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NO. 69044-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CHARLES FELD

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

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I. SUMMARY OF ARGUMENT

The breadth and depth of the record of this particular case is staggering. Mr. Feld was charged with eight felony counts ranging from attempted murder, arson, and assault one to harassment—threats to kill. At trial he was convicted of everything. Mr. Feld awaited trial for two years. During the two year period, Mr. Feld was examined for competency multiple times and ultimately found competent to stand trial in February 2012. During the pendency of his case, Mr. Feld had numerous court hearings where he: was physically difficult for jail staff to handle; made offensive, often threatening remarks to judges and attorneys; would not follow instruction of the court or show any decorum for the judicial process; and at times refused altogether to be present in court unless the jail wrestled him into the courtroom. Prior to trial, a hearing was held as to whether Mr. Feld would be shackled for the purposes of trial. Testimony was taken from jail officials and after weighing both sides, the trial court determined shackling was necessary for the safety of all involved. Mr. Feld now appeals the necessity of his shackling at trial. He also appeals

the fact that he had a stand-in attorney at one of his competency hearings, that he was unable to bring in alleged reputation evidence against one of his victims, and whether his jail phone calls were improperly recorded and introduced as evidence. Finally, he appeals the validity of one of his jury instructions. His appeal is timely made; however, the State asks that this Court deny his motions pertaining to the aforementioned issues. The State concedes as to one issue regarding double jeopardy and explains the proper remedy in the following.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion when it made a decision that due to security risks and Mr. Feld's prior conduct in court, he should be shackled during trial.
2. Whether Mr. Feld was denied the right to counsel during a critical stage when his primary attorney was unavailable, but another attorney assisted him at a competency hearing.

3. Whether the trial court abused its discretion in excluding evidence of one act where the victim allegedly acted violently.

4. Whether Mr. Feld's privacy interests were violated when his jail phone calls were recorded while he was in custody.

5. Whether the trial court erred in providing a particular jury instruction.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

[1] On April 17, 2012, in open court, the State filed a second amended information charging Mr. Feld with the following: Count 1, Attempted Murder in the First Degree, Firearm Enhancement (as to Stephen Callero); Count 2, Assault in the First Degree, Firearm Enhancement (as to Stephen Callero); Count 3, Attempted Murder in the First Degree (as to Timothy Hanby); Count 4, Assault in the First Degree, Firearm Enhancement (as to Timothy Hanby), Count 5, Arson in the First Degree; Count 6, Unlawful Possession of Firearm in the First Degree; Count 7, Assault First Degree, Firearm

[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

Enhancement (as to Deputy Steven Gonzalez); Count 8, Assault in the First Degree Firearm Enhancement (as to Deputy Jess Brannon) and Count 9, Harassment—Threats to Kill. CP 83-87.

After a hearing on severance of the charges, the Court severed the count of Unlawful Possession of a Firearm and that count was later dismissed. 4/11/12 RP 4-6.

Mr. Feld refused to come to court on May 13, 2010, for entry of an order to be sent to Western State Hospital for a competency evaluation on three attempts. The Court took testimony of Sgt. Ron Coakley of the Skagit County Jail to the effect that the defendant refused to be brought to court and indicated a request for everyone "to go kill themselves." The Court entered an order finding the defendant refusing to appear in court and sending him to Western State Hospital for 15 days for a competency examination. 5/13/10-6/06/12 RP 7-8.

Mr. Feld was brought to court on June 10, 2010, for entry of an order of competency based upon the report from Western State Hospital and agreement of the parties to move forward with formal arraignment. 5/13/10-6/06/12 RP 9-10. Mr. Feld refused to stand quiet and maintained yelling profanities at everyone in the room. The Court removed the defendant and with agreement from Mr. Feld's

counsel, entered pleas of not guilty to all charges on behalf of the defendant. 5/13/10-6/01/12 RP 10-11.

On December 2, 2010, Mr. Feld's attorney raised issues of competency again to the Court. The parties agreed to have Mr. Feld brought to court on December 3, 2010, to address the issue of competency. 5/13/10-6/01/12 RP 22-25. On December 3, 2010, the Court went through a colloquy with the defendant at length regarding issues of competency before excusing Mr. Feld for the remainder of the hearing at his request. 5/13/12-6/06/12 RP 26-39. On December 3, 2010, the Court made a finding that Mr. Feld was incompetent and sent him back to Western State for an evaluation and opinion on restoring competency, notwithstanding Judge Rickert's finding of competency six months previous. 5/13/12-6/06/12 RP 43-44.

On February 24, 2011, Mr. Feld was returned from Western State Hospital and there was a motion from the State to enter a finding of competency and move forward with the case. Mr. Feld's attorney Mr. Richards was absent due to the weather and another public defender, Mr. Adam Yanasak, was standing in, requesting a one week continuance. 02/24/11-1/26/12 RP 3-4. Mr. Feld advised Mr. Yanasak that he wanted to go to trial and that he is competent, agreeing with the order from Western State. Mr. Yanasak explained

to Mr. Feld that he wanted to wait for Mr. Richards to return and Mr. Feld instructed Mr. Yanasak to proceed without Mr. Richards. 02/24/11-1/26/12 RP 5-8. The Court entered a finding that the defendant was competent. 02/24/11-1/26/12 RP 7-8, 11. One week later, on March 3, 2011, Mr. Richards went through omnibus on Mr. Feld's case and at that time Mr. Richards was present and made no objection to the entry of the competency order that occurred one week prior in his absence. 02/24/11-1/26/12 RP 12; 3/3/11 RP 3.

On March 10, 2011, a hearing was held before the Court on Mr. Feld's motion to substitute counsel due to conflict. Mr. Feld did not respond to Court when asked for further comment. The Court denied the motion. 03/10/11 RP 5.

On March 24, 2011, there was a motion to find cause for the Court to continue the trial date in this case. Mr. Feld refused to appear in court at this hearing. The Court granted the trial continuance. 2/24/11-1/26/12 RP 17-18.

