No. 30815-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NATHEN BENNETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Robert Lawrence-Berrey

BRIEF OF APPELLANT

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1. The trial court erred by finding Nathen Bennett's preemptory challenge to Juror 4 was racially-discriminatory and seating the juror.

2. The trial court erred by finding Mr. Bennett's preemptory challenge to Juror 21 was racially-discriminatory and seating the juror.

3. The trial court erred by refusing to give Mr. Bennett's proposed jury instruction on justifiable homicide. CP 26, 54.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State alleges that a defendant exercises his preemptory challenges in a manner that discriminates against a racial group, the court may deny the challenges and seat the juror only if the State proves a discriminatory purpose. Mr. Bennett explained he challenged Juror 21 because he was a grade school teacher who was vocal about detecting when someone was telling the truth and because the juror enjoyed sharing the Gospel with the homeless in his free time. Defense counsel challenged Juror 4, a full-time homemaker, because she was not vocal during voir dire and appeared intimidated or disinterested. Must Mr. Bennett's conviction be reversed because he offered valid and racially-neutral reasons for excusing the two jurors and the State did not establish purposeful discrimination against Hispanics?

2. Washington citizens have the right to defend themselves when they are the victim of a violent felony. Mr. Bennett testified that he stabbed the victim because the older man was raping him, and he proposed the jury be instructed as to justifiable homicide. Where the trial court is required to instruct the jury on self-defense if there is any evidence to support the instruction, must Mr. Bennett's conviction be

reversed because the trial court refused to instruct the jury on justifiable homicide?

3. The State has the burden of proving self-defense because it negates the mental element of murder and assault. The mens rea for felony murder is the commission of the predicate felony, in this case second degree assault, and Mr. Bennett proposed the jury be given an instruction explaining the right to use force to defend oneself. Must Mr. Bennett's conviction be reversed because the trial court refused to instruct the jury on self-defense by utilizing the standard for negating the mental element of murder rather than that negating the mental element of second degree assault?

C. STATEMENT OF THE CASE

Nineteen-year-old Nathen Bennett was living with his grandmother in Granger, Washington in the fall of 2010. 4RP 685.[1] Mr. Bennett and a teenage friend were at the Pronto Store in Granger when 48-year-old Leonardo Cantu, Jr. asked them for a dollar to buy beer and then told them he could get them any drugs they needed. 2RP

[1] Mr. Bennett refers to the five-volume verbatim report of proceedings with the volume number provided by the court reporter:
1RP – March 5 & 6, 2012
2RP – March 7, 2012
3RP – March 8, 2012
4RP – March 12, 2012
5RP – March 13 & 14 and April 13, 2012.

337; 4RP 686-87. Mr. Bennett obtained a free dime bag of marijuana from Mr. Cantu. 4RP 687-88. A few days later, Mr. Bennett was sitting on the bench in front of the store when Mr. Cantu again appeared and gave Mr. Bennett marijuana. 4RP 688-69.

On November 4, Mr. Bennett met Mr. Cantu, and the two went to Mr. Cantu's home to get marijuana. 4RP 690-91. Mr. Cantu lived with his parents and an adult brother, and he directed Mr. Bennett to enter the residence through his bedroom window. 3RP426, 427-28, 445-46, 458; 4RP 692. Once inside, Mr. Cantu forced Mr. Bennett to have sexual intercourse with him, not stopping although Mr. Bennett continued to tell him no. 4RP 692, 695. Afterwards, Mr. Cantu laughed and told Mr. Bennett to return the next day for the marijuana because he did not have any. 4RP 694, 699. Mr. Bennett left the Cantu residence through the bedroom window. 4RP 699.

Late in the afternoon of the next day, Mr. Cantu and Mr. Bennett met at the Cantu residence, went to another house to obtain marijuana, and returned to Mr. Cantu's house where they smoked the marijuana outside. 4RP 700-02. When Mr. Bennett announced he was leaving, Mr. Cantu directed him to go in a certain direction. 4RP 704.

Mr. Cantu then stopped Mr. Bennett and told him to go into his bedroom through the window or the back door. 4RP 705.

When Mr. Bennett refused, Mr. Cantu began to have sexual intercourse with Mr. Bennett outside the house, pulling down Mr. Bennett's pants and putting his mouth on Mr. Bennett's penis. 4RP 705-06, 720. Mr. Bennett tried to push Mr. Cantu's head away, and told him to stop, but Mr. Cantu continued. 4RP 706-07, 708. Mr. Bennett pulled out a pocket knife and stabbed Mr. Cantu until he fell down. 4RP 706-07. Mr. Bennett explained that he had no alternative because he told Mr. Cantu to stop, but Mr. Cantu continued to rape him. 4RP 708, 710, 720.

From inside the house, Mr. Cantu's brother, Lionel Cantu, heard Mr. Cantu call for help and looked outside to see his brother staggering back and forth.[2] 3RP 426, 429-30. When Lionel realized his brother's shirt was covered with blood, he called his mother and they met Mr. Cantu at the front door. 2RP 432-33. Lionel made his brother sit down, used towels to apply pressure to his neck wound, and called 911. 3RP 433-45. Police officers and paramedics came to the house to help Mr. Cantu, who was frantic, asking for help but refusing it. 2RP 354-

[2] Lionel Cantu is an adult. He is referred to by his first name only for purposes of clarity; no disrespect is intended.

