Supreme Court No. 90842-7
(Court of Appeals No. 69044-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FELD,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Charles Feld asks this Court to review the opinion of the Court of Appeals in *State v. Feld*, No. 69044-2-I, filed September 2, 2014. A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court deprive Mr. Feld of his constitutional right to counsel by holding a competency hearing in the absence of Mr. Feld's attorney, after the attorney slid off the road in a snowstorm and a colleague who knew nothing about the case went to court and requested a continuance so counsel could be present? RAP 13.4(b)(3).

2. Did the trial court violate Mr. Feld's rights under the Fourteenth Amendment and article I, section 22 by ordering him to wear shackles during trial on the basis that (1) a jail guard said he was concerned for the safety of defense attorneys in light of Mr. Feld's prior verbal outbursts, and (2) Mr. Feld decided to wear jail clothing so the trial judge thought shackles would not cause additional prejudice? RAP 13.4(b)(3).

3. Did the trial court violate Mr. Feld's Sixth Amendment right to present a defense by ruling that he would have to testify himself that he was aware of the alleged victim's prior acts of violence, and that his wife could not testify that she told him about these acts? RAP 13.4(b)(3).

4. Are telephone calls between jail inmates and their loved ones "private affairs" protected by article I, section 7 of the Washington Constitution, such that recording the calls requires a warrant or an exception to the warrant requirement? RAP 13.4(b)(3).

5. Should this court disapprove of the bracketed portion of WPIC 4.01, which equates "beyond a reasonable doubt" with having "an abiding belief in the truth of the charge," given this Court's recent holdings that the jury's job is not to determine the truth but to determine whether the State proved the elements of the crime? RAP 13.4(b)(4).

6. Given that the State must disprove self-defense beyond a reasonable doubt in cases where self-defense is at issue, must the absence of self-defense be included in the "to convict" instruction? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Charles Feld and his neighbor, Stephen Callero, had a dispute over $150. Mr. Callero believed Mr. Feld owed him this amount, and, after the two exchanged hostile voice messages, Mr. Callero decided to go to Mr. Feld's house to collect it. Mr. Callero asked his son, Aaron, and his neighbor, Tim Hanby, to accompany him. 4/12/12 RP 110-15.

Callero and Hanby went together in Hanby's truck, and Aaron Callero drove separately. After the three arrived at Mr. Feld's house,

Hanby and Stephen Callero got out of the truck and approached the porch. Hanby was armed with a fish club. 4/12/12 RP 119; 4/13/12 RP 74-77.

Mr. Feld and his wife came out on the porch, and "emphatically" asked the visitors to leave. 4/13/12 RP 69, 101; 4/18/12 RP 147. The trespassers did not budge. Instead, Hanby raised the club and yelled and swore at Mr. Feld to give Callero the money. He said, "I'm going to beat that money out of you, you motherfucker." 4/18/12 RP 152. Mr. Callero was also yelling at Mr. Feld, who yelled and swore in return. Mr. Feld then went inside. 4/13/12 RP 77. Mr. Hanby yelled at him to "get his ass back out." 4/13/12 RP 79; 4/16/12 RP 153.

Mr. Feld came back outside with a bucket filled with gasoline and other substances, again told the men to leave his property, and threw the contents of the bucket at Hanby. 4/13/12 RP 79-81; 4/16/12 RP 154. He had a lighter and threatened Mr. Hanby with it. 4/12/12 RP 122.

Undeterred, Hanby continued to swear at Mr. Feld, told him he was going to "kick [his] ass," moved toward the porch, and hit Mr. Feld with the fish club. 4/12/12 RP 143; 4/13/12 RP 82, 105; 4/16/12 RP 154. Mr. Feld grabbed some pots from the porch and threw them at the intruders, who still did not leave. 4/12/12 RP 125. Instead, Hanby kept "trying to get on the porch so I could kick [Mr. Feld's] ass." 4/13/12 RP 83.

Mr. Feld then went inside again, retrieved his gun, and chased the two men back to their truck while firing the gun. 4/13/12 RP 84-86. According to Hanby and Callero, Mr. Feld pointed the gun at Mr. Callero's head and pulled the trigger, but it did not fire. 4/12/12 RP 127; 4/13/12 RP 89-90. Mr. Hanby and the Calleros drove away, and went to the fire station. 4/13/12 RP 95. While there, they heard that Mr. Callero's home was on fire. 4/12/12 RP 131.

Later, two police officers went to the Felds' house. Mr. Feld was not home, and the officers stayed on the property and maintained surveillance. Mr. Feld called 911 and said that if the police were not off his property in 30 minutes they would be killed. Sometime later, a man shot a bullet in the vicinity of the officers. 4/16/12 RP 32-37, 54-55.

The next morning, Mr. Feld turned himself in to authorities. He said he was afraid of the armed intruders, and that he had a right to defend himself and his wife on their property. 4/16/12 RP 12-15. He expressed disappointment that the intruders were not in jail. 4/16/12 RP 17. The State eventually charged Mr. Feld with two counts of first-degree attempted murder, four counts of first-degree assault, first-degree arson, and felony harassment.[1] CP 83-87.

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[1]A count of unlawful possession of a firearm was severed and later dismissed. 4/11/12 RP 4-6.

Throughout the case, Mr. Feld's attorney had serious doubts about Mr. Feld's competency to stand trial. Mr. Feld was sent to Western State Hospital multiple times. On December 8, 2010, the court found Mr. Feld incompetent to stand trial, and he was once again sent to the hospital. 12/23/10 RP 26-43; CP 353.

On February 24, 2011, the State asked the court to find Mr. Feld competent. The weather was bad and Mr. Feld's attorney slid off the road en route to the hearing. He called his office to ask someone to request a continuance. The judge, who was different from the one who had found Mr. Feld incompetent in December, nevertheless denied the continuance and proceeded to hold a competency hearing in the absence of Mr. Feld's attorney. The court found him competent to be tried. 2/24/11 RP 4-12.

After several additional pretrial and competency hearings, the case proceeded to voir dire on February 11, 2012. Over Mr. Feld's objections, the court ordered him to wear shackles on his legs during the first four days of trial. 4/11/12 RP 15-26, 64-67.

The Calleros, Tim Hanby, and numerous law enforcement officers testified for the State. Mrs. Feld testified for the defense. Although the defense was self-defense, the court did not allow Mrs. Feld to testify about Mr. Callero's prior acts of violence which caused Mr. Feld to fear him. 4/18/12 RP 50-69.

The court instructed the jury on self-defense, as well as on the lesser offenses of second-degree attempted murder and second-degree assault. CP 197-255. The jury found Mr. Feld guilty as charged on all counts. CP 263-75. The court sentenced him to 866 months in prison. CP 324.

Mr. Feld raised several issues on appeal. Although the Court of Appeals reversed two counts of assault for a violation of the right to be free from double jeopardy, it otherwise affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The constitutional right to counsel must mean more than the right to have a person with a bar card appear and unsuccessfully move for a continuance of a critical-stage hearing after defense counsel slides off the road en route to court.**

    a. The trial court proceeded with a competency hearing in the absence of Mr. Feld's attorney after the attorney slid off the road in a snowstorm and asked for the hearing to be rescheduled.

Competency was a highly contested issue in this case. After a hearing in December of 2010, the court found Mr. Feld incompetent to stand trial and sent him to Western State Hospital. 12/3/10 RP 26-43; CP 353.