On April 7, 2011, Mr. Feld's attorney again raised issues of competency and the Court entered an order sending Mr. Feld back to Western State for a competency examination, including an order to require medication if necessary. 5/13/10-6/06/12 RP 47-49.

On July 7, 2011, Mr. Delay is substituted in for Mr. Richards as counsel for Mr. Feld. 5/13/10-6/06/12 RP 50.

On August 4, 2011, Mr. Delay moves the Court for another evaluation of Mr. Feld by Dr. Muscatel, seriously questioning Mr. Feld's current competency. 2/24/11-1/26/12 RP 21. Dr. Muscatel, Mr. Feld's expert, found the him incompetent on March 25, 2011, and on June 10, 2011, Western State Hospital, through Dr. Hendrickson, found Mr. Feld competent. Dr. Muscatel was present for the evaluation of Mr. Feld in June 2011 by Dr. Hendrickson. 2/24/11-1/26/12 RP 22-23. Mr. Feld's attorney requested a thirty day continuance to allow Dr. Muscatel to re-evaluate Mr. Feld. Mr. Feld refused to participate in court on this day. 2/24/11-1/26/12 RP 24. The Court granted a thirty day continuance and made findings that Mr. Feld voluntarily absented himself from the hearing and Chief Wend of the Skagit County Jail also indicated that "it would be a wrestling match" to get the defendant to appear involuntarily in court. 2/24/11-1/26/12 RP 26. A status hearing was scheduled for September 8, 2011. 2/24/11-1/26/12 RP 27.

On September 8, 2011, the parties agreed to find a mutually agreeable date for a special set hearing for competency and reset the dates for status in the case. 2/24/11-1/26/12 RP 32-34.

On September 23, 2011, the Mr. Feld refused to appear for a status/competency hearing. Mr. Delay had moved to withdraw as counsel for Mr. Feld and the court appoints a public defender to represent Mr. Feld once again. 9/23/11-4/04/12 RP 6.

On October 6, 2011, Mr. Delay and Mr. Richards are present representing Mr. Feld for a status on Mr. Delay's request to withdraw and competency. 9/23/11-4/04/12 RP 11. Mr. Richards advised the Court his concern to appointment because Mr. Feld refused to meet with him. 9/23/11-4/04/12 RP 10. The Court appointed Mr. Richards to represent Mr. Feld. 9/23/11-4/04/12 RP 12-13.

On October 27, 2011, a hearing was held regarding Mr. Feld not taking his medications, not talking with his attorney, and general issues of competency again. Mr. Feld refused to appear for this hearing. The Court entered an order sending defendant back to Western State for a competency evaluation. 9/23/11-4/04/12 RP 21-24.

On November 3, 2011, the official order for Mr. Feld to be evaluated by Western State Hospital is entered. 9/23/11-4/04/12 RP 25.

On December 15, 2011, another status hearing to determine a special set date for competency hearing. 2/24/11-1/26/12 RP 36-38.

On January 11, 2012, the case was set for status of competency. Mr. Feld's expert, Dr. Muscatel is ill and has not completed his report. 5/13/10-6/06/12 RP 52-55.

On January 26, 2012, the case was set for a status hearing. Mr. Feld refused to appear in court. Mr. Feld is now represented again by Mr. Richards and Ms. Nancy Neal, another Skagit County Public Defender. Mr. Feld's expert, Dr. Muscatel, has had surgery and has not been able to complete a report or give a date for hearing. 2/24/11-1/26/12 RP 41-44.

On February 2, 2012, a status hearing on Dr. Muscatel's situation was held. Again, Mr. Feld refused to appear in court. 9/23/11-4/04/12 RP 27-28.

On March 13, 2012, a competency hearing was held and the court found Mr. Feld competent. 9/23/11-4/04/12 RP 30. A trial date was set at that time for May 7, 2012.

On March 22, 2012, Mr. Feld was not being quiet in the courtroom and was ordered removed by the Judge: "--reflect to the best of its abilities his language and outbursts and inability to control himself and sit quietly to allow us to conduct the hearing. So he has, in my opinion, absented himself based on his own conduct; he was not required to leave." 9/23/11-4/04/12 RP 29. The State also

moved to alert the Court that the trial date was set outside of the sixty day time for trial and indicated that they were ready to go to trial on March 27, 2012. 9/23/11-4/04/12 RP 32. Mr. Feld's counsel indicated their calculation for the time for trial was April 7, 2012. 9/23/11-4/04/12 RP 33. The Court, after discussion on the calculations found good cause to set the trial date to April 9, 2012. 9/23/11-4/04/12 RP 38. The Court set April 4, 2012 for a 3.5 hearing. 9/23/11-4/04/12 RP 39.

On April 4, 2012, Mr. Feld's counsel put on the record the numerous times the defendant refused to meet with them, including notes from Mr. Feld to them that they should kill themselves, and their concerns regarding competency of the defendant. 9/23/11-4/04/12 RP 42. Mr. Feld's counsel moved to substitute in new counsel for Mr. Feld, the court denied those motions. 9/23/11-4/04/12 RP 44. An order regarding stipulation to the 3.5 hearing was entered. Mr. Feld refused to sign it. 9/23/11-4/04/12 RP 45-46. The case was confirmed for trial for April 11, 2012. 9/23/11-4/04/12 RP 47.

On April 4, 2012, the issue of Mr. Feld's attire for trial is raised. Mr. Feld wishes to remain in jail attire for his trial. The court instructed the defendant that he was welcome to choose how he wished to dress for trial on the morning of trial. 9/23/11-4/04/12 RP

49. The court also took into consideration alternatives about how to proceed in the event that Mr. Feld was not able to "sit through trial appropriately" on April 4, 2012. The court decided to deal with that issue the morning of trial. 9/23/11-4/04/12 RP 50-51.