55; 3RP 463-64, 480, 527, 529. Mr. Cantu did not respond when asked what happened. 4RP 434, 529. He was still combative in the ambulance as paramedics took him to the Toppenish Community Hospital, but he got progressively weaker and eventually stopped breathing. 2RP 356-57; 4RP 613. Hospital personnel were unable to revive him. 2RP 357.

Mr. Cantu's sister, Irene Torres, told the police that she had seen Mr. Cantu and Mr. Bennett together earlier that evening. 3RP 454-55, 481. Yakima County Sheriff's Detective Dave Johnson and a Granger police sergeant went to Mr. Bennett's grandmother's home and placed Mr. Bennett under arrest. 3RP 482; 4RP 615. Mr. Bennett told the officers, "He tried to rape me so I stabbed him." 3RP 485; 4RP 616, 710. Mr. Bennett gave the officers the clothing he had been wearing. 3RP 485; 4RP 616-17. During a video-taped interview at the police station in Yakima, Mr. Bennett told Detective Johnson that he stabbed a man because the man was raping him. 4RP 644, 5RP 784; Exs. 60, 61, 64.

The Yakima County Prosecutor's Office charged Mr. Bennett with second degree murder under two alternatives – intentional murder or felony murder based upon the predicate offense of second degree

assault – and also alleged he was armed with a deadly weapon. CP 4-5.[3] At the close of the State's case, however, the prosecutor was permitted to amend the information to charge only felony murder in order to eliminate the possibility that the court would instruct the jury on lesser-included offenses. 4RP 607-09, 659-62, 681-82; CP 48-49.

At a trial, forensic pathologist Gina Fino testified that Mr. Cantu died as the result of the loss of blood caused by stab wounds to his neck and chest. 2RP 316-17. She found 26 incision and stab wounds on Mr. Cantu's neck, chest, back, fingers, and arms, which she opined were cause by a knife with a blade of approximately three to five inches. 2RP 323-24, 328, 333. A forensic scientist with the Washington State Crime Laboratory testified that he found a small drop of blood on the sleeve of the sweatshirt Mr. Bennett gave to the police. 3RP 492, 502, 504. DNA testing revealed a mixed sample consistent with Mr. Cantu and Mr. Bennett, with Mr. Cantu as the major contributor. 3RP 505-07.

Mr. Bennett requested that the jury be instructed on self-defense. CP 25-29, 51-54, 55-57. The trial court refused to give any self-defense instructions, and Mr. Bennett was convicted of second

[3] Both the information and the amended information incorrectly reference RCW 9A.32.050(1)(a) and (c) instead of (a) and (b).

degree felony murder while armed with a deadly weapon. CP 78-79; 4RP 814; 5RP 811, 872-4. He received a sentence of 180 months in prison followed by 36 months of community custody. CP 84-85; 5RP 894. Mr. Bennett appeals. CP 91-99.

D. ARGUMENT

1. Mr. Bennett's conviction must be reversed because the trial court incorrectly limited his preemptory juror challenges.

The trial court found that two of Mr. Bennett's preemptory challenges to prospective jurors were racially discriminatory and sat the two jurors over Mr. Bennett's objection. The reasons given by Mr. Bennett's attorney for exercising preemptory challenges, however, did not reveal any bias or attempt to exclude Hispanic jurors from deciding the case. Because the court incorrectly determined the reasons for challenging the two jurors were not racially-neutral and the two jurors were on the jury that convicted Mr. Bennett, his conviction must be reversed and remanded for a new trial.

a. The equal protection clause forbids racial discrimination in jury selection. A person's race is "unrelated to his fitness as a juror." Batson v. Kentucky, 476 U.S. 79, 87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 66 S.

Ct. 984, 90 L. Ed. 1181 (1946)). The use of juror challenges in a racially-discriminatory manner violates the equal protection rights of the parties and the potential jurors. U.S. Const. amend. XIV; Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Batson, 476 U.S. 79, 87. Thus, a party may not exercise a preemptory challenge for the purpose of excluding a racial group from the jury.

When the State challenges a defendant's use of preemptory challenges as discriminatory, the court reviews the challenge using a three-part test:

> (1) The State must demonstrate a prima facie case of racial discrimination based upon the circumstances of the case;
>
> (2) The burden then shifts to the defendant to articulate a racially-neutral explanation for challenging the jurors in question;
>
> (3) The court must then determine if the State has proven purposeful discrimination.

McCollum, 505 U.S. at 59; Batson, 476 U.S. at 95-98; State v. Vreen, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001). As will be demonstrated below, Mr. Bennett provided legitimate and racially-neutral reasons for

his preemptory challenges, and the trial court's determination that he violated the Equal Protection Clause was incorrect.

b. The State claimed Mr. Bennett's preemptory challenges were exercised in a discriminatory manner. After the parties exercised their six preemptory challenges, the State raised a Batson challenge to four of Mr. Bennett's challenges. 1RP 219. The prosecutor explained that Mr. Bennett was Caucasian and Mr. Cantu was Hispanic.[4] 1RP 219. He asserted Mr. Bennett improperly exercised his preemptory challenges to excuse four jurors who appeared to be Hispanic, resulting in an "all-white jury." CP 21; 1RP 219-20. The jurors referred to as Hispanic were Juror Numbers 4, 10, 21, and 31 (Scott Ryel). 1RP 219; CP 106.

