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No. 69044-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FELD,

Appellant.

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

BRIEF OF APPELLANT

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1. The trial court violated Mr. Feld's Fourteenth Amendment right to the presumption of innocence and article I, section 22 right to appear and defend in person by ordering him to wear shackles during trial.

2. The trial court violated Mr. Feld's right to counsel under the Sixth and Fourteenth Amendments and RCW 10.77.020 by holding a competency hearing in the absence of his attorney.

3. The convictions on counts one and two violate Mr. Feld's Fifth Amendment right to be free from double jeopardy.

4. 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, offered to show Mr. Feld's reasonable fear and support his claim of self-defense.

5. The trial court erred and violated Mr. Feld's rights under article I, section 7 by denying his motion to suppress recordings of private telephone conversations he had with his wife.

6. The trial court erred and violated Mr. Feld's right to due process by denying his request to include the absence of self-defense in the "to convict" instructions for counts one through four.

7. The trial court erred in overruling Mr. Feld's objection to Instruction 3, because the instruction misstated the definition of proof beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because shackling a defendant infringes the Fourteenth Amendment right to the presumption of innocence and article I, section 22 right to appear and defend in person, courts may not order defendants restrained except in extraordinary circumstances where there is a compelling need to do so. Here, the court ordered Mr. Feld to wear leg irons which were visible to the jury on the basis that a jail guard said he was concerned for the safety of defense attorneys in light of Mr. Feld's prior verbal outbursts. The defense attorneys vigorously opposed shackling, noting Mr. Feld had never assaulted or threatened them in the two years they had worked with him, and Mr. Feld had never escaped or attempted to do so. Did the trial court violate Mr. Feld's constitutional right to appear free from restraints, requiring reversal and remand for a new trial?

2. A defendant has a constitutional right to counsel at every critical stage of proceedings, including competency hearings. The complete denial of counsel at a critical stage is structural error requiring reversal. Two and a half months after one judge found Mr. Feld

incompetent to stand trial, another judge held a hearing on the State's motion to find Mr. Feld competent. Mr. Feld's attorney slid off the road in a snowstorm en route to the hearing, and called his office to have someone ask the court to reschedule the hearing. The court declined to continue the hearing, and found Mr. Feld competent in his attorney's absence. Did the trial court deprive Mr. Feld of his constitutional right to counsel, requiring reversal and remand for a new trial?

3. The Fifth Amendment guarantees the right not to be punished twice for the same offense, and both this Court and the Supreme Court have reversed convictions under the Double Jeopardy Clause where defendants have been convicted of both assault and attempted murder for the same acts. Mr. Feld was convicted of attempted murder on count one based on allegations that he chased his neighbor off of his property with a gun and pulled the trigger, and he was convicted of assault on count two based on allegations that he chased his neighbor off of his property with a gun. Do the two convictions violate Mr. Feld's Fifth Amendment right to be free from double jeopardy?

4. The Sixth Amendment guarantees a defendant the right to present a defense, which includes the right to introduce relevant evidence supporting the defense. Evidence of an alleged victim's prior acts of violence, which are known by the defendant, is relevant to a claim of self-

defense. In this case, in which the jury was instructed on self-defense, the court excluded evidence of the alleged victim's prior acts of violence which were known by Mr. Feld. Did the trial court violate Mr. Feld's Sixth Amendment right to present a defense?

5. Article I, section 7 of the Washington Constitution prohibits the invasion of private affairs absent authority of law. Without a warrant, the government recorded telephone conversations Mr. Feld had with his wife while Mr. Feld was in jail. Did the trial court err in denying the motion to suppress the recordings, because the recording of private conversations without authority of law violates the state constitution?

6. Where the evidence supports a claim that the defendant acted in self-defense, the absence of self-defense becomes an essential element of the charge that the State must prove beyond a reasonable doubt. In Washington, the "to convict" instruction must contain all of the elements of the crime. Here, the absence of self-defense was an element the State had to prove beyond a reasonable doubt as to counts one through four, but the trial court denied Mr. Feld's request to include that element in the "to convict" instructions. Did the trial court err in omitting the absence of self-defense from the "to convict" instructions?