On April 11, 2012, Mr. Feld brought a motion to sever count 6, unlawful possession of a firearm. The court granted this motion. 4/11/12 RP 4, 6.

On April 11, 2012, the court considered the issue of shackling the defendant during trial. The court ruled that if the defendant is electing to wear jail attire, then shackling is not so much of an issue because the jury will already know he is in jail by his attire. Testimony was taken from Skagit County Jail Sergeant Ron Coakley regarding Mr. Feld's demeanor and recommended shackling. The court delayed making a ruling to wait to see what Mr. Feld decided to wear to court before making a ruling on shackling. 4/11/12 RP 21-26.

2. Statement of Facts

Steven Callero had a tree cutting business and lived on Guemes Island, in the County of Skagit. 4/12/13 RP 108-109. Mr. Feld, a neighbor, had done business with Stephen Callero in the past. 4/12/13 RP 109-110. In March of 2010, Stephen Callero had an agreement with Mr. Feld to rent a rototiller for him so long as the

defendant washed it and filled it with gas prior to Mr. Callero picking it up and returning it to the rental company. 4/12/13 RP 111-112, 148. Mr. Feld was to reimburse Mr. Callero for his expenses when Mr. Callero picked up the rototiller. 4/12/13 RP 112. Mr. Callero's expense for this rototiller was $150. 4/12/13 RP 112.

Mr. Callero picked up the rototiller and it was covered in mud and empty of gas. 4/12/13 RP 112. Mr. Callero attempted to get the defendant to repay him to which Mr. Feld would respond that he would pay him the next day. This went on for a week. 4/12/13 RP 113. Mr. Callero received three or four voicemails from Mr. Feld during that week that essentially said "call me up goddamn it or come over here like an F'ing man and talk to me", and used other foul language. 4/12/13 RP 114, 144. On those voicemails, Mr. Feld was nasty and threatening and invited Mr. Callero to come to his house. 4/13/12 RP 24, 4/13/12 63. After listening to the voicemails from Mr. Feld, Mr. Callero called the Sheriff's department to make a complaint that the defendant was outspoken and he was soft-spoken and as such was concerned about going over to get reimbursed from defendant. 4/12/13 RP 114-115. Mr. Callero believed that the Sheriff's department advised Mr. Callero that there was strength in

numbers and to bring someone with him when going to the Mr. Feld's residence. 4/12/13 RP 115.

On April 2, 2010, between 4:30 and 5:30 p.m. Mr. Callero, a co-worker Tim Hanby and Mr. Callero's son, Aaron Callero, went to Mr. Feld's house. 4/12/15 RP 115, 155, 4/13/12 RP 28. Mr. Hanby drove with Mr. Callero as passenger and Aaron Callero followed in a separate vehicle to the defendant's property. 4/12/13 RP 119. Mr. Hanby parked approximately 40-50 feet from Mr. Feld's house, facing the house. Aaron Callero parked out on the drive-way and didn't ever come close to Mr. Feld's house. 4/12/13 RP 119-120 155, 4/13/12 RP 28-29.

Mr. Callero exited the vehicle and got to about 20 feet from the appellant's porch and asked him for reimbursement for the rototiller. The appellant was yelling and screaming profanities at Mr. Callero. 4/13/12 RP 69. Mr. Hanby was a little behind Mr. Callero and to the left, holding a fishing club. 4/12/13 RP 121, 142, 156, 4/13/12 RP 14. Mr. Feld replied by using foul language and telling them to get off of his property. Mr. Feld then went and retrieved from the house a bucket of gasoline and other substances and threw it at Mr. Callero, who veered out of the way and it landed on the face of Mr. Hanby. 4/12/13 RP 121-122, 4/13/12 RP 35-36, 80-81. Mr. Feld then pulled

out a bic lighter and tried to light Mr. Hanby on fire with it multiple times but the wind kept blowing the flame out. 4/12/13 RP 122. Mr. Callero called 911 to report Mr. Feld's actions. 4/12/13 RP 123. Mr. Feld threw a cement pot at Mr. Callero, hitting him and knocking his cell phone out of his hand and Mr. Feld began shooting a firearm at Mr. Callero and Mr. Hanby. 4/12/13 RP 125, 4/13/12 RP 36-38, 85-87. Mr. Feld fired three shots at Mr. Callero and Mr. Hanby before Mr. Callero reached the truck to leave. 4/12/13 RP 126, 4/13/13 RP 11. Mr. Feld followed Mr. Callero to the truck and stuck the gun a foot from Mr. Callero's face and pulled the trigger. 4/12/13 RP 125, 127, 4/13/12 RP 20, 89. Mr. Feld's gun jammed and didn't fire. 4/12/13 RP 127, 4/13/12 RP 89. Mr. Feld then broke the window out of the passenger side of Mr. Hanby's truck with his gun. 4/12/13 RP 128, 140, 4/13/13 RP 11, 4/13/12 RP 23-24, 40, 90. Mr. Feld reached into the truck and grabbed Mr. Callero and was attempting to pull him out of the truck. 4/12/13 RP 128, 4/13/12 RP 40. Mr. Hanby and the appellant had an altercation and Mr. Hanby hit the appellant with the fish club and was able to free Mr. Callero so they could leave the appellant's property. 4/12/13 RP 128, 4/13/12 RP 91-92. Mr. Hanby and Mr. Callero drove immediately to the fire station to obtain aid. 4/12/13 RP 129, 4/13/12 RP 95.

While at the fire station, from about 6:30 p.m. to about 2:30 a.m., Mr. Callero and Mr. Hanby stayed as they believed Mr. Feld was still after them. 4/12/13 RP 130-131. There was a call out to the fire station an address he recognized as his as being on fire. 4/12/13 RP 131, 4/13/12 RP 43. Mr. Callero's entire property burned to the ground. 4/12/13 RP 132.