On February 24, 2011, the State moved for the court to find that Mr. Feld's competence had been restored. The hearing was held before a

different judge from the one who had found Mr. Feld incompetent. 2/24/11 RP 4. Mr. Feld's attorney was not there. Another lawyer, Adam Yanasak came and told the court that Mr. Feld's lawyer needed to reschedule the hearing due to the weather. 2/24/11. Mr. Richards had been in a car accident due to the snow and ice. 2/27/12 RP 6; Slip Op. at 4.

The messenger said, "I do not know anything about this case other than I was handed this file, was told that Mr. Richards was asking if we could just continue his matters for a week. He's out today I believe due to the weather, so, your honor, I am not prepared to adequately address these matters...." 2/24/11 RP 4.

The court then asked the prosecutor, "what is your intent and desire to have happen today?" 2/24/11 RP 7. The prosecutor said, "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 trial dates." 2/24/11 RP 7.

The judge then asked, "Mr. Feld, how you doing today?" Mr. Feld said, "I am well, your honor, how are you?" 2/24/11 RP 7. The court then found Mr. Feld competent. 2/24/11 RP 8.

The lawyer who had served as a messenger regarding Mr. Feld's attorney not being able to be present reiterated an objection to entering a competency order in the absence of counsel. 2/24/11 RP 10. He said, "I

don't know the case, [and] I don't know Mr. Feld." 2/24/11 RP 10. He went on, "I know nothing about even the allegations or even really the procedural history of the case." 2/24/11 RP 10. Therefore, "I would ask if the court would just delay for one week the decision on competency until Mr. Richards can get back." 2/24/11 RP 10.

The court nevertheless entered an order of competency. 2/24/11 RP 11; CP 361.

b. The trial court violated Mr. Feld's rights under the Sixth and Fourteenth Amendments and RCW 10.77.020 by proceeding with a competency hearing in his attorney's absence.

A person accused of a crime has a constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The right to counsel accrues not just during trial, but at every critical stage of litigation. *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). Competency hearings are a critical stage at which the Sixth Amendment right to counsel attaches. *Id.* at 910.

In addition to the Sixth Amendment, Washington's competency statute guarantees the right to counsel:

> At any and all stages of the proceedings pursuant to this chapter, any person subject to the provisions of this chapter shall be entitled

> to the assistance of counsel, and if the person is indigent the court shall appoint counsel to assist him or her. A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive.

RCW 10.77.020(1). The provisions of the competency statute are mandatory, and failure to observe procedures adequate to protect an accused's right not to be tried while incompetent is a denial of the right to due process. *In re the Personal Restraint of Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); U.S. Const. amend. XIV.

Here, the trial court violated Mr. Feld's rights under the Constitution and statute by proceeding to hold a competency hearing in the absence of Mr. Feld's attorney, who had slid off the road in a snowstorm. As explained below, the error is structural, and the Court of Appeals erred in affirming the trial court.

c. The Court of Appeals wrongly held that the messenger's presence satisfied the right to counsel and also wrongly required Mr. Feld to prove that the complete deprivation of counsel had "a substantial effect on the outcome of the case.".

The problem in this case is not that Mr. Feld's attorney was ineffective. *Cf. Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The problem is that the court held a critical stage of proceedings in the *absence* of Mr. Feld's attorney, thereby inflicting a complete denial of counsel upon Mr. Feld. "A complete denial

of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." *Heddrick*, 166 Wn.2d at 910 (citing *Cronic*, 466 U.S. at 658-59, & n.25). Thus, the Court of Appeals was wrong to affirm on the basis that the absence of Mr. Feld's attorney did not have a "substantial effect on the outcome of the case." Slip Op. at 7.

The Court of Appeals was also wrong in holding that the presence of the attorney who served only as a messenger satisfied the right to counsel. Slip Op. at 7. This is not a case like *Heddrick*, where one attorney appeared on behalf of the defendant in the place of another attorney who authorized the substitution and "fully apprised" the replacement attorney of the defense position on competency. *Heddrick*, 166 Wn.2d at 911-12. Rather, in this case, Mr. Feld's attorney slid off the road and called the office to ask someone to deliver a message to the court that he could not be there and had to reschedule the hearing. The lawyer who appeared was serving as a messenger, not as a lawyer; he repeatedly stated he knew absolutely nothing about the case or Mr. Feld.

The Court of Appeals implied that Adam Yanasak was second-chair on the case, stating, "the fact that Feld's *primary* counsel, Richards, was absent due to inclement weather does not mean that Feld experienced a complete denial of counsel under *Cronic*." Slip Op. at 7 (emphasis

added). Adam Yanasak was not Mr. Feld's "secondary counsel;" he was not on the case at all. A defendant's constitutional right to counsel is not satisfied simply because a person with a bar card who knows nothing about the case appears and delivers a message for the defendant's actual attorney. Mr. Yanasak made clear he was in court as a messenger, not to represent Mr. Feld: "I do not know anything about this case other than I was handed this file, was told that Mr. Richards was asking if we could just continue his matters for a week. He's out today I believe due to the weather, so, your honor, I am not prepared to adequately address these matters...." 2/24/11 RP 4. The court denied the motion for a continuance, *and no contested hearing was held.* The court simply found competency had been restored after the prosecutor stated it was his "desire" that the court agree with the report the State filed, and Mr. Feld said "I am well" after the court said, "How are you doing?" 2/24/11 RP 7-8. Mr. Yanasak renewed his objection to the court's holding the hearing without Mr. Feld's attorney, to no avail. 2/24/11 RP 10. Mr. Yanasak never challenged the State's evidence of competency and never presented evidence of incompetency because he knew nothing about the case.

This procedure constituted a complete deprivation of counsel at a critical stage. The right to counsel includes the right to "meaningful adversarial testing." *Cronic,* 466 U.S. at 656. "A lawyer's opinion as to

his client's competency and ability to assist in his own defense is a factor which should be considered and to which the court must give considerable weight." *State v. Crenshaw*, 27 Wn. App. 326, 331, 617 P.2d 1041, 1044 (1980) *aff'd*, 98 Wn. 2d 789, 659 P.2d 488 (1983).

> Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, ... an expressed doubt in that regard by one with "the closest contact with the defendant," ... is unquestionably a factor which should be considered.

Drope v. Missouri, 420 U.S. 162, 177 n. 13, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

But the lawyer who served as messenger knew nothing and did nothing. He could not and did not "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Mr. Feld was completely deprived of counsel at a critical stage, requiring reversal and remand for a new trial. *Heddrick*, 166 Wn.2d at 910. Instead, the Court of Appeals concluded that a person who knew nothing about the case and was serving as a messenger satisfied the right to counsel simply because he had a bar card. The conclusion is offensive and unconstitutional. This Court should grant review. RAP 13.4(b)(3).

2. **The trial court violated Mr. Feld's rights under the Fourteenth Amendment and article I, section 22 by ordering him to wear shackles on his legs during trial, and wrongly considered Mr. Feld's attire when deciding whether he should be shackled.**

   a. Over defense objection, the trial court ordered Mr. Feld restrained in leg shackles in full view of the jury.

During some of the pre-trial competency hearings, Mr. Feld spoke out of turn and ignored the court's request for silence. At those times, the court warned Mr. Feld he would be removed if he did not stop talking, and Mr. Feld was in fact removed once or twice after failing to heed these warnings. 5/13/10 RP 9. Occasionally, Mr. Feld himself decided not to come to court or meet with his attorneys, and instead advised them that they should all "kill themselves." 5/13/10 RP 6; 4/11/18 RP 18; CP 67, 78. But after the court determined he was competent and trial was imminent, Mr. Feld became "calm and collected." 4/11/12 RP 15.