7. The role of the jury is to decide whether the prosecution met its burden of proof, and it misleads the jury to encourage it to search for "the

truth." Over Mr. Feld's objection, the court instructed the jury that it could find the State met its burden of proof if it had "an abiding belief in the truth of the charge." Where both this Court and the Supreme Court have held it is not the jury's job to determine the truth, did the court misstate the burden of proof by focusing the jurors on whether they believed the charge was true?

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. They did not. 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 house 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.

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

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

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.

D. ARGUMENT

1. 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.

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.

"It 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).

Restraining 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).

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Finch, 137 Wn.2d at 844 (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). When the accused appears in court in restraints, "the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers." *Finch*, 137 Wn.2d at 845 (quoting *State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897)). Thus, the presumption of innocence is subverted by shackles. *Id.*

In addition to compromising the presumption of innocence, shackling a defendant undermines the "right to appear and defend in

person" guaranteed by article I, section 22 of the Washington Constitution. Const. art. I, § 22.

> The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.

State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (citing *Williams*, 18 Wash. at 51).

Thus, in *Hartzog*, the Court held the Walla Walla County Superior Court erred in shackling all defendants accused of having committed crimes while prisoners at the penitentiary. Instead, a court must make an individualized determination of whether restraints are required in a given case. *Hartzog*, 96 Wn.2d at 400-01. 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." *Id.* 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*, the 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. 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 only 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."[2] 4/11/12 RP 65. Four days into trial, when Mr. Feld decided to wear street clothes, the court ordered the shackles removed. 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.

In *Davis*, as here, the defendant wore leg restraints. *Davis*, 152 Wn.2d at 678. Davis's attorney did not object, and the Supreme Court held that this failure to object constituted ineffective assistance of counsel.

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[2] This reasoning is incorrect, and the Supreme Court rejected it in *Hartzog*. There, the superior court assumed shackling did not prejudice the jury against defendants because it was well-known that the defendants and witnesses were prison inmates, as the crimes alleged were committed in prison. The Supreme Court said, "we cannot agree." *Hartzog,* 96 Wn.2d at 399-400. Instead, shackling must be justified by an individualized determination of *dangerousness*, not an assumption that shackling is not prejudicial because the jury already knows the defendant is in jail or prison. *See id.*

Because the issue was not preserved and was raised for the first time in a personal restraint petition, the defendant bore the burden of proving prejudice. The Court held the failure to object to shackling was prejudicial with respect to the death sentence, even though only one juror saw the defendant in shackles for brief glimpses. *Id.* at 704-05.

In *Finch*, 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.*

The Supreme 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* and *Davis*, it is certainly absent here. Mr. Feld's charges were serious, but not as serious as in *Finch* and *Davis.* 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. 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.

d. The remedy is reversal of the convictions and remand for a new trial.

Because the shackling order violated Mr. Feld's rights under the Fourteenth Amendment and article I, section 22, the constitutional harmless error standard applies. *Finch*, 137 Wn.2d at 859. The State must prove beyond a reasonable doubt that the violation did not contribute to the verdict. *Id.*; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot meet that heavy burden here. In *Davis*, the death sentence was reversed even though only one juror caught a fleeting glimpse of the defendant's leg irons. Here, the leg irons were obvious, and one juror alerted all of the other jurors during voir dire that Mr. Feld had "handcuffs" on his legs. The State cannot show that the shackles had no impact on the jury. This is especially so in light of the fact that the jury was instructed on self-defense and on lesser-included offenses. If not for the unconstitutional restraints, which implied Mr. Feld was a dangerous person, the jury may well have found Mr. Feld acted in lawful self-defense or that he was guilty of only lesser offenses. This Court should accordingly reverse the convictions and remand for a new trial.

2. The trial court violated Mr. Feld's right to counsel under the Sixth and Fourteenth Amendments and RCW 10.77.020 by holding a competency hearing without Mr. Feld's attorney present.