To establish a prima facie case of purposeful discrimination, the objecting party need only produce evidence of any circumstances that "raise an inference" that the challenge was used to exclude a venire member from the jury based upon race. Batson, 476 U.S. at 96; State v. Rhone, 168 Wn.2d 645,651, 229 P.3d 752, cert. denied, 131 S. Ct. 522

[4] Appellant understands that many Hispanics are Caucasian, but utilizes the terms used by the parties and court. No disrespect is intended to any cultural or racial group or person.

According to the U.S. Census statistics for 2011, 88.6% of the residents of Yakima County are "white." 45.8% were identified as of "Hispanic or Latino Origin," and 46.9% as "White persons, not Hispanic."
http://quickfacts.census.gov/qfd/states/53/53077.html (last viewed 11/26/12).

(2010). When the State raised its Batson challenge, defense counsel disagreed that the State had made a prima facie case, but nonetheless explained the reasons for his challenges to four Hispanic jurors. 1RP 220-22. Once the court determines there is a prima facie case of purposeful discrimination in jury selection, the responding party must come forward with a neutral explanation for its use of the preemptory challenge. Batson, 476 U.S. at 97. The explanation need not be particularly persuasive or even plausible. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); Vreen, 143 Wn.2d at 927; see State v. Sanchez, 72 Wn. App. 821, 867 P.2d 638 (1994) (prosecutor's challenge to Hispanic juror because English was his second language and he did not like attorneys was nondiscriminatory). "Unless a discriminatory intent is inherent in the [proponent's] explanation, the reason offered will be deemed race neutral." Purkett, 514 U.S. at 768; see State v. Beliz, 104 Wn. App. 206, 213-14, 15 P.3d 683 (2001) (prosecutor's explanation that she exercised her preemptory challenges against Hispanic jurors because she wanted a predominately older, male jury revealed impermissible gender bias).

The court found that two of Mr. Bennett's challenges were based upon non-discriminatory reasons. 2RP 225. Juror Number 10 was a federal probation officer, which the court believed was a typical defense challenge. 1RP 74, 119; 2RP 225. Juror Number 31 worked at a warehouse and expressed concern about missing work; he was later excused for cause for this reason. 1RP 82; 2RP 225, 235-26. The trial court found Juror 31's desire not to be on the jury was a nondiscriminatory reason for the challenge. 2RP 225.

However, the court found that Mr. Bennett's challenges to Jurors 4 and 21 were discriminatory. 2RP 225. The court therefore ordered the parties to start the preemptory challenges anew and forbid the defense from challenging the two jurors. 2RP 225, 233. Defense counsel moved for a mistrial, asserting that his reasons were race-neutral. 2RP 227-28, 231-32. The two jurors sat on the jury that convicted Mr. Bennett. CP 78-79, 120.

c. Mr. Bennett's reasons for excluding the two jurors were reasonable and racially neutral. The trial court found Mr. Bennett's challenges to Jurors 4 and 21 demonstrated purposeful discrimination. 2RP 225. The court, however, did not dispute the factual basis of defense counsel's explanations. 2RP 225. The trial court was

incorrect, however, because defense counsel offered valid and racially neutral explanations for challenging each of the jurors.

i. *Defense counsel offered a legitimate race-neutral reason for excusing Juror Number 21*. Mr. Bennett provided a race-neutral reason for his decision to excuse Juror Number 21, Hector Mendez. Mr. Mendez was a fifth grade teacher and father of three children. 1RP 123. Both Mr. Mendez and his wife were active in their children's education. 1RP 123. Mr. Mendez described his other leisure activity as "sharing the Gospel over at the Union Gospel Mission reaching out to the homeless." 1RP 123. He also had close friends in law enforcement. 1RP 68.

Mr. Mendez participated actively in the jury selection process. 1RP 154-55, 187-88, 207-08. When the prosecutor asked questions about deciding the case based upon evidence and determining witness credibility, Mr. Mendez explained that he wanted to hear the "testimonials." 1RP 154. Based upon his experience as a grade school teacher, Mr. Mendez posited that when people are lying, their story changes. 1RP 154-56. He also agreed with other jurors that "[b]ody language says a lot." RP 156.

Mr. Bennett's attorney explained that he sought to excuse Juror 21 because of his religious orientation and work with the Union Gospel Mission, his employment as a teacher, and because of what he said in jury selection, including his discussion of "testimonials." 1RP 221.

The neutrality of a party's challenge to a juror is viewed in light of the facts of the individual case. State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996). In Rhodes, the prosecutor exercised a preemptory challenge to the only African-American on the jury panel because the juror revealed he and a friend had been briefly detained by police searching for two men who had recently committed a crime in the area. Rhodes, 82 Wn. App. at 197-99. The juror did not think the police action was unreasonable, but admitted black people may be stopped more frequently by the police than white people. Id. at 199. The Court of Appeals found the challenge was not based upon racial discrimination because of the facts of the case – the defendant argued he was mistakenly accused of the crime because he happened to be at the crime scene. Id. at 202-03

Mr. Mendez's discussion of how he determined witness credibility based in part upon whether the person's story changed was of great importance in this case. Mr. Bennett's statement to the police

was admitted at trial. Ex. 60. In it, Mr. Bennett refused to answer some questions, and his trial testimony revealed details not included in the statement. Ex. 64 at 6-7, 23-24; 4RP 716; 738-39, 5RP 755, 785-86. Moreover, Mr. Mendez appeared to be a person who was confident in his own view point and inclined to recruit others to his position, as seen by his work sharing the gospel with the homeless. Mr. Mendez thus could be a potent force for the prosecution in deliberation if he expressed his views about determining if someone was lying in jury selection and persuaded others of its validity. In fact, Mr. Mendez was the jury foreman, showing concerns about his potential to lead the jury to convict were proven correct. CP 78-79.