Shortly before voir dire, the State moved to have Mr. Feld restrained during trial. CP 63-68; 4/11/12 RP 15. Mr. Feld's attorneys vigorously opposed the motion. CP 74-78; 4/11/12 RP 17-22. Although Mr. Feld had decided to wear jail clothing during trial, he did not agree to be shackled, and his attorney pointed out that to impose restraints would violate his rights under article I, section 22. 4/11/12 RP 16-17. He argued

that "shackles makes any defendant look more dangerous than a person who is simply in jail clothes." 4/11/12 RP 22.

Sergeant Ron Coakley, who is a jail guard, testified that his biggest concern was for the defense attorneys, Wes Richards and Nancy Neal. 4/11/12 RP 23. He said Mr. Feld might "lose control" while in the "midst of his verbal tirades." 4/11/12 RP 23. He would be within arm's reach of defense counsel, and might even "make it to your Honor." 4/11/12 RP 23-24.

Mr. Richards noted that he had been representing Mr. Feld for two years and Mr. Feld had never tried to attack anyone, either in court or in jail, even though at times he was not happy with his defense attorneys or the experts with whom he met. 4/11/12 RP 25. Defense counsel described Mr. Feld as a person "who has bark but no bite." 4/11/12 RP 25. Ms. Neal, the other defense attorney, stated that she had met with Mr. Feld alone, that he had never been physically aggressive toward her, and that she had no concerns for her physical safety. 4/11/25 RP 26. Mr. Richards reiterated that it "would be highly prejudicial" to have Mr. Feld shackled. 4/11/12 RP 26.

The court nevertheless ordered that Mr. Feld's legs be shackled during trial. 4/11/12 RP 64. The court reasoned:

> Mr. Feld decided to wear the red suit, so it is no great mystery to the jury that Mr. Feld is in custody, since he's dressed in the jail garb. And based on the testimony of Sergeant Coakley this morning, there are some concerns, the Court has some concerns due to some of Mr. Feld's outbursts. And the Court, on previous occasions, and due to the nature and extent of the charges, and due to the nature and extent of some of Mr. Feld's threats in the course of this case, felt that it was, upon balancing, appropriate to leave Mr. Feld shackled at the feet for security purposes.

4/11/12 RP 65.

The shackles were visible to the jury when Mr. Feld entered the courtroom. 4/11/12 RP 64. During voir dire, one of the jurors noted that Mr. Feld "[has] got handcuffs around his ankles." 4/11/12 RP 144. Another potential juror, who used to be a King County Prosecutor, said that based on prior experience he or she would draw certain conclusions because of what Mr. Feld was wearing. This juror was therefore dismissed, but the discussion regarding the impact of Mr. Feld's appearance on this juror occurred in front of the other potential jurors. 4/12/12 RP 63-64.

On the fourth day of trial, Mr. Feld decided to wear street clothes. The Court ordered that he no longer be shackled, with no discussion of the potential danger of leaving him unrestrained. 4/16/12 RP 5.

b. A court may not shackle a defendant except in extraordinary circumstances because shackling undermines the presumption of innocence and the right to appear and defend in person.

Shackling a defendant infringes upon the Fourteenth Amendment right to the presumption of innocence. U.S. Const. amend. XIV; *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). It also undermines the "right to appear and defend in person" guaranteed by article I, section 22 of the Washington Constitution. Const. art. I, § 22; *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). Thus, [i]t is a long-standing rule in this jurisdiction that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." *In re the Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004) (internal citation omitted).

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." *Hartzog*, 96 Wn.2d at 398. Factors to be considered include the seriousness of the charges, the defendant's temperament and character, his age and physical attributes, his past record, past escapes or attempted escapes, evidence of a present plan to escape, threats to harm others or cause a disturbance, self-destructive tendencies, the risk of mob violence or of attempted revenge by others, the possibility of rescue by

other offenders still at large, the size and mood of the audience, the nature and physical security of the courtroom, and the adequacy and availability of alternative remedies. *Id.* at 400 (citing *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353 (1976)). "[T]he use of handcuffs, shackles, and other forms of physical restraints should be used only as measures of last resort." *Finch*, 137 Wn.2d at 850.

c. The shackling order violated Mr. Feld's constitutional rights because there were no extraordinary circumstances demonstrating a compelling need for shackling.

In this case, the court violated Mr. Feld's constitutional rights by ordering him to wear shackles on his legs for the first four days of trial in the absence of extraordinary circumstances demonstrating a compelling need. Although Mr. Feld was charged with serious crimes, this is far from sufficient on its own to justify restraints. In both *Finch* and *Davis*, this Court reversed death sentences because of improper shackling – even though these defendants were charged with the worst crime possible: aggravated murder. *Davis*, 152 Wn.2d at 705; *Finch*, 137 Wn.2d at 866.

Nor do the other factors provide a basis for ordering Mr. Feld to wear leg irons. Mr. Feld never escaped or attempted to escape. As his attorneys emphasized, in the two years they had worked with him, he had never attempted to harm them. Nor had he threatened anyone; the State

acknowledged that Mr. Feld did not threaten to kill anyone but rather expressed his wish that the people he did not like would "kill themselves." CP 67, 78. There was no "risk of mob violence" or of attempted revenge by others, nor were there any "other offenders still at large." *See Hartzog* at 400. Mr. Feld was small and 56 years old, and he had no criminal history. CP 309, 323. There was simply no demonstrated "impelling necessity" to require Mr. Feld to wear leg irons. *Finch*, 137 Wn.2d at 843.

Indeed, the trial court appeared to recognize the absence of an impelling need to order the leg restraints. It ordered them mainly because Mr. Feld was wearing jail garb, reasoning that shackles would not be prejudicial in light of the fact that Mr. Feld was wearing "the red suit." 4/11/12 RP 65. Four days into trial, when Mr. Feld decided to wear street clothes, the court ordered the shackles removed. 4/16/12 RP 5. Thus, it is clear that the shackling order was not justified by a compelling need to address a security risk. The shackles violated Mr. Feld's constitutional rights.

The Court of Appeals neglected to evaluate the *Hartzog* factors and neglected to mention that the trial court removed the shackles only because Mr. Feld decided to stop wearing jail garb, thus demonstrating that the shackling order was not based on a compelling need. The court also failed to recognize that if the problem is *verbal* outbursts, leg irons

will not solve the issue. The appropriate – and constitutional – response is warnings first, removal second, and shackling only as a last resort. *See Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

Furthermore, the Court of Appeals minimized this Court's decision in *Finch*. There, the defendant was in leg restraints throughout trial, and his hands were cuffed during the testimony of two witnesses who were victims of other crimes committed by the defendant. *Finch*, 137 Wn.2d at 802-04. The trial court had engaged in an individualized inquiry, concluding shackling was necessary because the defendant had repeated his desire to kill one of the surviving victims and had also threatened to kill doctors from Western State Hospital. *Id.* at 851. A correctional officer had testified that security officers were concerned because the defendant was "a rather large man ... and once he got going, he'd have quite a lot of momentum." The State also argued that shackling was justified because the defendant was on trial for murder, had prior convictions for violent offenses, and had attempted suicide in prison. *Id.*

This Court reversed, holding "these facts do not indicate a 'manifest need' for restraints." *Id.* It ruled, "the decision to restrain Mr. Finch throughout the course of his trial, based on these facts, is contrary to the overwhelming case law in this area." *Id.*

The same is true here. If a "manifest need" for restraints was absent in *Finch*, it is certainly absent here. Mr. Feld's charges were serious, but not as serious as in *Finch*. Mr. Feld had expressed his wishes that his attorneys and the judge would harm themselves, but unlike in *Finch*, he never threatened to kill them. His attorneys stated that he had never attempted to hurt them in the two years they had represented him, and he had never escaped or attempted to do so. Unlike Mr. Finch, who was a large, young man with a violent criminal history, Mr. Feld was an older, small man with no criminal history – let alone a violent one. The trial court essentially acknowledged there was no manifest need for shackles when it allowed the shackles to be removed as soon as Mr. Feld decided to wear street clothes.