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. In a 2007 proceeding in district court, Mr. Feld had been found incompetent to stand trial and charges against him were dismissed. CP 396; 2/27/12 RP 58. From the beginning of this case, Mr. Feld's attorney, Wes Richards, had concerns about Mr. Feld's competence to stand trial. The court first

ordered an evaluation on May 13, 2010, and on June 10, 2010 the court found Mr. Feld competent after reading a report from Western State Hospital. CP 350.

However, a few months later, Mr. Feld decompensated after failing to take his medications. Mr. Richards told the court he believed Mr. Feld was not competent to stand trial. 12/2/10 RP 22-23. After a hearing, the court found Mr. Feld *incompetent* – disagreeing with the conclusion of a report from Western State Hospital. Mr. Feld was sent back to Western State Hospital in December of 2010. 12/3/10 RP 26-43; CP 353.

On February 24, 2011, the State moved for the court to find Mr. Feld competent. The hearing was held before a different judge from the one who had found Mr. Feld incompetent. 2/24/11 RP 4. The State acted as if the latest report from Western State was determinative and there was no need for a contested hearing. The prosecutor said, "The court has, I believe, received a report which found Mr. Feld to be competent to proceed to trial. We're prepared to enter an order finding the defendant competent and set new dates." 2/24/11 RP 4.

Mr. Feld's attorney was not there. Another lawyer 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.

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. amend. VI; U.S. Const. amend. 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 plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

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 reversal is required.

c. The remedy is reversal and remand for a new trial.

The problem in this case is not that Mr. Feld's attorney was ineffective. *Cf. Strickland*, 466 U.S. at 687. 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).

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. Thus, Mr. Feld was subjected to a complete denial of counsel, requiring automatic reversal. *Cronic*, 466 U.S. at 658-60.

Not only was this hearing a critical stage as a matter of law, it was particularly critical because Mr. Feld had been found *incompetent* at the prior proceeding. Thus, at the February 24th proceeding, the *State* bore the burden of proving that Mr. Feld was no longer incompetent. *State v. Coley*, 171 Wn. App. 177, 188, 286 P.3d 712 (2012); *State v. P.E.T.*, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 1808065 (2013).

Mr. Feld's attorney would have held the State to its burden had the court not proceeded without him. "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.

3. The convictions for counts one and two violated Mr. Feld's Fifth Amendment right to be free from double jeopardy.

The Fifth Amendment to the United States Constitution provides, "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb…." U.S. Const. amend. V. The Double Jeopardy Clause protect defendants against "prosecution oppression." *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, courts apply the "same evidence" test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would

have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at 772 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)).

Prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2007). Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if "it was impossible to commit one without also committing the other." *Id.*

In light of the above rules, both this Court and the Supreme Court have reversed assault convictions for violations of the right to be free from double jeopardy where the defendant was also convicted of attempted murder for the same acts. *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 820,100 P.3d 291 (2005) (gunshot); *State v. Gohl*, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (multiple blows to the head). This Court should do the same here.

Mr. Feld was convicted of attempted murder on count one for the following conduct, as explained in the prosecutor's closing argument:

> He went to the truck that Tim Hanby and Steve Callero went back to, retreated, were ready to leave, when Feld comes out of the house with a gun, when they saw it and they went back there, Callero dives on the floor, Hanby is trying to get into the truck, and what does the defendant

> do? The defendant takes the handgun, puts it in the truck – one foot, three feet, I don't know – but he puts it by Steve Callero's head and pulls the trigger. That, ladies and gentlemen, the state believes, shows premeditated intent to go out to that truck, to these people who were leaving, to kill Steve Callero.

4/19/12 RP 40.

Mr. Feld was convicted of assault on count two for the same conduct, as explained in the prosecutor's closing argument:

> I believe the evidence will show that those actions of pointing that gun at Tim Hanby and Steve Callero amount to Assault in the First Degree. And at that point he was not defending anything. He was chasing people. He was hunting.

4/19/12 RP 43.

The trial court properly recognized that counts one and two constituted the same criminal conduct. Supp. CP ___ (sub 201). They involved the same intent, same victim, and same time and place. *Id.* "[T]here was a continuous, uninterrupted sequence of conduct over a very short period of time at the Feld property." *Id.* at 2. In light of these trial court findings, the prosecutor's closing argument, and caselaw from this Court and the Supreme Court, the convictions on counts one and two violate double jeopardy. The remedy is reversal and remand for vacation of the conviction on count two, and for resentencing. *State v. Weber*, 159 Wn. 2d 252, 281, 149 P.3d 646 (2006).