Sheriff's Office sent called for the SWAT team to respond to Guemes Island. 4/13/12 RP 155-157. Two deputies went to the defendant's home to see if defendant was there. 4/13/12 RP 159. Mr. Feld called 911 and indicated if the two deputies didn't leave his property, he would shoot them in 30 minutes. 4/13/12 RP 159. Mr. Feld turned himself into deputies the morning after the fire. 4/13/12 RP 170.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE MR. FELD'S RIGHTS BY HAVING HIM SHACKLED FOR A PORTION OF HIS TRIAL.

During the two years that this case was pending, Mr. Feld made numerous outbursts, threats and verbal tirades to the court and the attorneys handling his case. On more than one occasion, the court made findings that Mr. Feld came down and would not cease

shouting at the court, the prosecutor and the public in general and when asked to cease, Mr. Feld only got louder with his outbursts and attacks on the system, the court, the prosecutor and others present. Mr. Feld was removed and brought back into court three times, to try again to enter a competency order and complete a formal arraignment. 5/13/2010 RP 10-12. Due to his outbursts, he was removed and the Court entered a competency order and formally arraigned him without his presence. 5/13/2010 RP 10-12.

On June 10, 2010, Mr. Feld appeared in court and said the following on the record, "I will not submit to your rule. Your laws do not apply to me. As an ambassador for the God of justice I warn you that your deaths have been appointed. You have caused enough damage in this county and in this nation. All Mighty God has determined that it is over for the criminal justice system and the crimes that you have committed against the people of this nature." The court replied, "Thank you, Mr. Feld."

Mr. Feld responded, "And I recommend you shut up, Judge. You shut your mouth, Rickert. You are standing before the All Mighty God, you whore of Satan, you free nation of luminatus [ph]. You will be executed for your crimes." 6/10/2010 RP 14-15.

On August 4, 2011, Chief of the Jail, Charlie Wend, advised the court that the jail staff would have to wrestle Mr. Feld to come to court. The court indicated that it did not want any jail staff injured in an altercation with Mr. Feld and made a finding that Mr. Feld would be physically combative if made to appear in court. 8/4/2011 RP 24-25.

On March 27, 2012, Mr. Feld came into court and caused disruption by his outbursts and profanity, yelling at the judge, "I am not going to sit and say nothing when corruption continues to go on in this nation. I recommend you go home and kill yourself, you fucking black-robed whore of Lucifer." The judge responded, "Alright, Mr. Feld will be removed from the courtroom." Mr. Feld yelled back, "Kill yourself, you goddamned whore." 3/27/2012 RP 28-29.

Before, trial, Mr. Feld was advised that he has a right to wear civilian clothes to trial. Mr. Feld insisted since day one to wear jail jumpsuit. His defense attorney argued that was a sign of incompetence, yet the court indicated, that, or it could be the most rational decision made by a defendant to create appeal issues down the road to which Mr. Feld responded, "ssshhhhhhh." 4/11/2012 RP 16-18.

In response to the shackling issue, the court found that Mr. Feld has been disruptive many times in the past and indicated there is a system in place to excuse the jury and remove Mr. Feld from the courtroom should he be disruptive. 4/11/2012 RP 20-21.

Testimony of Jail Sgt. Ron Coakley supported his concern for Mr. Feld's tirades and Sgt. Coakley testified that Mr. Feld often loses control in the middle of an outburst and thus he may act out physically against his attorneys, staff or may hurt the trial judge. 4/11/2012 RP 23-24. Sgt. Coakley stated, "If he is unrestrained, literally, we cannot act fast enough to stop him from doing some kind of physical harm to them before we can get control of him." 4/11/2012 RP 24.

The court ruled that since Mr. Feld was given a choice of civilian clothes or jail clothes, and Mr. Feld chose "to wear the red suit, so it is no great mystery to the jury that he is in custody." The Court ordered him to have ankle shackles due to that and the concerns of Sgt. Coakley and the numerous outbursts Mr. Feld had engaged in during the course of pre-trial. Also, due to the nature of the charges (in addition to attempting to murder to civilians, he also shot at two sheriff's deputies) and Mr. Felds' threats in the course of this case the Court found it appropriate after balancing, to leave Mr.

Feld in shackles for security purposes. The Court also ruled that due to the small size of the courtroom and the close quarters of everyone, that shackles were appropriate. 4/11/2012 RP 65-66.

Deputy Prosecutor Brown described the entrance and placement Mr. Feld in the court room as coming through the back door, and then having a five feet gap before sitting down at waist high tables. The Court agreed that it would be difficult for the jurors to see the shackles due to the layout of the courtroom. The Court also indicated that Mr. Feld was athletic and young, not old and infirm and prudence dictated that the shackles remain secured. 4/11/2012 RP 66-67.

Ms. Neal voir dired potential jurors regarding appearance of Mr. Feld and whether that has an impact on the juror's decision about him. Juror 19 indicated not at all, juror 45 indicated that you can tell he is incarcerated by his clothing and his shackles, but indicated that it didn't have an impact – just tells you that he is in jail, not walking around on the streets. Juror 58 indicated that defendant's appearance does not have an impact on them, that they wouldn't be swayed. Juror 56 also indicated it doesn't have an impact. 4/11/2012 RP 144-145. After four days of trial, Mr. Feld had decided that he wanted to wear street clothes, rather than a jail jumpsuit and he had

also demonstrated that he could control himself and act with some decorum in court, thus the court decided to remove the shackles.

It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *See, e.g., Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Hartzog,* 96 Wn.2d 383, 635 P.2d 694 (1981); *State v. Ollison,* 68 Wn.2d 65, 411 P.2d 419 (1966); *State v. Sawyer,* 60 Wn.2d 83, 371 P.2d 932 (1962). This is to ensure that the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington State Constitution. *See Holbrook v. Flynn,* 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Hartzog,* 96 Wn.2d at 397-98, 635 P.2d 694. This court has emphasized: Section 22, art. 1, of our constitution, declares that, "In criminal prosecutions the accused shall have the right to appear and defend in person." The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation

of the constitutional guaranty. *Hartzog,* 96 Wn.2d at 398, 635 P.2d 694.