In sum, the trial court erred and violated Mr. Feld's constitutional rights by ordering him to wear leg irons for the first four days of trial. This Court should grant review. RAP 13.4(b)(3).

3. The trial court violated Mr. Feld's Sixth Amendment right to present a defense by excluding evidence of the alleged victim's prior acts of violence.

Mr. Feld presented evidence that he acted in lawful self-defense in counts one through four. The court accordingly instructed the jury on self-defense. CP 226-31.

The alleged victim as to counts one and two was Stephen Callero. 263-64. The State, through Tim Hanby, presented testimony that this alleged victim "is a gentle, mild mannered, kind of passive ... not aggressive kind of guy." 4/18/12 RP 53. Mr. Hanby described Callero as "a little passive, ... soft spoken and a little mild mannered." 4/13/12 RP 98. Mr. Callero also testified that "I was very soft spoken." 4/12/12 RP 114.

In an effort to rebut this testimony and support his defense, Mr. Feld moved to introduce evidence of Callero's prior acts of violence. 4/18/12 RP 50-59. Specifically, Phyllis Feld would testify that Callero once "took a baseball bat to confront someone over a dispute," and that Mr. Feld was aware of this. 4/18/12 RP 59-61. Mr. Feld's attorney pointed out that this was relevant to the question of whether Mr. Feld reasonably feared Mr. Callero. 4/18/12 RP 55. It "relates to the defense we have asserted in this case, which is self-defense." 4/18/12 RP 59.

The trial court ruled that Mr. Feld would have to waive his right not to testify if he wanted this evidence to be admitted, and he would have to testify to it himself. The court did not allow Mrs. Feld to present this testimony. 4/18/12 RP 60-61. This ruling was improper.

The Sixth Amendment guarantees the right to present a defense. U.S. Const. amend. VI; *State v. Jones*, 168 Wn. 2d 713, 720, 230 P.3d 576

(2010). Although this right does not extend to irrelevant evidence, "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn. 2d 612, 621, 41 P.3d 1189 (2002).

Evidence of an alleged victim's prior acts of violence, which are known by the defendant, is relevant to a claim of self-defense "because such testimony tends to show the state of mind of the defendant ... and to indicate whether he, at that time, had reason to fear bodily harm." *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972). Accordingly, such evidence is admissible to show the defendant's reason for apprehension and the basis for acting in self-defense.

Where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *State v. Wanrow*, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account "*all* the facts and circumstances known to the defendant, including those known substantially before the [incident]." *Id.* at 234. Because the "final question is the reasonableness of the defendant's apprehension of danger, the jury must stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." *Id.* at 235.

In this case, the trial court violated Mr. Feld's right to present a defense by excluding the relevant evidence of Mr. Callero's prior acts of violence. The court appeared to recognize that the evidence was relevant and that Mr. Feld had a constitutional right to present it to support his defense, but ruled the evidence could come in *only* through Mr. Feld. 4/18/12 RP 61-62. Mr. Feld's attorney said, "I'm not aware of a case that says the defendant has to testify." 4/18/12 RP 62. Indeed, the defendant has a Fifth Amendment right *not* to testify, and the State did not present a case stating that a defendant must waive his Fifth Amendment right in order to exercise his Sixth Amendment right to present a defense. *Cloud* indicates to the contrary:

> [A] defendant charged with homicide may show **by third persons** that they had previously had quarrels with the deceased, and show the conduct of the deceased on those occasions, if such prior occurrence or occurrences were made known to the defendant before the commission of the crime for which he is being tried, because such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he at that time had reason to fear bodily harm.

Cloud, 7 Wn. App. at 218 (quoting *State v. Adamo*, 120 Wash. 268, 269, 207 P. 7 (1922)) (emphasis added).

The Court of Appeals ignored the improper basis for the trial court's ruling, and affirmed on the basis that Mr. Feld "did not indicate when the baseball bat incident occurred." But the timeframe of the

incident was not at issue in the trial court. Rather, the trial court wrongly forced Mr. Feld to choose between his Fifth Amendment right to silence and the Sixth Amendment right to present a defense. 4/18/12 RP 60-62. For this reason, too, this Court should grant review. RAP 13.4(b)(3).

4. This Court should address the question of whether article I, section 7 of the Washington Constitution protects the private telephone conversations of pre-trial detainees.

Mr. Feld was held in jail prior to trial, and while there he spoke to his wife on the telephone. The government recorded these calls, and intended to introduce the recordings at trial. Mr. Feld moved to suppress the recordings as violating his constitutional rights. He acknowledged the Court of Appeals decisions in *State v. Archie*, 148 Wn. App. 198, 199 P.3d 1005 (2009), and *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012), but preserved the issue in the event they were overruled. The trial court denied the motion, and the recordings were played for the jury. 4/11/12 RP 32-33; 4/17/12 RP 147-50; exs. 178, 179. The Court of Appeals affirmed under *Archie* and *Haq*. Slip Op. at 20. This Court has never addressed the issue, and should take the opportunity to do so here.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The state constitutional protection "is explicitly broader than that of

the Fourth Amendment." *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

In determining whether something is a "private affair" subject to the protection of the state constitution, "a central consideration is the nature of the information sought – that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life." *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). For example, in *Miles*, banking records were held to be a private affair because:

> The information sought here potentially reveals sensitive personal information. Private bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more.

State v. Miles, 160 Wn.2d 236, 246-47, 156 P.3d 864 (2007). "Little doubt exists that banking records, because of the type of information contained, are within a person's private affairs." *Id.* at 247.

Similarly, in *Boland*, garbage was held to be a "private affair" because the items in the trash, like "bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs." *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). In *Gunwall*, the numbers people dialed on

their telephones were held to be private affairs, even though the conversations themselves were not recorded. *State v. Gunwall*, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986).

Given that banking records, motel registry information, telephone records, and even garbage are private affairs protected by article I, section 7, it is clear that the conversations Mr. Feld had with his wife are also "private affairs" under our state constitution. Conversations explicitly reveal the kinds of private information that banking records, motel registries, and garbage only implicitly reveal.

In *Archie*, the Court of Appeals held that because the defendant was in jail he "had no reasonable expectation of privacy." *Archie*, 148 Wn. App. at 200.[2] But this Court has emphasized that unlike the Fourth Amendment, the question under article I, section 7 is "whether the 'private affairs' of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable." *Boland*, 115 Wn.2d at 580; *accord State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008).

The *Archie* court further erred in engaging in a balancing of interests, stating, "[b]alancing the circumstances here against the privacy protection usually applied to telephone communications, we are persuaded

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[2] The Court followed *Archie* in *Haq*, 166 Wn. App. at 258.

that Archie's phone calls from the jail were not private affairs deserving of article I, section 7 protection." *Archie*, 148 Wn. App. at 204. But this Court has held that article I, section 7 does not countenance balancing; it mandates that private affairs not be invaded absent authority of law. *State v. Buelna Valdez*, 167 Wn.2d 761, 775-76, 224 P.3d 751 (2009); *accord State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

In sum, if the numbers one dials on a phone are private affairs protected by article I, section 7, the actual conversations certainly are. This Court should grant review to address the question. RAP 13.4(b)(3).