4. 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.

a. For counts one and two, evidence of self-defense was presented and the court instructed the jury on self-defense, but the court excluded evidence of the alleged victim's prior acts of violence offered to show Mr. Feld's reasonable fear.

Mr. Feld presented evidence that he acted in lawful self-defense in counts one through four. Tim Hanby, Stephen Callero, and Aaron Callero went to Mr. Feld's house, and Mr. Hanby was armed with a fish club as they approached the porch. They would not leave even after the Felds repeatedly told them to leave, and they continued to approach the Felds even after Mr. Feld threw a bucket of liquid at them. 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, Mrs. 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.

b. The exclusion of the evidence of the alleged victim's prior acts of violence violated Mr. Feld's Sixth Amendment right to present a defense.

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). In sum, the trial court violated Mr. Feld's Sixth Amendment right to present a defense by excluding evidence of the alleged victim's prior violent acts.

c. <u>The remedy is reversal of the convictions on counts one and two, and remand for a new trial</u>.

The constitutional harmless error standard applies to a violation of the right to present a defense. *Jones*, 168 Wn.2d at 724 (citing *Chapman*, 386 U.S. at 24). The State must prove beyond a reasonable doubt that the error did not contribute to the verdict. The State cannot meet this burden here. If Mr. Feld had been permitted to present evidence of Mr. Callero's prior violent acts, the jury may have found he reasonably feared his

unwelcome visitor and acted in lawful self-defense. The convictions on counts one and two should be reversed, and the case remanded for a new trial.

5. The trial court violated Mr. Feld's rights under article I, section 7 of the Washington Constitution by denying his motion to suppress recordings of private telephone conversations he had with his wife while he was in jail.

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 this Court's 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.

For the reasons set forth below, this Court should overrule *Archie* and *Haq* and hold that the recording of Mr. Feld's private conversations with his wife, and the use of those recordings against him at trial, violated his state constitutional rights.

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). It "clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." *Id.* In short, "Article I, section 7 is a jealous protector of privacy." *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (quoting *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984)). "[W]hether advanced technology leads to diminished subjective expectations of privacy does to resolve whether use of that technology without a warrant violates article I, section 7." *State v. Jackson*, 150 Wn.2d 251, 260, 76 P.3d 217 (2003). Unlike the Fourth Amendment, the question 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.

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." *Boland*, 115 Wn.2d at 578. In *Jackson*, the Court held police may not install a GPS device on a car without a warrant because "vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles." *Jackson*, 150 Wn.2d at 262. 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, location, 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. There can be no doubt that telephone conversations are private affairs.

In *Archie*, this Court held that because the defendant was in jail he "had no reasonable expectation of privacy." *Archie*, 148 Wn. App. at 200.[3] But our supreme 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.

> Unlike in the Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution." *State v. Morse,* 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

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

State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008) (rejecting Fourth Amendment's "private search" doctrine).

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 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. The Supreme Court has held that article I, section 7 does not countenance balancing; it mandates that private affairs not be invaded absent authority of law. *Valdez*, 167 Wn.2d at 775-76. This conclusion follows from the differences in language between the state and federal provisions. *Id.*

> **The holding in *Stroud* ... was based upon "a reasonable balance" between the privacy rights afforded under article I, section 7 and considerations for simplicity in law enforcement**, mirroring considerations also discussed in *Belton. See Stroud,* 106 Wn.2d at 152, 720 P.2d 436; *id.* at 166, 720 P.2d 436 (Durham, J., concurring). To the extent *Stroud* relied on or was persuaded by its interpretation of *Belton,* **that interpretation failed to adequately account for the distinction between the language of the Fourth Amendment and article I, section 7**. The *Stroud* court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement ease and expediency. *See Stroud*, 106 Wn.2d at 152, 720 P.2d 436; *id.* at 166, 720 P.2d 436 (Durham, J., concurring). It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or state expediency. The search incident to arrest exception, born of the common law, arises from the

> necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited. ***Stroud's* balancing of interests is inappropriate under article I, section 7.**

Id. (emphases added). *See also State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (rejecting the Fourth Amendment inevitable discovery exception to the exclusionary rule in Washington and stating "the balancing of interests should not be carried out when evidence is obtained in violation of a defendant's constitutional rights").

