries. Because we agree with Russell's contention regarding the failure to seek a limiting instruction, we do not reach these other ineffective assistance claims.

P.3d 1282 (2007)).

This court starts with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Russell points to the following exchange between the State and Officer Thomson as the basis for his argument:

> Q: Did – did Christina Russell indicate to you that [Russell] does not have her approval to enter her apartment when she is not there?
> [DEFENSE COUNSEL]: Same objection. Raised hearsay.
> [COURT]: Let's go – take the jury out for a minute. I don't know who opened that door.
> . . .
> [COURT]: You know what your evidence is, I don't. So where's – where are we headed with this?
> [STATE]: Well Your Honor, it's defense counsel did a pretty good job of getting Ms. Russell to say he has a key, he's welcome there whenever he wants in essence. So I think – you know – given that fact I think we – we're allowed to impeach her by saying she told law enforcement just the opposite of that. That he wasn't allowed there unless she was there and didn't have permission on that date to go into the residence. So it's just two questions. Impeachment – standard impeachment. So in opposition to what she said on the stand.
> [COURT]: Okay.
> [DEFENSE COUNSEL]: I guess my response was he could have challenged Ms. Russell to that effect.
> [COURT]: Well that was my thought. But then you both have the right to recall her. So – I think that I – under those – indeshek (ph) – will allow the questions. And as I say, we didn't excuse her so –
> [DEFENSE COUNSEL]: I – I will be calling her back.
> [COURT]: Okay.
> [DEFENSE COUNSEL]: Thank you Your Honor.
> [COURT]: And we're good.
> [STATE]: And I – I believe actually – specifically ask her – you know – did you

> tell the officer that so – I did ask her that question when she was up there. So –
> [DEFENSE COUNSEL]: I mean – I – I may have missed it.
> [STATE]: So – I mean – because I anticipated asking him the same thing. I anticipated her – so – I mean – I – I don't necessarily see that she should be recalled to be asked the same question but –
> [COURT]: Judge: I don't – I don't remember specifically either so –
> [STATE]: – okay.
> [COURT]: – okay.
> . . .
> [QUESTIONS CONTINUE]
> Q: During your brief interaction with Christina Russell, did she tell you that Jay Russell, the Defendant, does not have her approval to enter the apartment when she is not home?
> A: Yes.
> Q: Okay. And did Christina Russell also indicate to you that the Defendant did not have her permission to enter the apartment on that date in question?
> A: Yes.

RP at 192-95. This questioning of Officer Thomson by the State came after the following cross examination of Christina by defense counsel:

> Q: Now as far as the going back and forth and ferrying the kids, would you go into [Russell's] house?
> A: Yes.
> Q: And was it always communicated that you could go in? You knew where the key was?
> A: Yes. Um-hum.
> Q: As far as [Russell] coming to your house, what was the arrangement?
> A: Typically because of their age it would be a drop off. There were times that he'd walk them to the door because he had something or was helping them carry their stuff and times when I wasn't there he'd let them in. He knew where the community key was.
> Q: So you'd communicated to [Russell] where the community key was?
> A: Right.
> Q: And you allowed him to come into your home?
> A: To – yeah. [Russell] was not told he could not come into my home on a day to day basis. It was never like it was forbidden.
> Q: Okay. When we go back to that September 5th incident –
> A: Okay.

> Q: – you've never had a specific conversation saying on this date and time –
> A: No.
> Q: – you can come in?
> A: No.
> Q: But the arrangement that's been going on as far as taking the kids back and forth and your relationship, he had access to your home?
> A: Yes. He had access to my home, yes.
> Q: And do you feel like he had permission to enter that day?
> A: I would not have denied him permission. I just wasn't there to have him – to talk to him that day to grant it.
> Q: But now let me specifically ask – so generally speaking [Russell] had access to the community key?
> A: Right.
> Q: And he had permission to go in when you weren't there?
> A: Right. There were times that he would come and let my dog out or grab something for the girls.
> Q: Okay. And as far as going to his house, you would go over to his house –
> A: Any time.

RP at 161-63. Russell also references the portion of the State's closing argument discussing Christina's statements to law enforcement as an example of its use of the impeachment testimony as substantive evidence.

Impeachment evidence goes to the credibility of the witness and is not proof of the substantive facts therein. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). When the court admits such evidence, an instruction cautioning the jury to limit its consideration to its intended purpose is both proper and necessary. *Johnson*, 40 Wn. App. at 377. But 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). Despite this

presumption, the facts in this case do not support it.

Whether or not Russell had permission to enter Christina's apartment was a crucial issue relating to the burglary charge. The officer's impeachment testimony that Christina told him that Russell did not have permission to enter the apartment, which from the record appears to be quite adamant, demonstrates how important such a limiting instruction would have been. There was no legitimate tactical reason for Russell's counsel to fail to seek a limiting instruction. This is particularly the case in light of Russell's defense that he had permission to enter the apartment.

Russell's counsel was clearly deficient in this instance because under ER 105, Russell was freely entitled to such a limiting instruction. And Russell was prejudiced by this deficient performance because had his counsel requested the instruction, not only would he have received it, but then the jury would have been clearly instructed on how to deal with the officer's impeachment testimony and very possibly would have found him not guilty of burglary. This is particularly the case because the jury was required to find beyond a reasonable doubt that Russell unlawfully entered and remained in Christina's apartment. The only significant evidence as to this element comes from Christina's testimony. Without the limiting instruction, the jury was allowed to use the officer's impeachment testimony to bolster Christina's testimony substantively. This is more than enough to "undermine confidence in the outcome." *Powell*, 150 Wn. App. at 153.

For these reasons, Russell's argument prevails. Because this issue relates only to the burglary charge, we reverse that conviction and remand for a new trial.[6]

[6] Because we reverse Russell's assault and burglary convictions based on the aggressor instruction error and ineffective assistance of counsel respectively, we do not reach Russell's other arguments

Affirmed in part, reversed in part, and remanded for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Van Deren, J.

related to those charges. And because Russell only challenged his felony harassment conviction on sufficiency of the evidence grounds, to which we disagreed, his felony harassment conviction stands.