5. This Court should take the opportunity to disapprove of the final, bracketed language in WPIC 4.01, because it is inconsistent with this Court's holding that the jury's job is not to find the truth but to determine whether the State proved its case.

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. Thus, a prosecutor commits misconduct when it urges the jury to "declare the truth." *See id.*

Over Mr. Feld's objection, the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 29 (Instruction 3); CP 20 (defense proposed instruction without this

language); 2 RP 3-4. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*.

The State claimed that prosecutorial misconduct is a separate question from whether a jury instruction is improper. But the two are intertwined. Indeed, prosecutors purport to be explaining the jury instructions when making this improper argument. *See State v. McCreven,* 170 Wn. App. 444, 472, 284 P.3d 793, 807 (2012) (reversing for prosecutorial misconduct where prosecutor told the jury, "the law says that you have to determine if you have an abiding belief in the truth of the charge. ... the truth, of what happened that night ..."). This Court should grant review and disapprove of the use of the bracketed language in the reasonable doubt instruction. RAP 13.4(b)(4).

6. This Court should hold that the absence of self-defense must be in the to-convict instruction.

Mr. Feld argued that he did not commit assault or attempted murder as charged in counts one through four because he acted in lawful self-defense. Because the State bears the burden of disproving self-defense as an element of the crime, Mr. Feld asked the court to include it in the "to convict" instructions. Specifically, he proposed instructions for attempted murder which included the element "that the attempted killing

was not excusable or justifiable," and for assault which included the element "that the defendant was not acting lawfully in self-defense, defense of another, or defense of property." *See* CP 103-04, 107-08; 4/18/12 RP 203-05. The court rejected the proposed instructions. 4/18/12 RP 204; CP 207, 211, 216, 217. This Court should grant review and hold that where self-defense is at issue it must be included in the "to convict" instruction.

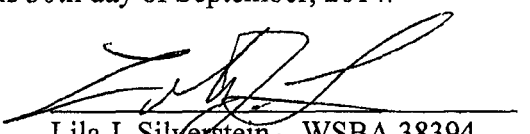
In Washington, where the issue of self-defense is raised, the absence of self-defense becomes an essential element of the offense which the State must prove beyond a reasonable doubt. *State v. Acosta,* 101 Wn.2d 612, 621-23, 683 P.2d 1069 (1984). The "to convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. *Id.* at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Smith*, 131 Wn.2d at 263.

Although in *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the Court rejected the contention that the absence of self-defense had to appear in the "to convict" instruction, this holding has been abrogated by subsequent cases including *Smith*, 131 Wn.2d at 263 (reversing where "to convict" instruction stated wrong underlying crime for conspiracy charge); *State v. Aumick*, 126 Wn.2d 422, 429-30, 894 P.2d 1325 (1995) (reversing where trial court omitted element of intent from "to convict" instruction); and *State v. Eastmond*, 129 Wn.2d 497, 503, 919 P.2d 577 (1996) (reversing where trial court omitted element of specific intent from "to convict" instruction in assault prosecution). Because the "to convict" instruction is the yardstick by which the jury measures guilt or innocence, and because a person is not guilty of a crime if he acts in lawful self-defense, this Court should grant review and hold that where self-defense is at issue, the State's burden to disprove self-defense beyond a reasonable doubt must be included in the "to convict" instruction.

E. CONCLUSION

Charles Feld respectfully requests that this Court grant review.

Respectfully submitted this 30th day of September, 2014.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES EUGENE FELD, Appellant,	No. 69044-2-I DIVISION ONE UNPUBLISHED OPINION FILED: September 2, 2014

BECKER, J. — This opinion affirms appellant Charles Feld's convictions for attempted murder, assault, arson, and felony harassment, all arising out of a confrontation between Feld and a neighbor at Feld's home on Guemes Island.

Feld and the neighbor, Stephen Callero, got into a dispute over $150. In March 2010, Callero agreed to rent a rototiller for Feld so long as Feld washed it and filled it with gas before Callero had to return it to the rental company. Feld was to reimburse Callero for the $150 rental fee.

Callero testified that when he went to pick up the rototiller, it was covered in mud and empty of fuel, and Feld was not there to pay him. According to Callero, for about a week, Feld kept saying he would pay him the next day. Recordings of Feld's provocative and insulting voice mails were admitted at trial.

Callero went to Feld's home on the evening of April 2, 2010, to confront Feld about getting paid. Callero's co-worker, Tim Hanby, drove him there in

Hanby's truck. They pulled up near Feld's home while Callero's son, who had also come along, remained in his own truck just off the main road. Callero got out of the truck and approached Feld's residence. Feld came out onto the porch "screaming and yelling and cussing." When Callero got within about 20 feet from the house, he asked Feld for reimbursement for the rototiller.

Meanwhile, Hanby got out of his truck carrying a fish club. Feld's wife, Phyllis Feld, testified that Hanby raised the club and said, "I'm going to beat that money out of you, you mother fucker." Feld went inside and returned with a bucket he had previously filled with gasoline and other toxic chemicals. He threw the bucket at Callero. The bucket missed Callero, but its contents hit Hanby in the face and spilled down his front. Feld pulled out a lighter and tried to light Hanby on fire, but the wind kept blowing the flame out.

Callero called 911. Feld threw a large cement flower pot at Callero, hitting him and knocking the cell phone out of his hand. Feld went back into the house and came back out shooting a gun. He fired three shots as Callero ran back to the truck.

Callero testified that Feld followed him to the truck, held the gun about a foot from his face, and pulled the trigger. Callero testified, "I saw my whole life go in front of me," but Feld's gun jammed. Feld then used the butt of the gun to break the window of the truck. He reached inside and tried to pull Callero out of the truck. Hanby hit Feld with the fish club and got him away from Callero.

Feld went back to his house, and Hanby and Callero were able to drive away. They went to a nearby fire station as instructed by the 911 dispatcher.

While there, Callero heard a dispatch call reporting that his house was on fire. His entire property burned to the ground.

Two Skagit County sheriff's deputies went to Feld's house that night. They found only Feld's wife there. Feld called 911 and said that if the deputies did not leave his property within 30 minutes, they would be killed. A shot was fired toward the deputies, and one of them saw the silhouette of someone standing nearby.

The next morning, Feld turned himself in to authorities.

At trial two years later, Feld faced charges of two counts of first degree attempted murder (of Callero and Hanby), four counts of first degree assault (for his actions against Callero, Hanby, and the two deputies), one count of first degree arson, and one count of felony harassment (threat to kill). The jury found Feld guilty on all eight counts and returned special verdicts for firearm enhancements. The court imposed a prison sentence of 866 months. Feld appeals.

Right to Counsel at Competency Hearing

Feld contends his convictions must be reversed because the court denied him the right to counsel at a competency hearing.

In the two years Feld awaited trial, his competency to stand trial was the subject of numerous hearings. Defense counsel consistently took the position that Feld was not competent. Feld was ordered to Western State Hospital on May 13, 2010; December 8, 2010; April 7, 2011; and November 17, 2011.

On May 13, 2010, Feld refused to appear in court for his arraignment. In his absence, the court granted the State's motion for a competency evaluation.

On June 10, 2010, Feld was forcibly brought before the court for arraignment. He had to be removed after a verbal outburst. The court found Feld competent to stand trial based on the reports from Western State Hospital. The court entered pleas of not guilty in Feld's absence but with his attorneys present.