Courts have recognized that restraining a defendant during trial infringes upon this right to a fair trial for several reasons. The one most frequently cited is that it violates a defendant's presumption of innocence. *See Hartzog,* 96 Wn.2d at 398, 635 P.2d 694. The presumption of innocence, although not articulated in the Constitution, "is a basic component of a fair trial under our system of criminal justice." *Estelle,* 425 U.S. at 503, 96 S.Ct. 1691. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Estelle,* 425 U.S. at 503, 96 S.Ct. 1691 (quoting *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)).

Courts have recognized that the accused is thus entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man. *Kennedy,* 487 F.2d at 104; *Samuel,* 431 F.2d at 614. Courts of other jurisdictions, including our own, have long recognized the substantial danger of destruction in

the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled. *See Allen,* 397 U.S. at 344, 90 S.Ct. 1057; *Hartzog,* 96 Wn.2d at 398, 635 P.2d 694.

Shackling or handcuffing a defendant has also been discouraged because it tends to prejudice the jury against the accused. *See Boose,* 66 Ill.2d at 265, 5 Ill.Dec. 303; *Kennedy,* 487 F.2d at 105-06. Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial. *Estelle,* 425 U.S. at 506, 96 S.Ct. 1691. The Supreme Court has stated that use of shackles and prison clothes are "inherently prejudicial" because they are "unmistakable indications of the need to separate a defendant from the community at large." *Holbrook,* 475 U.S. at 568-69, 106 S.Ct. 1340.

Shackling or handcuffing a defendant has also been discouraged because it restricts the defendant's ability to assist his counsel during trial, it interferes with the right to testify in one's own behalf, and it offends the dignity of the judicial process. *See Allen,* 397 U.S. at 344, 90 S.Ct. 1057; *Hartzog,* 96 Wash.2d at 398, 635

P.2d 694; *Boose,* 66 Ill.2d at 265, 5 Ill.Dec. 832, 362 N.E.2d 303; *Kennedy,* 487 F.2d at 105–06.

"[C]lose judicial scrutiny" is required to ensure that inherently prejudicial measures are necessary to further an essential state interest. *Estelle,* 425 U.S. at 504, 96 S.Ct. 1691; *Holbrook,* 475 U.S. at 568, 106 S.Ct. 1340. This close judicial scrutiny of inherently prejudicial practices has not always led to reversal however. In *Illinois v. Allen,* the court emphasized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen,* 397 U.S. at 344, 90 S.Ct. 1057. However, the Court nonetheless observed that in certain extreme situations "binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant. *Id.*

When determining whether restraints should be used during a courtroom proceeding this Court has stated: A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent

injury. That discretion must be founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be 'potentially dangerous' is a failure to exercise discretion. *Hartzog,* 96 Wn.2d at 400, 635 P.2d 694.

Thus, this Court and courts of other jurisdictions have universally held that restraints should "be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *State v. Finch*, 137 Wn.2d 792, 842-846, 975 P.2d 967, 997 - 1000 (1999).

In the instant case, the lengthy pre-trial record supports the necessity for shackling Mr. Feld in order to prevent injury to those in the courtroom and to prevent disorderly conduct while in trial. Importantly, the record also supports that the trial court did not abuse its discretion in deciding that shackling was necessary because it weighed different factors and heard from both parties before making a ruling.

Mr. Feld time and again refused to come to court during the pre-trial phase, with jail staff noting on the record that in order for him to be brought to court they would literally have to wrestle with him. Mr. Feld also caused numerous disruptions in court with threatening

remarks, profanity, and a complete lack of decorum. Mr. Feld made inflammatory remarks to numerous judges, attorneys and others in the court room and it is clear from the record that his attorneys did not have control of him and could not persuade him to act appropriately. The other related but distinct issue is that Mr. Feld was physically demonstrative in his outbursts. This is different than a person who merely makes inappropriate comments. Throughout the pretrial process Mr. Feld had, at different times, physically taken steps toward the Judge or stood up, and but for restraints would be difficult to control, according to jail staff. While Mr. Feld may not have physically assaulted his attorneys during the pendency of his case, it is clear from the record that his actions and statements were unpredictable and uncontrollable. Furthermore, this Court cannot ignore the fact that Mr. Feld was charged with extremely serious crimes. Mr. Feld not only attempted to murder two civilians by shooting at them and trying to light them on fire after dousing one victim with a napalm-like substance, but he also shot at two deputies who responded to his residence after he attempted to kill civilians, Mr. Callero and Mr. Hanby. The trial court did not abuse its discretion in finding that shackling Mr. Feld was appropriate during trial. The trial court did not make a decision in haste either in

regard to shackling. A motion hearing was held with testimony from Sgt. Coakley of the Skagit County Jail, who testified that he was concerned for the safety of the judge and attorneys during the trial based on Feld's prior conduct and the small courtroom layout coupled with the jail staff's ability to get to the potential injured party before Feld would. Even though shackling is reserved for the most serious situations, Mr. Feld's trial was one of those situations. The trial court did not abuse its discretion when it determined that due to courtroom security measures and Mr. Feld's demonstrated conduct during the pre-trial phase, coupled with the knowledge of the very serious nature of the charges; shackling was necessary.

Furthermore, the fact that Mr. Feld was unshackled after four days of trial weighs favorably toward the trial court, rather than showing that shackling was unnecessary. After four days of trial, Mr. Feld had showed restraint and decorum in court and decided to wear street clothes, so the trial court decided to give him the opportunity to remain unshackled. 4/16/2012 RP 5. This Court should find that the trial court properly exercised its discretion in its shackling decisions in this case.