Defense counsel's explanation that he was motivated by the juror's religious activities was also not racially discriminatory. In Vreen, defense counsel had exercised a preemptory challenge to an African-American juror who was a pastor and retired from the military. Vreen, 143 Wn.2d at 926. Defense counsel explained he feared the witness "would have been of an authoritarian mindset, so could give more credence to the state's arguments and evidence." Id. On appeal, the State correctly conceded that defense counsel's explanation was race-neutral. Id. at 927. Other states have found prosecutor's

preemptory challenges to prospective jurors because they were ministers or involved in religious activity to be race-neutral. Arthur v. Sexton Dental Clinic, 368 S.C. 326, 628 S.E.2d 894, 900 (2006) (minister); Young v. State, 283 S.W.3d 854, 868-69 (Tx.Crim.App.) (prospective juror involved in outreach ministries in prisons), cert. denied, 130 S. Ct. 1015 (2009); Darden v. State, 293 Ga.App. 127, 666 S.E.2d 559, 565 (2008) (one juror was priest, another was associate pastor).

Mr. Bennett's counsel offered race-neutral reasons for excusing Juror 21 that were tied to the facts of the individual case, not the juror's ethnic background as required by Batson. Batson, 476 U.S. 97-98. The trial court erred as a matter of law by finding the challenge was discriminatory.

ii. *Defense counsel offered legitimate race-neutral reasons for excusing Juror Number 4*. Juror Number 4, Sonya Cerda, was a stay-at home mom with three children, ages 9, 2, and 1, married to a supervisor at a steel company. 1RP 118. During the Donahue-type jury selection, she did not volunteer to answer any questions. The prosecutor called on her during the discussion of how the jurors would judge witness credibility and how to determine if someone was telling

the truth. 1RP 146-63. Ms. Cerda simply said she agreed with what other jurors had said. 1RP 157. ("Oh, I agree with them too -- you know, you have to have evidence and whatever they were saying -- I just agree.") (prosecutor's interjections omitted).

Defense counsel explained that he excused Ms. Cerda because she was not vocal and appeared intimidated or disinterested; he therefore believed she would not be a good juror in this case. 1RP 221; 2RP 230-40. This racially neutral explanation for the preemptory challenge to Ms. Cerda did not provide the needed evidence for the court's conclusion that the challenge was discriminatory.

Jury selection is hardly an exact science. Some lawyers look carefully at the potential jurors' body language and appearance in selection. Thomas A. Mauet, Fundamentals of Trial Techniques, pages 34-35 (Boston 1980). Others look to whether individual jurors appear to have strong or weak personalities, with defense counsel often preferring jurors who appear strong and independent. Id. at 35. Mr. Bennett's counsel noted Juror 4 was "looking down all of the time" and appeared intimidated, and the trial court did not contradict his view. 2RP 225, 239-40. Challenging a juror because she appeared passive, intimidated, or just disinterested is not racially discriminatory.

A juror's appearance or body language may constitute a valid basis for exercising a preemptory challenge. Rice v. Collins, 546 U.S. 333, 336-37, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (denying habeas because prosecutor's challenge could be based upon juror's demeanor if not her youth); Purkett, 514 U.S. at 769 (prosecutor's explanation that he struck juror because he had long hair, a beard and a mustache was race neutral); State v. Luvene, 127 Wn.2d 690, 700, 903 P.2d 960 (1995) (prosecutor asserted juror's body language showed he was trying to avoid questions about the death penalty); State v. Ashcraft, 71 Wn. App. 444, 460, 859 P.2d 60 (1993) (prospective juror "nervous and evasive"); State v. Morales, 53 Wn. App. 681, 769 P.2d 878 (prosecutor struck a Hispanic juror because she appeared extremely uncomfortable, did not make eye contact, and he feared she would be a weak and indecisive juror) rev. denied, 112 Wn.2d 1028 (1989). The South Carolina Supreme Court noted that cases from that state as well as other jurisdictions have consistently found demeanor and appearance to be race-neutral reasons to exercise preemptory challenges. State v. Rayfield, 357 S.C. 497, 593 S.E.2d 486, 489 (2004) (juror was retired and had "conservative appearance").

The prosecutor also challenged jurors who, like Juror 4, had not been vocal during jury selection. CP 106 (Jurors 3, 20, and 30). Mr. Bennett's counsel gave valid and racially neutral reasons for exercising a preemptory challenge to excuse Juror 4. The trial court erred as a matter of law by finding the challenge demonstrated purposeful discrimination.

d. The State did not prove purposeful discrimination. The State had the burden of proving racial discrimination at every stage of the Batson analysis. Purkett, 514 U.S. at 768. Once the defendant articulates the reasons for his preemptory challenges, the trial court must determine if the State established "purposeful discrimination." Batson, 475 U.S. at 98; Rhone, 168 Wn.2d at 651.

This crime occurred in Granger, a primarily Hispanic community.[5] Race was not an issue at trial and or discussed in jury selection. More important to jury selection was the juror's attitudes towards homosexuality.[6]

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[5] According to the 2000 Census, 85.5% of the population of Granger was Hispanic or Latino. http://en.wikipedia.org/Wiki/Granger_Washington (last viewed 11/1/2012).

