71518-6

71518-6

NO. 71518-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN KAYSER,

Appellant.

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

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence as a matter of law to support the conviction.

2. Appellant assigns error to the court's failure to instruct on defense of property.

3. Appellant was denied effective assistance of counsel when his attorney asked the court to delete defense of property from the jury instructions.

4. Appellant assigns error to Instruction No. 5, quoted in full below. CP 29.

5. Appellant assigns error to Instruction No. 6, quoted in full below. CP 30.

6. The court erred by admitting into evidence a note found inside the defendant's office that was never seen by the complaining witness. Exs. 90-91.

7. The court erred by not granting a mistrial for erroneously admitting Exs. 90-91.

8. The court commented on the evidence and vouched for a witness by informing the jury that a detective sitting at counsel table, like the prosecutor, also represented the State of Washington.

Issues Relevant to the Assignments of Error

1. Where the complaining witness testified the defendant fired all three shots into the air and did not intentionally aim the gun at him, is the evidence sufficient to support a conviction of assault?

2. Was appellant entitled to an instruction on defense of property where the complaining witness entered his property to serve process, but did not leave when told after completing service?

3. Was defense counsel ineffective for withdrawing an instruction on defense of property after arguing throughout trial that was a defense theory and the instruction was needed?

4. Did withdrawal of an instruction on defense of property reduce the State's burden of proving the elements of second degree assault?

5. Did the to-convict instruction deny appellant due process by not requiring the State to prove the assault was "intentional," and not requiring it to prove the absence of self-defense?

6. Did the trial court erroneously admit a piece of paper not displayed and never seen by the

complaining witness, suggesting the defendant would use a gun regardless of the threat?

7. Did the court improperly comment on the evidence and vouch for a police witness by permitting him to sit at counsel table and telling the jury he represented the State of Washington, the same as the prosecutor?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

a. *Background*

Steven Kayser is an inventor. Born in 1944, now 70 years old, he was raised on an Iowa farm to be self-reliant and work hard. He worked full-time since he was nine years old. At age 18 he enlisted in the United States Air Force, serving 1965-69. He later earned degrees in accounting, business and taxation. RP 814-18.

After being a tax partner in a large firm in San Diego, Mr. Kayser worked privately as a forensic accountant. RP 818-19. In the early to mid-1980s, he was a cooperating witness and whistle blower with the FBI and United States Attorney's Office on criminal bankruptcy fraud matters. In

connection with that work he received death threats. RP 821.

About 2002 he began inventing safety dental products for prison inmates. The products cannot be converted to a weapon; they are a commercial success. This has been his exclusive business since 2004-05. He continues inventing. He owns many patents, trademarks, copyrights and trade secrets. Some of his products have been counterfeited, and he has been involved in related litigation. RP 818-20, 822.

In 2006 he moved to Whatcom County near Ferndale. He bought property with a home and a barn, which he could use as an office and warehouse for his business and inventions. The property has a large gate with prominent no-trespassing signs. Exs. 71-77. The warehouse contains many of his trade secrets and inventions. He keeps the building locked at all times. Plywood covers the windows and doors so people cannot see in. He opens wooden blinds on the office windows during the day, but otherwise they are shut. RP 819-20.

In 2007, Mr. Kayser married Gloria Young. She was born in China, but taught much of her adult

life in urban Virginia. The Ferndale property was her first experience in country living. RP 744-49.

b. *February 18, 2010*

In late 2009-early 2010, Mr. Kayser referred a fraud and counterfeiting matter to the Seattle United States Attorney, FBI, U.S. Customs Enforcement, and the FDA Criminal Investigations Unit. He anticipated retaliation. RP 821-22.

Ms. Young saw a strange car parked on their property near the road. It hadn't pulled up to the front of the warehouse or the house, as most people did who came to visit. RP 781-91, 753-55, 308, 323; Exs. 6, 11, 14, 22, 32.

She saw a burly man with long hair and unkempt clothes go up to the warehouse. He looked into a boarded window. He tried the handle on a locked door. Then he walked around the building and out of sight, to an area where there was only a propane tank. RP 753-55, 781-85, 308-09, 327, 355, 364.

Ms. Young quickly went into the house, locked the door, and phoned Mr. Kayser in his office. She asked if he was expecting anyone. He said no. She told him there was a large man snooping around, looking into boarded windows, trying to jimmy a

locked door. Ms. Young was very scared. RP 757-58, 771-72, 792-98.

Ms. Young saw the man walk towards Mr. Kayser's office. She stepped outside and walked slowly toward the man to distract him. She was much smaller than he was. RP 308-09.[1] She was scared of him, but shouted, "Who are you, what do you want?" RP 759.

The man, later identified as Mark Adams, didn't answer her questions, which made her more frightened. RP 332. She was on high alert waiting for Mr. Kayser to come out of his office. RP 759-60.