B. THE TRIAL COURT DID NOT DENY MR. FELD COUNSEL AT THE TIME OF ONE OF HIS COMPETENCY HEARINGS.

It is well settled case law an individual charged with a crime has a constitutional right to an appointed attorney at public expense if the charged individual cannot afford an attorney. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The primary test in reviewing a trial court's competency determination is whether the trial court manifestly abused its discretion. *State v. Crenshaw*, 617 P.2d 1041 at 331

RCW 10.77.060 (1) provides in part:

> (1) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant....

RCW 10.77.090 (1) states in part:

> If at any time during the pendency of an action and prior to judgment, the court finds following a report as provided in RCW 10.77.060, as now or hereafter amended, that the defendant is incompetent, the court shall order the proceedings against him be stayed ...

Where a substantial question of possible doubt exists as to the defendant's competency to stand trial, due process requires that the

trial court conduct a competency hearing. *State v. Johnston*, 84 Wn.2d at 576, 527 P.2d 1310; *State v. Wright*, 19 Wn.App. 381, 387, 575 P.2d 740 (1978). The decision to hold a competency hearing is within the trial court's discretion and will not be overturned absent an abuse of discretion. *State v. Johnston, supra,* cited in *State v. Higa*, 38 Wn.App. 522, 524, 685 P.2d 1117 (1984).

Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; *State v. Everybodytalksabout,* 161 Wn.2d 702, 708, 166 P.3d 693 (2007). A critical stage is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Agtuca,* 12 Wn. App. 402, 404, 529 P.2d 1159 (1974). A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. *United States v. Cronic,* 466 U.S. 648, 658–59, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

On February 24, 2011, Mr. Feld was in court again after having been re-evaulated yet another time by Western State

Hospital. Mr. Feld was represented by a public defender, Wes Richards, however, due to inclement weather and a car collision, Mr. Richards was not able to make it to court in time for Mr. Feld's in custody hearing regarding the newest competency evaluation. Mr. Adam Yanasak, a fellow public defender from the same office as Wes Richards stood in for Mr. Richards on behalf of Mr. Feld. Mr. Yanasak moved for a continuance, saying in part,

> "I am not prepared to adequately address these matters, and if there is an issue with time running out, I don't think there will be any issue though with –Mr. Richards, would I think be agreeable to extending that time or waiving any objections to the speediness of this given that the delay is due to his absence today." 2/24/2011 RP 5.

Mr. Rich Weyrich, the prosecutor handling Mr. Feld's case responded. "Well, your Honor, we are concerned. The time running was set for today which I believe was within the ninety days to see if he could be restored to competency and that began.....it was reset for today's date." 2/24/2011 RP 5. Mr. Yanasak told Mr. Feld on the record that because of weather, Mr. Richards isn't here. Mr. Feld then replied, "I don't care. We can proceed without him." 2/24/2011 RP 6. Mr. Yanasak then informed the court,

> "Your Honor, I can let the court know on behalf of Mr. Feld, he's indicated to me that he would like to proceed without Mr. Richards being here, that he would

like to be found competent and move this case along to a trial. Those are his representations, your Honor. I, again, don't want to speak on behalf of Mr. Richards, so I recognize it's kind of a delicate situation and trying to balance everybody's rights here, so it's unfortunate the way things came out today."
2/24/2011 RP 6-7.

The court then asked Mr. Weyrich how he would like to proceed. Mr. Weyrich stated, "Well, your Honor, based on the report, which I believe finds Mr. Feld competent, and apparently, acknowledging that, we would have an order signed finding him competent and set new trial dates." 2/24/2011 RP 7.

The court then made the following findings:

"Good. Obviously, your primary attorney, Mr. Richards, is not here today, I believe there are some weather related issues or something, because of the snow, and he's not in court, and Mr. Yanasak is standing in for Mr. Richards, Mr. Yanasak and Mr. Richards work together in the same office, as you probably know. There has been a report returned from Western State Hospital dated February 17th and it says in conclusion: "Mr. Feld appears to have the current ability to have a factual and rational understanding of the charges and the court proceedings he faces. He appears to have the current capacity to communicate with his attorney with a reasonable degree of rational understanding and is able to work with his attorney to assist in his defense. We, therefore, recommend that he return to court to resume adjudication of his pending criminal matter."
2/24/2011 RP 7.

Even though the court entered a finding of competency on February 24, 2011, the issue of competency was far from over at that point in the case. Mr. Richards hired Dr. Muscatel to do a separate evaluation for competency on Mr. Feld because defense counsel did not agree with Western State's finding of competency as to the February 2011 order that was entered. It took another year before a full blown competency hearing with witnesses was held before court. On February 27, 2012, a competency hearing was held before Judge Rickert with Mr. Feld being represented by Wes Richards and the State being represented by Rich Weyrich and Russ Brown. 2/27/2012 RP 4-134. The State called Dr. Ray Hendrickson and the defense called Dr. Kenneth Muscatel. At the close of the hearing, the court issued found that Mr. Feld was competent.

In the instant case, Mr. Feld was not denied a right to counsel during a critical stage of his case. While Mr. Richards was not present at the February 24, 2011, hearing in regard to competency, another felony public defender, Mr. Yanasak, was present and was able to assist Mr. Feld. In fact, it is clear from the record that Mr. Feld did not want a continuance of the hearing and clearly wanted to proceed with his case. Furthermore, on March 3, 2011, just one week after the aforementioned order was entered Mr. Richards was

back at work and present in court with Mr. Feld for an omnibus hearing. Mr. Richards could have brought up the prior week's entry of the competency order at that time and made an objection on the record that the court entered the order without his presence, but he declined to do so and instead went through omnibus on Mr. Feld's case. Finally, Mr. Feld was evaluated again for competency after the hearing in question by two other doctors and was found to be competent on February 27, 2012. The trial court did not abuse its discretion in entering the order of competency on February 24, 2011, because Mr. Yanasak was an attorney qualified to assist Mr. Feld and because Mr. Feld himself made it clear he wanted to proceed.