In sum, if the numbers one dials on a phone are private affairs protected by article I, section 7, the actual conversations certainly are. Because the State recorded Mr. Feld's private conversations without a warrant, the recording violated article I, section 7 of the Washington Constitution, and the trial court erred in denying the motion to suppress.

The State cannot show the error was harmless beyond a reasonable doubt. Indeed, the jury asked to listen to the recorded conversations again just before finding Mr. Feld guilty. 4/20/12 RP 158. The remedy is reversal of the convictions and remand for suppression of the evidence and for a new trial. *State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008).

6. The trial court violated Mr. Feld's right to due process by providing erroneous instructions to the jury.

a. The to-convict instructions for counts one through four omitted the essential element that the State had to prove the absence of self-defense.

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 reverse, because the absence of self-defense is an element of the crime which 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). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); *see In re Winship*, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. *Smith*, 131 Wn.2d 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); *Aumick*, 126 Wn.2d at 429-30 (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, the trial court violated Mr. Feld's right to due process by omitting the absence of self-defense from the "to convict" instructions for counts one through four.

Where an essential element is omitted from the "to convict" instruction, reversal is required unless the State can prove beyond a reasonable doubt the error did not contribute to the verdict obtained. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005). The State cannot meet that stringent standard here. Whether Mr. Feld acted in lawful self-defense was a hotly contested issue. Three men went to Mr. Feld's home, where Mr. Feld was alone with his wife. Two of the men approached Mr. Feld's porch, and one was armed with a club. The men yelled and swore at Mr. Feld. The Felds told the men to leave and when they did not Mr. Feld threw pots and a bucket of liquid at the men. He only escalated his response after these initial actions failed to deter the intruders. Under these circumstances, the State cannot prove beyond a reasonable doubt that the failure to include self-defense in the "to convict" instructions was

harmless. This Court should reverse the convictions on counts one through four, and remand for a new trial.

b. The trial court erred in overruling Mr. Feld's objection to the reasonable-doubt instruction, because the Supreme Court has held 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); *see also State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). 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. "[A] a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

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 202 (Instruction 3); CP 53 (defense proposed instruction without this language); 4/18/12 RP 202; 4/19/12 RP 6-7 (objection to State's proposed

instruction). The prosecutor also emphasized this language in closing argument. 4/19/12 RP 20. By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. 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 presumption of innocence guaranteed by the due process clause may be diluted or even "washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. *Id.* In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. *Id.* at 318.

That pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3rd ed. 2008) ("WPIC").

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. *Id.* at 764 n.14.

In *Pirtle*, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995). The Court ruled that the "[a]ddition of the last sentence [regarding having an abiding belief in

the truth] was unnecessary but was not an error." *Id.* at 658. The *Pirtle* Court did not focus its attention on whether this language encouraged the jury to view its role as searching for the truth. *Id.* at 657-58. Instead, it was addressing whether the phrase "abiding belief" was different from proof beyond a reasonable doubt. *Id.*

The *Pirtle* Court concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet *Emery* demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in *Emery*. 174 Wn.2d at 760.

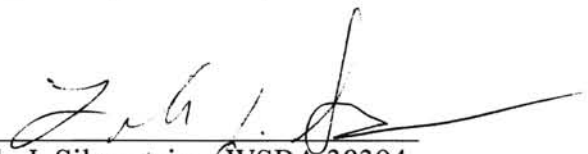
Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. *Bennett*, 161 Wn.2d at 318. This Court should hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions.

E. CONCLUSION

For the reasons set forth above Mr. Feld asks this Court to reverse and remand for a new trial.

DATED this 20th day of May, 2013.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69044-2-I
v.	)	
	)	
CHARLES FELD,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	CHARLES FELD 294584 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272-0777	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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