[6] One juror was excused for cause because he said he could not be fair after learning the defendant and the victim had a "homosexual relationship." 1RP 113-14.

There were 80 people in the jury panel. CP 126-28. Thirty-three were excused for cause or hardship, and one did not return for the second day of trial. CP 126-28; 1RP 54, 56-57, 59, 61, 66, 69, 70, 71, 73, 76-77, 79, 81, 83-84, 86, 88, 92, 94, 96, 108-09, 113-14, 142; 2RP 226. Of the remaining 34 jurors, at least one-fourth appear to have Hispanic names. CP 126-28.

Without little explanation, the trial court found that defense counsel's reasons for excluding Jurors 4 and 21 were not racially-neutral and concluded the discrimination was purposeful because defense counsel "excluded all four Hispanics" near the front of the jury pool. 2RP 225. A woman with a Hispanic surname, however, was seated as an alternate juror. CP 120. The court assumed racial bias because Mr. Bennett was Caucasian and Mr. Cantu was Hispanic, but did not identify any actual bias or use of stereotypes in defense counsel's explanation of his reasons for the challenges or questioning of potential jurors. 2RP 225.

Nor did the State provide any further basis for finding discrimination. CP 20-21. The State did not assert that defense counsel's questioning during voir dire, for example, was aimed at excluding Hispanic jurors. Nor did the State point to a history or

practice of racially-motivated discrimination in jury selection by defense counsel or by other members of the public defender office where he was employed.

Defense counsel's reasons for excusing the jurors did not show racial prejudice or rely upon racial stereotypes. In fact, the two non-Hispanic jurors defense counsel challenged were quite active in the voir dire discussions like Juror 21. CP 106; 1RP 61, 73-74, 118-19, 167, 175-76, 210-11, 215) (Juror 9); 1RP 126-27, 191, 196-97, 202-07) (Juror 38). After the court ordered the challenged jurors to be seated, defense counsel exercised his preemptory challenges against people like Juror 4 who did not volunteer any ideas during the discussion. CP 107; 1RP 120-21, 125, 125-26

As argued above, Mr. Bennett's attorney offered legitimate and racially-neutral explanations for all four of the preemptory challenges. The State failed to meet its burden of showing purposeful discrimination.

e. Mr. Bennett's conviction must be reversed. The trial court incorrectly denied Mr. Bennett's challenges to Jurors 4 and 21, both of whom sat on the jury that convicted Mr. Bennett and one of whom was the jury foreperson. In Washington, the erroneous denial of a

defendant's preemptory challenge is never harmless "when the objectionable juror actually deliberates."[7] Vreen, 143 Wn.2d at 932. Mr. Bennett's conviction must be reversed and remanded for a new trial. Id. at 926, 932.

2. **Mr. Bennett's conviction must be reversed because the trial court refused to instruct the jury on self-defense.**

Mr. Bennett testified that he assaulted Mr. Cantu to stop Mr. Cantu from raping him, and he defended on the ground that he acted in self-defense. The trial court, however, refused to instruct the jury on self-defense after concluding that Mr. Bennett did not establish he was in reasonable fear of great bodily injury or death. The trial court utilized the wrong standard, because (1) Washington law permits the use of self-defense to repel serious felonies and (2) the relevant mens rea to be countered by self-defense was the mens rea for second degree assault not second degree murder because Mr. Bennett was charged with felony murder based upon assault. Mr. Bennett's conviction must be reversed because the court incorrectly refused to instruct the jury on self-defense.

[7] While the United States Supreme Court has rejected automatic reversal, States are free to find the error is reversible per se. Rivera v. Illinois, 556 U.S. 148, 162, 129 S. Ct. 1446, 174 L. Ed. 2d 320 (2009); Hardison v. State, 94 So.2d 1092, 1101 (Miss. 2012) (joining Washington and other states in requiring automatic reversal); People v. Hecker, 15 N.Y.3d 615, 942 N.E.2d 248 (2010).

a. Self-defense negates the mental elements of assault and murder and the State must therefore prove the absence of self-defense beyond a reasonable doubt. Due process requires the State to prove every element of a charged crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Mr. Bennett was charged with second degree felony murder based upon the predicate crime of second degree assault, RCW 9A.32.050(1)(b). CP 48; 4RP 660-62, 681-82. The elements the State was required to prove were that (1) Mr. Bennett committed second degree assault by assaulting Mr. Cantu with a deadly weapon, (2) he caused Mr. Cantu's death in the course of committing second degree assault, and (3) Mr. Cantu was not a participant in the assault. RCW 9A.32.050(1)(b); CP 68, 73; State v. Wanrow, 91 Wn.2d 301, 306-07, 588 P.2d 1320 (1978); State v. McCreven, ___ Wn. App. ___, 284 P.3d 793, 810 (2012).

The Washington criminal statutes do not include a definition of "assault," and the court therefore look to the common law. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). The common law definition of assault includes three alternative, including actual battery,

which is "an unlawful touching with criminal intent." Wilson, 125 Wn.2d at 218; State v. Madarash, 116 Wn. App. 500, 513, 66 P.3d 682 (2003). An assault is an intentional act. State v. Russell, 69 Wn. App. 237, 247, 848 P.2d 743, rev. denied, 122 Wn.2d 1003 (1993); State v. Mathews, 60 Wn. App. 761, 766-67, 807 P.2d 890 (1991), rev. denied, 118 Wn.2d 1030 (1992).