C. THE CONVICTIONS FOR COUNTS TWO AND FOUR SHOULD BE VACATED; RE-SENTENCING IS NOT NECESSARY.

The appellant argues that count two (Assault in the First Degree) should be vacated due to double jeopardy in relationship to count one (Attempted Murder). The trial court found that counts two and four should be considered the same criminal conduct for purposes of sentencing. The State would concede the double jeopardy argument brought forth by the appellant and extend its breadth to include count four, even though the appellant did not

present this argument in her brief. At sentencing, counts two and four were not included in Mr. Feld's offender score, thus they were not considered for purposes of sentencing and neither count added any additional time to Mr. Feld's sentence. Because neither count two nor count four increased Mr. Feld's sentence, Mr. Feld does not need to be remanded back to court for resentencing. The proper remedy would be for this Court to order the trial court vacate counts two and four for purposes of Mr. Feld's criminal history and for purposes of correcting the record.

D. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF ALLEGED ACTS OF VIOLENCE ON THE PART OF THE VICTIM.

During the trial, Mr. Feld's attorney sought to introduce one alleged act of violence on the part of Mr. Callero, one of Mr. Feld's victims. Mr. Feld sought to introduce this reputation allegation through Mr. Feld's wife, Phyllis Feld, after Tim Hanby, another of Mr. Feld's victims, testified that on the day in question Mr. Callero was gentle, mild-mannered, kind of passive, not a wimp, but a real soft spoken, not aggressive kind of guy. 4/18/2012 RP 53.

The trial judge declined to allow Mr. Feld to present reputation evidence of Mr. Callero based on one occasion through Mrs. Feld and stated:

> But you see my point. I've seen that done, where someone else was aware of the incident. Otherwise – I mean, think of the problems you would have in these kinds of cases. You could just bring any number of outside witnesses in to testify of knowledge that so-and-so was a bad actor, oh, yes, by the way, I did tell the defendant that that is the case too. And you could never control that.
> 4/18/2012 RP 61

> The principal requirement is one of relevance. The victim's misconduct must have been of the sort to suggest danger, and the defendant must have been aware of that misconduct at the time the defendant claims to have acted in self-defense. But I believe that it's the defendant that has to so testify. I don't think someone else can testify to the knowledge of prior bad acts and then say, by bootstrap, and I told the defendant, therefore he must have had knowledge too…Even if she did tell Mr. Feld, maybe Mr. Feld is the type that laughed it off and said, I don't care, it didn't scare me a bit, and he didn't have any reasonable apprehension of fear, even if he had knowledge. Mrs. Feld might have had an apprehension of fear, but what if Mr. Feld said I don't care, I'm not afraid of Callero, it doesn't bother me a bit?
> 4/18/2012 RP 61-62.

The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view. *State v. Thomas*, 123 Wn.App. 771, 778-79, 98 P.3d 1258 (2004); *State v. Martin*, 169 Wn. App. 620, 281 P.3d 315 (2012). Generally, evidence of a person's character is inadmissible to prove conformity therewith on a particular occasion. ER 404(a). However, an exception to this rule provides that "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible. ER 404(a)(2).

ER 404 provides in pertinent part:
"(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
"(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused ..."

However, evidence of specific instances of conduct is admissible only if the character trait is "an essential element of a charge, claim, or defense." ER 405(b).

A victim's character and prior misconduct in general are excluded from evidence. Our Supreme Court has held that the Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010)(where rape conviction

reversed because defendant precluded from testifying to his version of the act). Thus, where a defendant claims self-defense, courts have admitted evidence of a victim's prior acts of violence to establish a defendant's reason for apprehension and the basis for acting in self-defense. *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972). However, in self-defense cases, "specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998). Furthermore, an individual act does not establish a reputation and therefore was insufficient to characterize the deceased as a violent person. *State v. Adamo*, 120 Wash. 268, 207 P.7 (1922).

In *Cloud*, the court found that when the reputation of a deceased for violence, turbulence and ferocity is bad and this is shown to have been known by the defendant at the time of the altercation this evidence is admissible to show reason for apprehension and grounds for self-defense by the defendant. *Id.* If the deceased's reputation for violence was unknown to the defendant at the time of the affray, it is admissible nonetheless to corroborate a defendant's claim that the deceased was the aggressor. *Id.* However, the court in *Cloud* also found that an individual act *does not*

establish a reputation and therefore was insufficient to characterize the deceased as a violent person and held that the trial court properly excluded the proffered evidence as hearsay. *Id.* at 218 (emphasis added).

Like *Cloud*, in the instant case, Mr. Feld wanted to present evidence through the testimony of his wife that on one occasion Mr. Callero allegedy came after someone with a baseball bat. No other alleged instances of violence were proffered by Mr. Feld's attorney. One instance alone is insufficient to establish that someone has a reputation for violence or a propensity to act in any particular way. Additionally, without Mr. Feld's testimony, we don't know if he even knew of the alleged act of Mr. Callero with a bat, and if he did know the allegation, when he was told that story. Furthermore, we have no way of knowing without Mr. Feld testifying whether the allegation had any effect on his mind-set and actions. This Court should find as the court did in *Cloud*, that the trial court acted properly in excluding the allegation that Mr. Callero had a reputation for violence.

Furthermore, any error is harmless. The trial judge offered to strike the statement made by Mr. Hanby in regard to Mr. Callero being soft-spoken and mild-mannered, but Mr. Feld's attorney declined this offer of the court. 4/18/2012 RP 57. In addition, Mr.

Feld's statements to officers about Mr. Callero were admitted as evidence and as the court stated that evidence indicated Mr. Feld's opinion: "Mr. Callero's propensity, and that is, Mr. Callero is a drunken, drug-addicted bully, who has bullied people on the island for a long time." 4/18/2012 RP 57. Mr. Feld's confession was also admitted into evidence through testimony of Deputy Moses. 4/16/12 RP 170-4/17/2012 RP 18. Given all of the evidence against Mr. Feld, any error here was harmless.