On December 3, 2010, another hearing was held. Feld's appointed counsel Wesley Richards asserted that Feld's mental condition had deteriorated since the order finding him competent on June 10, 2010. Richards reported that Feld was refusing to meet with him and had declined antipsychotic medications. After an extensive colloquy with Feld, the court signed an order finding Feld incompetent and returning him to Western State Hospital for treatment and restoration of competency. A status review was scheduled for February 24, 2011, prior to expiration of the 90-day restoration period.

On February 24, 2011, the court held the status review hearing. This is the hearing at which Feld claims he was denied counsel. Based on a report from Western State Hospital, the State asked the court to find Feld competent and to proceed to trial. Feld's attorney, Richards, slid off the road in snowy conditions and was unable to be present for the hearing. Another public defender from the same office appeared and requested a one-week continuance. He said he was uninformed about the case and was not adequately prepared to address the issue of competency. Feld was present and said he wanted to proceed and to go

to trial immediately and plead guilty to all charges. The court denied the continuance and found Feld competent based on the report from Western State Hospital. Trial was set for March 2011. Another year went by before the trial actually began.

On March 25, 2011, Feld was interviewed at the jail by defense expert Dr. Kenneth Muscatel. On April 7, 2011, defense counsel Richards secured another order for a determination of competency. The defense motion asserted that due to Richards' absence from the hearing on February 24, 2011, the court had failed to consider the opinions of defense counsel regarding competency and Feld had been denied his right to have an independent mental health expert file a report regarding competency. The court ordered Feld committed to Western State Hospital for more observation and treatment. The order stated that defense counsel and a defense mental health expert were entitled to be present for forensic evaluations.

On July 6, 2011, Feld was released from Western State Hospital. After this, Feld was represented for a time by a different attorney, Lawrence Delay.

On November 17, 2011, Feld was again represented by Richards at a hearing. Upon a defense motion, the court ordered Feld committed again to Western State Hospital for observation. The hospital was directed to submit a report diagnosing Feld's mental condition and providing opinions as to whether he suffered from a mental disease or defect and if so, whether he was competent to stand trial; whether he presented a substantial danger to other persons unless kept in custody; and whether he required medication, taken either voluntarily or

forcibly, to maintain his competency. The case was continued until the reports came back.

When the hospital made its report, the State again asked the court to find Feld competent to stand trial. Defense counsel submitted a brief arguing that Feld's refusal to meet with counsel and his insistence on not raising a defense showed that he was unable to assist with his own defense. The brief asserted that because the court had previously made a finding that Feld was incompetent, the State had the burden of proving that Feld had been restored to competency.

On February 27, 2012, the court held what proved to be the final competency hearing. The prosecutor reminded the court that Feld had been found competent on February 24, 2011. Defense counsel responded that the order of competency had been entered that day in his absence and over his objection. The court said, "Understood. Okay. Thank you, Mr. Richards."

The court heard testimony from an expert witness at Western State Hospital, who opined that Feld's refusal to meet with Richards "was a volitional thing" rather than a symptom of a psychotic process. Dr. Muscatel opined that Feld could not rationally participate in his own defense.

On March 13, 2012, the court entered an order finding Feld competent to stand trial. The court concluded Feld was capable of assisting in his own defense "but at this point in time chooses not to, and chooses to stand on his own defense of, there is no defense because the system is corrupt." The trial began the next month.

Feld's contention is that the absence of Richards from the hearing on February 24 amounted to a complete denial of counsel at a critical stage, warranting automatic reversal under United States v. Cronic, 466 U.S. 648, 658-60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Competency hearings are a critical stage to which the Sixth Amendment right to counsel attaches. State v. Heddrick, 166 Wn.2d 898, 910-11, 215 P.3d 201 (2009). But the fact that Feld's primary counsel, Richards, was absent due to inclement weather does not mean that Feld experienced a complete denial of counsel under Cronic. Another attorney from the same office as Richards stood in for him and advocated that the decision be postponed until Richards could be present. The record indicates that the court was concerned about time running out. The absence of Richards at this hearing did not cause a loss of rights, a waiver of defenses, or any other substantial effect on the outcome of the case. The issue of Feld's competency would continue to be litigated for another full year.

Feld argues that the absence of Richards was critical because had Richards been there, he would have held the State to its burden of proving that Feld was incompetent. He claims that having once been found incompetent by the court on December 8, 2010, he was entitled to the presumption that he remained incompetent until the State proved otherwise. Feld relies on State v. P.E.T., 174 Wn. App. 590, 592, 300 P.3d 456 (2013), citing State v. Coley, 171 Wn. App. 177, 187, 286 P.3d 712 (2012). But the Court of Appeals decision in Coley was recently reversed by the Supreme Court in State v. Coley, __ Wn.2d

__, 326 P.3d 702 (2014). Under Coley, when an individual has been evaluated as competent after restoration treatment, the burden of proof is on the party challenging competency. Coley, 326 P.3d at 709. Thus at the hearing on February 24, 2011, and thereafter, Feld was not entitled to a presumption of incompetence. We conclude the absence of Feld's primary defense counsel at one of numerous hearings at which his competency was addressed does not, under these circumstances, entitle him to reversal of his convictions.

Shackling

The trial court ordered Feld to wear ankle shackles during the first three days of the trial. Feld contends the shackling violated his rights under the Fourteenth Amendment and article I, section 22 of the Washington Constitution.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981). Whether restraints are necessary is a question that must be given close judicial scrutiny. Finch, 137 Wn.2d at 846. However, a trial court has discretion to determine the best way to handle each particular situation.

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.

Illinois v. Allen, 397 U.S. 337, 343-44, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (affirming where judge exercised discretion to remove an obstreperous defendant rather than having him sit in the courtroom bound and gagged).

A trial court may not adopt a broad general policy to impose physical restraints upon potentially dangerous inmates and must instead exercise discretion "founded upon a factual basis set forth in the record." Hartzog, 96 Wn.2d at 400. It is an abuse of discretion to order physical restraints unless the decision is based on evidence that "the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom." Finch, 137 Wn.2d at 850.

During the two years that Feld went back and forth between the jail and Western State Hospital, hearings were held that Feld usually did not want to attend. When he did attend, he often did not behave in an orderly manner. Appellate counsel unduly minimizes Feld's conduct by saying that he sometimes "spoke out of turn and ignored the court's request for silence." Brief of Appellant at 9. On May 13, 2010, Feld was scheduled for arraignment and a hearing on whether he should be sent to Western State Hospital for evaluation. The court found that bringing Feld into court "would require nothing short of a full-fledged wrestling match where there would be a high possibility someone could be injured." Feld was brought into court but soon had to be physically removed. The court put on the record the following description:

> Mr. Feld was brought down to the court today for the signing of the competency or formal arraignment. He was brought down at approximately 1:20 or so. Upon arriving in the courtroom Mr. Feld commenced a loud and boisterous outburst, screaming at the Court, the Prosecutor, the general public, at everyone involved with the court staff. When asked to cease and [desist] he only got louder. The Court had him removed from the courtroom and had Mr. Feld's attorney, Mr. Tyne, go back and ask Mr. Feld if he would stand quiet so we can proceed with the arraignment. Mr. Feld replied with further and even louder outbursts and attacks against the system, and the Court, and the State, and the Prosecutor, and so on. When brought back into court Mr. Feld gathered steam as far as his outbursts were concerned so the Court had him removed again. He was taken back up to the jail. Approximately 15 minutes later he was brought back into court and asked once again to remain civil so the proceedings could take place. And Mr. Feld responded by another loud and boisterous outburst disrupting the court proceedings, making it absolutely impossible to get anything said, done, or heard over the top of this ranting and screaming in the court.