When a defendant acts in self-defense, this negates the necessary mental element of the crimes of murder and assault. State v. Acosta, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984) (second degree assault); State v. McCullum, 98 Wn.2d 484, 491-97, 656 P.2d 1064 (1983) (first degree murder). The State must therefore prove the absence of self-defense beyond a reasonable doubt. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); Acosta, 101 Wn.2d at 615-16; McCullum, 98 Wn.2d at 493-94. "If we were to hold that the defendant bore the burden of proving self-defense, we would be relieving the State of its obligation to prove that the defendant's use of force was unlawful." Acosta, 101 Wn.2d at 618.

b. The jury must be instructed on self-defense if there is some evidence from any source to support the instruction. The trial court is required to instruct the jury on self-defense if there is some evidence

from any source to support the instruction. State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997); State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); McCullum, 98 Wn.2d at 488.

> To ensure due process to a criminal defendant, a trial court must provide considerable latitude in presenting his theory of his case; more specifically, a trial court should deny a requested jury instruction that presents a defendant's theory of self-defense only where the defense theory is completely unsupported by the evidence. . .

State v. George, 161 Wn. App. 86, 100, 249 P.3d 202, rev. denied, 172 Wn.2d 1007 (2011).

Self-defense is assessed from the standpoint of a reasonable person in the defendant's shoes. Janes, 121 Wn.2d at 238. In deciding when to instruct the jury on self-defense, the trial court must therefore review the evidence from the defendant's point of view at the time of the event and in the light that most favors the defendant. McCullum, 98 Wn.2d at 488-89. The court may refuse to give a self-defense instruction only when there is no credible supporting evidence. Id. at 488.

When the trial court's decision not to give the defendant's proposed instructions is based upon a misunderstanding of the law, review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d

883 (1998). A determination that a reasonable person in the defendant's position would not believe he was in danger of imminent harm is an issue of law reviewed de novo. George, 161 Wn. App. at 95.

The trial court refused to give self-defense instructions in Mr. Bennett's case because the court found no evidence that Mr. Bennett was in reasonable fear of great bodily harm or death when he assaulted Mr. Cantu, adding that there were reasonable alternatives open to Mr. Bennett other than assaulting Mr. Cantu with a weapon. 4RP 808-11. Clearly the trial court was incorrect because Mr. Bennett testified he acted to defend himself against a rape. The trial court should have given either (1) Mr. Bennett's proposed jury instructions on justifiable homicide or (2) his proposed self-defense instruction appropriate for the mental element of second degree assault.

i. *The trial court incorrectly refused to give Mr. Bennett's proposed justifiable homicide instruction, WPIC 16.02.*

Washington law clearly provides that a person may act in self defense to defend himself or others against "a felony" or "great personal injury." RCW 9A.16.050

Homicide is justifiable when committed either:

> (1) In the lawful defense of the slayer . . . when there is a reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished.
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

RCW 9A.16.050. Subsection (a) addresses justifiable homicide where the person killed is about to commit a felony, and subsection (b) addresses the situation when the defendant acted in resistance to a felony that is being committed. State v. Brightman, 155 Wn.2d 506, 520-21, 122 P.3d 150 (2005).

Among other instructions, Mr. Bennett asked the court to instruct the jury that a person may act in self-defense to prevent a felony pursuant to RCW 9A.16.020(2).[8] CP 26, 54. Mr. Bennett proposed instructions two instructions based upon WPIC 16.03. CP 26-26. One of those instructions reads:

> It is a defense to a charge of murder and [sic] manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer. Rape is a felony.

[8] Mr. Bennett's requested instructions relevant to self-defense are attached to this brief as an appendix.

> The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstance as they appeared to him at the time and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 26. The other instruction is similarly worded. CP 54.

Mr. Bennett was entitled to this instruction because he produced credible evidence that he used force to prevent Mr. Cantu from continuing to commit a violent felony – rape. Brightman, 155 Wn.2d at 520; McCullum, 98 Wn.2d at 488. The trial court, however, declined to give the instruction on the grounds that Mr. Bennett's use of force was not reasonable. 5RP 809-11.

The trial court believed it was following the reasoning of Brightman, but that case does not support the court's decision The Brightman Court concluded the defendant's use of force was not reasonable where the defendant testified that he was not afraid of the victim. Brightman, 155 Wn.2d at 510. Brightman got into a fist-fight with the victim because he was trying to take $20 Brightman had paid

him for marijuana without providing the marijuana. Id. Brightman testified that his gun went off accidentally when he tried to strike the victim with it, thus raising the defense of excusable rather than justifiable homicide. Id. at 526. In holding a self-defense instruction was not appropriate "under the circumstances," the Brightman Court did not hold that it is never reasonable to use force to prevent a rape. Id. at 522.

The Brightman Court did refer to Washington cases finding resistance to a non-violent felony is not justifiable homicide. See State v. Nyland, 47 Wn.2d 240, 242, 287 P.2d 345 (1955) (adultery); State v. Griffith, 91 Wn.2d 572, 576, 589 P.2d 799 (1979) (trespass). In Nyland, the Supreme Court stated that 'killing in self-defense is not justified unless the attack on the defendant's person threatens life or great bodily harm," but the court also included rape as one of the violent felonies that justify homicide. Nyland, 47 Wn.2d at 242-44 (quoting State v. Moore, 31 Conn. 479 (1863) and United States v. Gilliam, 1 Hay. & Haz. 109, F. Cas. No. 15205A (1881)). Each case, however, must be reviewed based upon its individual circumstances. Brightman, 155 Wn.2d at 523 ("an individualized determination of

necessity is required). Brightman does not stand for the proposition that a defendant may never use deadly force to repel a rape.