E. MR. FELD HAD NO PRIVACY RIGHTS AS TO HIS JAIL PHONE CALLS; THUS HIS MOTION TO SUPPRESS THOSE CALLS BASED ON A PRIVACY EXPECTATION WAS PROPERLY DENIED.

Mr. Feld contends that jail phone calls are private affairs that, if recorded without a warrant, the recording violates article I, section 7 of the Washington State Constitution. This Court has repeatedly rejected this very argument. See *State v. Hag*, 166 Wn. App. 221, 268 P.3d 997,rev. denied, 174 Wn.2d 1004 (2012); *State v. Archie*, 148 Wn. App. 198,199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009). In any event, the appellant's legal claim is without merit. In *State v. Modica*, the Supreme Court held that jail phone calls are not private and that any expectation of privacy in the recorded calls is not reasonable. *State v. Modica*,164 Wn.2d

83, 186 P.3d 1062 (2008). In *State v. Archie*, supra, this Court held that the recording of jail phone calls does not violate article I, section 7 of the Washington Constitution. See also, *State v. Hall*, 168 Wn.2d 726,729 n.I, 230 P.3d 1048 (2010) ("Phone calls made from the King County jail are automatically recorded. Given that all parties are very clearly informed of this, we held this practice does not violate a prisoner's statutory right to privacy").

Mr. Feld argues that since banking records, telephone call records and garbage are private affairs within the meaning of article I, section 7, then a jail phone conversation must also be a private affair. But in none of the cases cited was the person alleging an article I, section 7 violation a jail inmate with a reduced expectation of privacy. See *Modica*, 164 Wn.2d at 88 (citing *State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929 (1984)). Further, in none of these cases cited was the aggrieved party fully aware that the item they considered private was in fact going to be searched-as is the case with jail phone calls. In determining whether a privacy interest merits article I, section 7 protection, the court asks several questions: whether the information obtained reveals intimate or discrete details of a person's life, what expectation of privacy a person has in the information sought, and whether there are

historical protections afforded to the perceived interest. *Archie*,148 Wn. App. at 202 (citing *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)). The person alleging a violation of article I, section 7 must prove that their expectation of privacy is "reasonable." *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *State v. Boland*, 115 Wn.2d 571,800 P.2d 1112 (1990). The individual must first, by their conduct, exhibit a subjective expectation of privacy, and second, this subjective expectation of privacy must be objectively reasonable. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P .3d 789 (2004). As this Court held in *Archie*, jail phone calls do not meet this test, they are "not private affairs deserving of article I, section 7 protection." *Archie*, at 204. Finally, even if the recordings were inadmissible, any error in the admission of the calls was harmless. Admission of evidence seized in violation of article I, section 7 is harmless error if the reviewing court is convinced beyond a reasonable doubt that any rational finder of fact would have reached the same result absent the error. *State v. Deal*, 128 Wn.2d 693, 703, 911 P .2d 996 (1996). Here, absent the allegedly improperly admitted evidence, the result of the trial would have been the same. The jail recordings were very limited. There

was no "confession" on tape. Considering the extensive eyewitness testimony, the confession that Mr. Feld provided to police and other circumstantial evidence, any error was harmless.

F. THE JURY INSTRUCTIONS WERE NOT ERRONEOUS; THUS MR. FELD WAS NOT DENIED DUE PROCESS.

Mr. Feld contends that the final "abiding belief" sentence of WPIC 4.01 was erroneously given by the court in light of *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), in which the court found prosecutorial misconduct in closing argument where the prosecutor argued that the function of the jury was to search for the truth.

In *Emery*, the argument was improper because the statements mischaracterized the role of the jury. "The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.' *Anderson,* 153 Wn. App. at 429, 220 P.3d 1273[[1]]. Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. *Winship,* 397 U.S. at 364, 90 S.Ct. 1068[[2]]." *Emery*, 174 Wn.2d at 760.

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[1] *State v. Anderson*, 153 Wn. App. 417, 200 P.2d 1273 (2009).
[2] *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245, 261 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996) (citations omitted).

WPIC 4.01, including the final "abiding belief" sentence, has been approved by several courts. *Pirtle*, *supra*; *State v. Lane*, 56 Wn. App. 286, 299, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 475-476, 655 P.2d 1191 (1982), *rev. denied*, 99 Wn.2d 1010 (1983). Indeed, the Supreme Court has specifically directed the trial courts to use this instruction. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

Emery does nothing to change settled law with regard to the jury instruction on reasonable doubt. The reasonable doubt instruction has, and does, explicitly tell the jurors their conclusion has to be based on the evidence in the case and so "there is no reasonable likelihood that the jury would have understood ['abiding belief'] to be disassociated from the evidence in the case." *Pirtle*, 127 Wn.2d at 657. Indeed, in the abiding belief sentence itself, the

abiding belief must be "after such consideration [of the evidence or lack of evidence]."

The "abiding belief" language does not instruct the jury that their role is to ascertain the truth. The instruction that the Supreme Court has instructed the trial courts to use does not misstate the prosecution's burden of proof or confuse the jury's role.

V. CONCLUSION

Due to the aforementioned reasoning and law the State respectfully requests that this Court deny the appellants request for reversal and remand. The State does move this Court to find that counts two and four should be vacated by the trial court, but remand and resentence is unnecessary because the appellant was not sentenced on those two counts, thus his sentence would not be subject to change.

DATED this 16th day of September, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

MELISSA W. SULLIVAN, WSBA#38067
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: LILA J. SILVERSTEIN, addressed as 701 Melbourne Tower, 1511 Third Avenue, Seattle, Washington 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16th day of September, 2013.

Karen R Wallace

KAREN R. WALLACE, DECLARANT