The man walked toward Ms. Young. He called out, "Are you Mrs. Kayser?" She said yes, her name was Gloria Young. He handed her some papers. Without her reading glasses, she couldn't read them. She asked what they were. She saw he had something shiny in his hand. RP 760-61, 799-801, 248-62, 307, 337-39. Even Mr. Adams acknowledged his behavior could have scared a 75-year-old woman. RP 332-34.

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[1] Gloria Young was 5' tall and 75 years old. Mr. Kayser was 5'5". RP 235.

Mr. Kayser came out of his office, walked toward the house, and was shocked to see Ms. Young outside. About two feet away facing her was a big man who looked like a biker, hair blowing in the breeze, with a beard. Mr. Kayser didn't understand why this man was so close to his wife. The man turned to face him. RP 824-25.

Mr. Kayser called out, "Can I help you?" The man did not respond, did not identify himself or say why he was there. RP 340-41. Mr. Kayser became more anxious as he approached. Ms. Young was looking down, starting to cry. She looked very submissive. The man asked if he was Steven Kayser. Mr. Kayser responded, "Yes, Steven Kayser. Can I help you?" The man took 2-3 steps toward Mr. Kayser and handed him some papers. Mr. Kayser, sensing something was wrong, grabbed the papers, never taking his eyes off the man. RP 825-28, 262-66, 341-42.

The man took several steps back toward Ms. Young. He held a metal container, and he began to open it and reach in. Mr. Kayser immediately thought, "Gun, gun, gun." RP 763-64. Mr. Kayser couldn't see what he had. He said loudly, "You've

got five seconds to get off the property." RP 828, 267-68, 334-35, 342, 738.

The man didn't move. Mr. Kayser repeated his warning. The man still did not move or say anything. RP 828-29, 763-65.

Mr. Kayser quickly ran to his office and got his shotgun from behind the door. He ran back up the steps to where the man still stood with his hand in the metal container. Mr. Kayser again said he had five seconds to get off the property, and started counting. RP 829.

Mr. Kayser was very frightened. He saw Ms. Young standing there. He thought of her high blood pressure. The man seemed to be smirking at him. Mr. Kayser counted again. When the man did nothing, he shot the gun up into the air, over the garage roof, pointing to the sky. RP 271. The man started laughing at Mr. Kayser. RP 830-32.

Mr. Kayser repeated his warning and counted again. After five, he shot again. He did not point the gun at the man. Now the man moved. He took his hand out of the container, closed it, and walked slowly on the gravel. RP 765-67, 808-09. For the first time, Mr. Kayser noticed the car near

the entrance to the property. When the man got to the car, he stood there with something in his hand. He looked again at Mr. Kayser. Mr. Kayser said again, "I'm counting to five." The man got into the car and made some motion toward the windshield with something in his hand. Again, Mr. Kayser was afraid he had a gun. RP 832-35.

Mr. Kayser fired a third shot into the air to his left, where he knew there was an open field. RP 835-36. Mr. Kayser wanted the man off his property and away from his wife. RP 870, 888, 894-95. He believed the man was trespassing and threatening them. RP 875.

The man drove quickly off, squealing his tires on the road. Mr. Kayser closed the gate to his property. RP 858-59.

Back in his office, Mr. Kayser tapped a "Memorandum on Trespassing Incident," quickly setting down his memory of the incident. Ex. 105.

c. *Police Response*

Mark Adams, the long-haired process server who never identified himself to Mr. Kayser or Ms. Young, drove down the road, pulled over and called 911. He told the police a man had just shot at

him. When a deputy sheriff arrived, he said Mr. Kayser pointed the gun at him and fired the second shot at him and his car. Although he later admitted in an interview and his trial testimony that all the shots were fired into the air, he did not tell the police that. RP 343-51.

Sgt. Mede of the Whatcom County Sheriff's Office assembled the SWAT team. Eight officers surrounded Mr. Kayser's property. RP 384-85, 394-95. Sgt. Mede phoned Det. Sgt. Sean Crisp who lived on adjacent property to ask for "intelligence" about the "target residence." RP 587. Detective Crisp knew Mr. Kayser and Ms. Young; he had attended their wedding and been to their home. His neighbors were not dangerous. He told the officers to call Mr. Kayser and ask him to come outside. RP 595-624.

When called, Mr. Kayser came outside. He was very cooperative. He was no danger to anyone. RP 479-80, 595-600. He brought his Memorandum on Trespassing Incident. Ex. 105. He told Sgt. Mede he shot only in the air. RP 588-94.

Deputy King handcuffed him and put him in his patrol car. Mr. Kayser told him he saw a man

talking to his wife, standing too close to her. When Mr. Kayser came out, the man gave him paperwork, asked him to sign it. Mr. Kayser told him to leave. When he wouldn't leave, Mr. Kayser got his gun. When he still wouldn't leave, he fired the gun twice in the air. Then the man got in his car and left as he fired a third shot in the air. RP 396-98. All the shots were in the air. RP 471-72.

d. *Sgt. Mede and Ms. Young*

Ms. Young came out of her home with her hands up, per orders the police shouted through a bullhorn. RP 776. Sgt. Mede stood with Ms. Young in the driveway. Ms. Young told him her husband warned the man that he had five seconds to get off the property; he did not say or he would shoot him. RP 804-06. Sgt. Mede claimed she said Mr. Kayser said, "You have five seconds to get off my property or I will shoot you." RP 1015-16.