Here, the trial court focused not on the harm caused by rape, but only upon whether Mr. Bennett reasonably feared great bodily injury or death. The damage caused by a rape, however, may be psychological and therefore constitute the "great personal injury" required by RCW 9A.16.050. Washington public policy shows that rape is considered a great personal injury, with laws that severely punish sex offenders while supporting and protecting their victims. See e.g. Community Protection Act of 1990, Laws of 1990 ch. 3 (provisions include the first sex offender registration requirements in the nation; civil commitment for sexually violent predators, increased statutory maximum terms for sex offense, increased punishment for crimes committed with sexual motivation, reduced good time for sex offenders); Two Strikes Law 1996, Laws of 1996 ch. 289. Washington also has special legislation protecting the victims of sexual assault. 70.125 RCW (Victims of Sexual Assault Act); 7.90 RCW (sexual assault protection orders). Public policy in Washington supports Mr. Bennett's position that he was entitled to use self-defense to protect himself from a rape even when the rapist is not about to kill or seriously injury him.

Washington cases finding instructions defining "great bodily injury" were improper also show the flaws in the trial court's reasoning that the jury should not be instructed on self-defense because Mr. Bennett did not fear great bodily injury or death. See Walden, 131 Wn.2d at 475-78; State v. Corn, 95 Wn. App. 41, 44, 975 P.2d 520 (1999); State v. Painter, 27 Wn. App. 708, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981). In each of these cases the trial court gave self-defense instructions but also provided the jury with a definition of "great bodily harm" that excluded an ordinary battery. Walden, 131 Wn.2d at 475 (instruction specifically excluded "ordinary battery"); Corn, 95 Wn. App. at 49 (defined as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ"); Painter, 27 Wn. App. at 711 (injury must be more serious than striking with hands). These instructions were found to be improper because they undermined the self-defense instruction and injected "an impermissible objective standard" into the instructions. Walden, 131 Wn.2d at 477; Corn, 95 Wn. App. at 54, Painter, 27 Wn. App. at 712.[9]

[9] The Painter Court also held the instruction was a comment on the evidence in

Here, the trial court refused to give self-defense instructions because the court determined Mr. Bennett could not have reasonably believed he was facing death or significant bodily injury. 5RP 811. Mr. Bennett, however, was entitled to act in self-defense if a reasonable person in his position feared "great personal injury" or was resisting a violent felony. RCW 9A.16.050. The above cases show the trial court used the incorrect legal standard. Mr. Bennett was being raped and was therefore entitled to act in self-defense. This Court must reverse Mr. Bennett's conviction.

ii. *The trial court incorrectly refused to give WPIC 16.03, the instruction applicable when a person uses deadly force to resist a felony*. Felony murder does not have its own mens rea. Instead, the mens rea is that necessary to commit the predicate felony. State v. Kosewicz, 174 Wn.2d 683, 692, 278 P.3d 184 (2011), cert. denied sub. nom. Brown v. Washington, __S. Ct. ___, 2012 WL 3638765 (10/15/12); State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984); Wanrow, 91Wn.2d at 311. The felony murder scheme "substitutes the incidents surrounding certain felonies" for the mental states required for murder or manslaughter. State v. Craig, 82 Wn.2d

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light of the facts of that case. Painter, 27 Wn. App. 713-14.

777, 781, 514 P.2d 151 (1973), abrogated on other grounds, State v. Ellis, 136 Wn.2d 498 (1998)); State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121, rev. denied, 119 Wn.2d 1015 (1992) ("[T]he underlying crime functions as a substitute for the mental state the State would otherwise be required to prove.").

Thus, the mental state defense to be negated in a felony murder prosecution is the mental state necessary to commit the predicate felony – here an intentional assault. Logically, self-defense must be viewed in light of the mental state required for the predicate crime.

RCW 9A.16.020(2) permits a party who is about to be the victim of a crime to use force to protect himself:

> The use, attempt, or offer to use force upon to toward the person of another is not unlawful in the following cases . . .
>
> (2) Whenever necessary by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or malicious interference with real or personal property unlawfully in his or her possession, in case the force is not more than necessary.

RCW 9A.16.020 (emphasis added). Mr. Bennett was trying to prevent a rape, which was a serious offense against his person. RCW 9A.44.060.

Mr. Bennett therefore requested that the jury be instructed on RCW 9A.16.020(2).[10] His proposed instruction, based upon WPIC 17.02, read:

> It is a defense to an allegation of Assault in the Second Degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of an prior to the incident.
>
> The State has the burden or proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 57.

Self-defense negates the relevant mental state of the charged offense. Mr. Bennett's proposed instruction correctly recited the

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[10] Defense counsel submitted an instruction based upon RCW 9A.16.020 and WPIC 17.02. CP 57. When defense counsel asked for time to research the appropriate standard for self-defense in a felony murder prosecution, the court denied the request. 4RP 811-14; CP 57.

standard for self-defense in a prosecution for assault. In rejecting this instruction, the court thus required Mr. Bennett to meet a standard of self-defense which was far greater than the mental state the prosecutor was required to prove for felony murder. Because the prosecutor's decision not to charge intentional murder relieved him of the burden of proving intent to kill, the court erred by requiring Mr. Bennett to meet the burden of reasonable fear required in an intentional homicide case. See State v. Arth, 121 Wn. App. 205, 212, 87 P.3d 1206 (2004) (rejecting argument that defendant may not claim self-defense when the State charges him with a property crime rather than assault a crime against a person).