In later hearings, Feld repeatedly called the judges before whom he appeared some variation of "black-robed whore of Lucifer" and told them and his attorneys that they should kill themselves. His tirades contained violent language—e.g., "I was groomed to assassinate men, women, children anywhere on this earth." "Kill yourself, you God damned whore."

The jail staff gave unrebutted testimony that when Feld did not want to attend a hearing, he was so combative it would take total restraints to get him into the courtroom. There was general agreement, including by defense counsel, that bringing Feld into the courtroom in restraints posed a high risk of injury that should be avoided by leaving him in the jail to the extent possible.

On April 10, 2012, the trial was about to begin. The State submitted a motion asking the court to consider shackling Feld as a courtroom security

measure or at least to consider minimal restraints. The motion was based in part on Feld's frequent references to the deaths awaiting his attorneys and the judge. The State's brief said, "While it is true the threats are usually in the form of 'Go kill yourself,' it cannot be overstated the number of times the threats have been made, nor the passion behind the threats." The brief also asserted that Feld's outbursts were a matter of concern because he did not just make "inappropriate comments" but was "physically demonstrative." The brief observed that throughout the pretrial process, 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." Defense counsel opposed the motion.

A hearing on the motion occurred shortly before the beginning of voir dire on Wednesday, April 11, 2012. The parties first discussed Feld's announcement that he would refuse to wear civilian clothes during the trial. Defense counsel pointed out that jail garb is prejudicial because it "strips away the presumption of innocence. And in my mind, it is further evidence that Mr. Feld is not making rational decisions in this case, and is not able to assist rationally in his defense." Defense counsel opposed the State's request for shackles, suggesting additional security as an alternative. "As the court is aware, convictions have been overturned by appellate courts in this state because jurors have seen defendants in shackles." Defense counsel's preference that Feld be medicated was also discussed, but counsel conceded that the only way to get Feld to take medication against his will was to send him back to Western State Hospital for another

competency evaluation. The State argued that some form of restraint was a better alternative than removing Feld from the courtroom.

The court warned that outbursts would be dealt with by removing Feld from the courtroom. The court remarked that if Feld was going to insist on appearing in court in jail garb, shackling was "not quite as big an issue." Sergeant Ron Coakley of the jail staff testified in support of the use of restraints because of his concern that Feld "tends to lose control" and might, in the midst of a verbal tirade, do physical harm to his attorneys or the judge or court staff. Defense counsel again objected that shackling was highly prejudicial, even more so than jail clothing. Counsel also stressed that Feld had never tried to attack him and stated his opinion that Feld "has bark but no bite." At the end of the hearing, the court said, "Okay. Well, we will see what we're going to do once we see what Mr. Feld is going to wear. That will make a difference."

When the trial began, Feld chose to wear jail clothing in the courtroom against the advice of counsel. The court instructed the jailers to unshackle Feld's hands and waist but to let the ankle shackles remain. The court put on the record the reasons for requiring ankle shackles:

> [THE COURT:] I did instruct the jailers to unshackle Mr. Feld's hands and remove the waistband so that Mr. Feld can assist in his defense with his hands, should he want to pass notes to his attorneys.
>
> I left the shackles on the feet due to the fact that Mr. Feld decided to wear the red suit, so it is no great mystery to the jury that Mr. Feld is in custody, since he's dressed in the jail garb. And based on the testimony of Sergeant Coakley this morning, there are some concerns, the Court has some concerns due to some of Mr. Feld's outbursts.

> And the Court, on previous occasions, and due to the nature and extent of the charges, and due to the nature and extent of some of Mr. Feld's threats in the course of this case, felt that it was, upon balancing, appropriate to leave Mr. Feld shackled at the feet for security purposes.
>
> We are in a small courtroom in comparison to the one we normally use, and quarters are tight in this particular courtroom. On balance, I feel that this is the appropriate thing to do at this point.
>
> . . . .
>
> . . . Mr. Feld appears to be an athletic individual, and for that reason I felt that, upon balancing, that prudence would dictate the shackles on the legs.

Although measures were taken to make it difficult for jurors to notice the shackles, during voir dire a juror mentioned seeing them. Defense counsel was making the point that Feld was presumed innocent and said, "Now, as Mr. Feld sits here before you today, the way that he's dressed, does that have any impact on your opinion of him?" A potential juror responded, "Well, you can obviously tell that he's been incarcerated because he is in the wardrobe, and he's also got handcuffs around his ankles."

Feld wore the jail garb and the ankle shackles through jury selection, opening statements, and the testimony of the State's first witnesses. When trial resumed on Monday, April 16, 2012, Feld was wearing street clothing and was no longer wearing shackles. There was no more shackling during the rest of the trial, which continued through closing arguments on Thursday, April 19, 2012. The jury began its deliberations the next morning and delivered the verdict just after 5 p.m. on Friday, April 20, 2012.

Feld contends the record is insufficient to show that he was a security risk. Feld also argues that the court abused its discretion by linking the decision to shackle to his decision to wear the red jail uniform.

We agree that a defendant's decision to wear jail garb in the courtroom does not, in itself, eliminate the prejudice inherent in shackling. We also recognize that the problem of defendants who scream and shout in court is not so unusual or threatening that trial judges will always be justified in resorting to shackling to deal with it. And it is well established that a court may not rely solely on the judgment of correctional officers who believe the use of restraints at a trial is necessary to maintain security if the record contains no other justifiable basis for restraints. Finch, 137 Wn.2d at 853.

However, Feld's disorderly conduct was exceptional. And the possibility that he would become assaultive in the courtroom was not an abstract proposition suggested by correctional officers. It is well documented that when Feld did not want to be present in court, he resisted physically. On more than one occasion, defense counsel urged the court to leave Feld in his cell during hearings rather than risk injury to Feld or the jail staff. Just two weeks before trial, on March 27, 2012, Feld was removed from the courtroom because of an outburst which concluded with his statement that he was "not going to sit and say nothing when corruption continues to go on in this nation." The court noted in the record Feld's "inability to control himself and sit quietly to allow us to conduct the hearing."

To argue that the trial court abused its discretion, Feld cites Finch and In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004). Both of these were aggravated murder cases where the Supreme Court found the use of shackles throughout the entire proceedings was not justified. In Finch, the trial court ordered the defendant to remain in shackles throughout the entire proceeding. While the defendant's estranged wife and her mother were testifying, the trial court ordered the additional restraint of having the defendant's right hand handcuffed to a chair and the shackles handcuffed to a table leg. Our Supreme Court found the trial court had not stated an adequate justification for the leg shackling and had failed to consider less restrictive alternatives for the hand shackling. Finch, 137 Wn.2d at 853-84. This error was deemed harmless in the guilt phase but not in the penalty phase. Finch, 137 Wn.2d at 862, 866; see also Davis, 152 Wn.2d at 700-05.

Feld argues that if a manifest need for restraints was absent in Finch and Davis, it was necessarily absent in his case as well. Feld overlooks significant distinctions. In Finch, the defendant was never disruptive in court and he "attended numerous pretrial proceedings in which he was completely compliant with the decorum of the court." Finch, 137 Wn.2d at 852. In contrast, Feld's outbursts during pretrial hearings presented a constant challenge to the decorum of the court. In Finch, the shackling decision was based primarily on the fact that the defendant had threatened his wife—and his wife was not in the courtroom for the entire trial. Finch, 137 Wn.2d at 851. While Feld did not personally threaten to harm anyone, he persistently exhorted his attorneys and the judge to kill

themselves. The judge was entitled to factor these violent comments into his decision.