Division Two has mistakenly come to a contrary conclusion in reviewing self-defense claims in felony murder prosecutions. McCreven, supra; State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856, rev. denied, 158 Wn.2d 1016 (2006). In Ferguson, the court sweepingly held that WPIC 17.02 can never be given in a felony murder prosecution based upon assault, declaring "it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." Ferguson, 131 Wn. App. at 862. This Court should reject the

faulty reasoning of Ferguson, which did not rely upon any cases addressing felony murder. Ferguson, 131 Wn. App. at 859; see Walker, supra (defendant charged with first degree murder, jury instructed on second degree murder and manslaughter); Walden, supra (second degree assault); State v. Churchill, 52 Wash. 210, 100 P. 309 (1909) (defendant charged with first degree murder, convicted of manslaughter).

The McCreven Court's logic is similarly unpersuasive. In McCreven, Division Two limited the broad Ferguson rule to cases where the predicate crime for felony murder is assault with a deadly weapon. McCreven, 284 P.3d at 804-06. The court held that a person charged with felony murder based upon a different means of second degree assault was entitled to the WPIC 17.02 instruction because "a person is entitled to use force to defend himself and prevent an injury less than great or serious bodily injury or death." McCreven, 284 P.3d at 804. The court nonetheless refused to reconsider Ferguson's statement that WPIC 17.02 should be given in a felony murder case where the predicate felony is assault with a deadly weapon. Id. at 804-05.

This holding is contrary to the structure of the felony murder statute and the mental element self-defense negates. Division Two's ruling also ignores the requirement that self-defense be viewed in light the facts of the individual case and from the point of view of the defendant. Walden, 131 Wn.2d at 473; Janes, 121 Wn.2d 238. The statute the State elects to charge should not change this determination. See Arth, supra.

This Court should reject Division Two reasoning and find that in a prosecution for felony murder, self-defense must be viewed in light of the mental element of the predicated crime and not the death that resulted from the commission of that crime. The trial court erred by refusing to give Mr. Bennett's proposed self-defense instruction.

d. Mr. Bennett's conviction must be reversed. Mr. Bennett had the constitutional right to present a complete defense.[11] U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Thus, Mr. Bennett had the constitutional right to present his defense and have

[11] The right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. Holmes, 547 U.S. at 324; Davis v. Alaska, 415 U.S. 308, 314-15, 94 S. Ct. 1105, 39 L. Ed. 2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

the jury instructed on it. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The court must instruct the jury on self-defense if there is some evidence to support it. Walden, 131 Wn.2d at 475. The trial court erred by refusing to instruct the jury on self-defense. Mr. Bennett's conviction must therefore be reversed and remanded for a new trial. George, 161 Wn. App. at 100-01.

E. CONCLUSION

Mr. Bennett did not discriminate against Hispanics in exercising his preemptory jury challenges, and the trial court erred by seating two of the challenged jurors, one of whom became the jury foreman. The court also erred by failing to instruct the jury on self-defense even though Mr. Bennett assaulted Mr. Cantu to prevent the older man from raping him.

Mr. Bennett's second degree felony murder conviction must be reversed and remanded for a new trial.

DATED this 29th day of November 2012.

Respectfully submitted,

Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

DEFENDANT'S PROPOSED INSTRUCTIONS CONCERNING SELF-DEFENSE

CP 25, 26, 27, 28, 29, 52, 53, 54, 56, 57

INSTRUCTION NO. ____

It is a defense to a charge of murder and manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) The slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;

(2) The slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.02 Justifiable Homicide--Defense of Self and Others

INSTRUCTION NO. ____

It is a defense to a charge of murder and manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer. Rape is a felony.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.03 Justifiable Homicide—Resistance To Felony

WPIC 2.09 Felony—Designation of

INSTRUCTION NO. ____

"Great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

WPIC 2.04.01 Great Personal Injury--Justifiable Homicide--Justifiable Deadly Force in Self-Defense--Definition

INSTRUCTION NO. ____

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

WPIC 16.07 Justifiable Homicide--Actual Danger Not Necessary

INSTRUCTION NO. ____

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 16.08 No Duty To Retreat

INSTRUCTION NO. _____

A person commits the crime of rape when he engages in sexual intercourse with another person not married to him when the other person did not consent to the sexual intercourse, and such lack of consent was clearly expressed by the other person's words or conduct.

WPIC 42.01

INSTRUCTION NO. _____

Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight. Sexual intercourse also means any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1)

INSTRUCTION NO. ____

It is a defense to a charge of murder and manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) The slayer reasonably believed that the person slain intended to commit a felony against him;

(2) The slayer reasonably believed that there was imminent danger of the felony being accomplished; and

(3) The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.02 Justifiable Homicide--Defense of Self and Others

INSTRUCTION NO. _____

It is a defense to a charge of murder that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 15.01 Excusable Homicide—Definition

INSTRUCTION NO. _____

It is a defense to an allegation of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02 Lawful Force—Defense of Self, Others, Property

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30815-4-III
	)	
NATHEN BENNETT,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	KEVIN EILMES, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	NATHEN BENNETT 357326 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2012.

X_____