Another important distinction is that unlike in Finch and Davis, the shackling of Feld did not last throughout the proceedings. This was an important consideration in State v. Clark, 143 Wn.2d 731, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001). In Clark, the trial court erred by ordering shackles in an aggravated murder case without an individualized assessment of the need for shackling, and where there was no reason to fear violence or escape and no evidence "of anything other than decorous behavior during pretrial hearings." Clark, 143 Wn.2d at 774. But the court judged the error harmless because the defendant was shackled only during the first day of voir dire and on the day the verdict was returned. "Because the impact of shackling on the presumption of innocence is the overarching constitutional concern, it would logically follow that in the minds of the jurors Clark's shackling on the first day of voir dire was more than logically offset by over two weeks of observing Clark in the courtroom without shackles." Clark, 143 Wn.2d at 776. The same is true here. Because Feld had sometimes been in court without causing disruption, the trial court chose a course of action that allowed Feld to show he was capable of sitting quietly and civilly in court. When Feld demonstrated throughout three days that he would comply with courtroom decorum and refrain from making a spectacle of himself and a circus out of the trial, the court responded to the changed behavior by lifting the shackling order. This approach may well have prevented a physical outburst of the type Feld had recently promised ("I am not going to sit and say

nothing.") Such an outburst would have resulted in the jail staff having to restrain and remove Feld in front of the jury, an event that would have been extremely prejudicial.

The court did not order shackling as a routine matter without considering alternatives. Defense counsel proposed the alternative of increasing the number of officers present. But it is not unreasonable to conclude that minimal and covered-up shackles are less prejudicial than "packing the courtroom with bailiffs." Jones v. Meyer, 899 F.2d 883, 884-86 (9th Cir.), cert. denied, 498 U.S. 832 (1990). The court balanced defense counsel's preference to allow Feld to remain unshackled against the State's proposal to have him fully shackled. The court did not rely on a general practice or defer to correctional officers, but instead made an individualized determination based on long familiarity with Feld. It would be difficult to say that there was an abuse of discretion under these circumstances.

Even if there was a violation of Feld's constitutional rights, the constitutional harmless error standard applies. Finch, 137 Wn.2d at 859-61. The evidence against Feld was overwhelming. We are satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result if there had been no shackles. The brief glimpses the jurors had of Feld's shackles at the beginning of the trial, when he was also voluntarily in jail garb, did not contribute to the verdict. See Wilson v. McCarthy, 770 F.2d 1482, 1486 (9th Cir. 1985).

Exclusion of Testimony About Victim's Prior Act

During the State's case, Hanby testified that Callero was a "gentle, mild-mannered, kind of passive . . . he's not a wimp, but he's real soft spoken, not aggressive at all kind of guy."

Feld characterized this as "character evidence" of Callero's peaceful character. He argued that Hanby's testimony opened the door to testimony that Callero was, in fact, aggressive. Feld proposed to have his wife testify that she once saw Callero take a baseball bat to confront someone. Feld's offer of proof anticipated his wife would testify that she had told him about the incident with the baseball bat, and that they had also discussed Callero's "violent tendencies or his threatening behavior to others." Feld argued that his wife's testimony about this incident would not only serve as character evidence in rebuttal to Hanby's remark, it would also be relevant to his claim that he acted in lawful self-defense, in that it would tend to show Feld had a reasonable fear for his safety or his wife's.

The court refused to admit the offered testimony of Mrs. Feld about the baseball bat incident. Feld assigns error to this decision. We review de novo his claim that excluding the testimony violated his Sixth Amendment right to present a defense. See State v. Jones, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010).

A defendant's right to offer testimony in his own defense is constitutionally guaranteed, but it must be of at least minimal relevance. Jones, 168 Wn.2d at 720. As character evidence, the proffered testimony was irrelevant. In proving the character of an alleged victim, specific acts of violence may not be shown.

State v. Adamo, 120 Wash. 268, 270, 207 P. 7 (1922). And to the extent Hanby's remark opened the door to character evidence, the trial court properly deemed the baseball bat testimony to be unnecessarily cumulative. As the trial court observed, the evidence before the jury already included a number of statements Feld had given to law enforcement officers characterizing Callero as "a drunken, drug-addicted bully, who has bullied people on the island for a long time."

Feld asserts Mrs. Feld's testimony should have been admitted as relevant to self-defense. The trial court instructed the jury on self-defense. The parties argued in closing about whether the State had proved the absence of self-defense. The State argued in part that Feld did not have a reasonable fear that he was in danger and that the actions he took were not reasonable under the circumstances. Feld contends his knowledge of the prior incident in which Callero allegedly confronted someone with a baseball bat was important to show that he had a reasonable fear that he was in danger when Callero approached his house.

At least in cases where a defendant is charged with homicide, the general rule is that the testimony of third persons may be admitted to show that they had quarrels with the deceased

> and show the conduct of the deceased on those occasions, if such prior occurrence or occurrences were made known to the defendant before the commission of the crime for which he is being tried, because such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he, at that time, had reason to fear bodily harm.

Adamo, 120 Wash. at 269. Feld's proposed application of the rule stated in Adamo assumes that it broadly encompasses cases of assault as well as homicide, and cases where the third party witness is not the person who had the previous quarrel with the defendant. Even assuming that to be so, there was no showing that the baseball bat incident was recent enough to be relevant. A defendant is permitted to show "specific acts of the deceased which are not too remote." Adamo, 120 Wash. at 271. Feld's offer of proof did not indicate when the baseball bat incident occurred.

The trial court was entitled to conclude that the occurrence connected with the offer of proof was not within the parameters of relevance established in Adamo. The exclusion of Feld's wife's testimony did not violate Feld's Sixth Amendment right to present a defense.

Jail Phone Recordings

Feld moved unsuccessfully to suppress jail recordings of his phone conversations with his wife as violating his privacy rights under article I, section 7. The trial court denied the motion, and the recordings were played for the jury. Feld assigns error to this ruling. As Feld acknowledges, his argument fails under State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, review denied, 166 Wn.2d 1016 (2009), and State v. Haq, 166 Wn. App. 221, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012).

To-convict Instructions and Self-defense

The to-convict instructions given to the jury for counts one through four did not include language about self-defense. Self-defense was covered in separate instructions.

Feld contends that self-defense should have been included in the to-convict instructions, as he proposed below. He contends the failure to do so is reversible error because the absence of self-defense is an essential element that the State had the burden of proving under State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Feld's argument is foreclosed by State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), in which the court rejected the same argument. Feld argues that Hoffman has been "abrogated" by Smith and other cases. The Supreme Court, though, has never said so. Following Hoffman, we conclude the mode of instruction was satisfactory.

Reasonable Doubt Instruction

Feld contends the trial court erred by including the optional "abiding belief" sentence of WPIC 4.01 in its reasonable doubt instruction, over Feld's objection. We reject this argument, following State v. Fedorov, ___ Wn. App. ___, 324 P.3d 784, 790 (2014).

Double Jeopardy

Feld contends his right to be free from double jeopardy was violated by the judgment convicting him for first degree assault and attempted murder of Callero based on the same course of conduct. The State agrees and concedes

that both assault convictions (counts two and four, involving Callero and Hanby respectively) should be vacated to avoid double jeopardy. We accept the concession. In re Personal Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). The judgment is remanded with orders to vacate the two assault convictions. Because Feld's sentence will remain unchanged, resentencing is unnecessary.

With the exception of the remand that is necessary to correct the judgment by vacating the two assault convictions, the judgment is affirmed.

Becker, J.

WE CONCUR:

Spearman, C.J.

Jan, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69044-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Melissa Sullivan, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

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Date: September 30, 2014