The officer told Ms. Young her husband shot at the man. Ms. Young knew that wasn't true and didn't understand why they were arresting Mr. Kayser. When she said her husband didn't shoot at the man, the officer became "very strong," "loud

and insistent" that he had shot at the man. RP 768-71. Sgt. Mede told her it was a crime to threaten to shoot someone then fire a weapon. RP 1015-16. Ms. Young told Sgt. Mede her husband did not threaten to shoot the man. RP 803-05. Although Sgt. Mede had taken a written statement from another witness, he didn't offer to take one from Ms. Young. RP 1017.

e. *Search of Office*

Mr. Kayser said the gun was behind the door in his office; he offered to get it for the police. When Mr. Kayser declined permission to search the office, the officers got a warrant. RP 423-25.

During the search, among many papers all over Mr. Kayser's very large office, police photographed a handwritten note taped on the inside of a window shutter. The note began with "Stop" drawn in something like a stop sign shape. "Do not ... without permission of owner and an appointment. This is a very dangerous place." The exhibit is a photograph. It did not capture the original text covered by post-it notes, which added "armed response." RP 456-58, 482; Ex. 90-91. The note

faced into the office, not outside. Mr. Adams never saw it. RP 427-32.

The defense objected to admitting this exhibit under ER 404(a) and (b). Counsel also objected that it was not within the scope of the search warrant, as it was not a long gun, shells, or a document of dominion or control. RP 429-32.

The court ruled it was in plain view during a lawful search, and so admissible. RP 432.

Deputy King told the jury they found signs that were "interesting and relevant:" "Stop. This is a very dangerous place. Armed response." RP 456.

After Deputy King testified to this note, the defense again objected and moved for a mistrial. The judge acknowledged she had misunderstood: she thought the note was visible from the exterior of the office door. The State admitted it was only visible inside the office. RP 640-46. The court acknowledged it had allowed the testimony and could not "unring the bell." It concluded the note was not a "bad act." The note was consistent with Mr. Kayser being a cautious and private man, concerned with safety, and so it was not prejudicial. The

court adhered to its original ruling and denied a mistrial. RP 661-65.

2. PROCEDURAL FACTS

a. *Pre-Trial*

The court released Mr. Kayser on bond pending trial. For over three years before trial, Mr. Kayser remained out of custody in complete compliance with every condition. CP 197.

The State offered plea resolutions, including dismissing the firearm enhancement and reducing the charge to three misdemeanors of reckless endangerment with 12 months probation and an anger management class. Mr. Kayser believed he had violated no law, that his acts were justified. He declined to plead guilty to any crime. CP 198.

b. *Trial*

i. *Motions in limine*

The defense moved in limine to exclude all witnesses before they testified, including Detective Allgire who sat at counsel table with the prosecutor. The defense argued the Whatcom County Sheriff's Office is not a party; permitting the detective at counsel table would bolster the

State's case. The court denied the motion. RP 23-28.

The court introduced the parties to the jury:

> The Prosecuting Attorneys' Office represents the State of Washington and with the prosecuting attorney is a detective who is also representing the State of Washington in this procedure....

RP 81.

ii. *Self-defense and defense of property*

The prosecutor told the jury in opening statement there is no law against trespassing for a process server. "You're allowed to go on to property to serve process. It's something that you're just allowed to do." RP 223-24.

The defense theory was that Mr. Kayser did not intentionally assault Mr. Adams; he was acting to protect his wife, himself, and to get Mr. Adams off his property. Defense counsel described Mr. Kayser's fears and his goal for Mr. Adams to "leave my property" in opening statement. RP 239.

Deputy King admitted he would be alarmed if a stranger came onto his property, was snooping around, and didn't come to the door. RP 485-86. He testified Mr. Adams told him he had introduced himself when he went on the property, RP 492,

although Mr. Adams testified he had not. RP 260-61. Defense counsel established on cross-examination that if a process server remains on property without permission after completing service, it is a trespass. RP 490.

iii. *Additional trial testimony*

Mr. Adams came to serve a summons and complaint on Mr. Kayser, his "Jane Doe" wife, and two corporations. He had no reason to believe Mr. Kayser would avoid service. RP 330-31. Yet he did not approach the residence. RP 323. He walked around the pole shed, knocking on doors and peering into windows, some of which were boarded over. RP 327, 355, 364. His boss then called his cell phone to see if he had completed service yet; the client was unusually impatient. RP 257-58, 306.

Signatures are not required to prove service, but Mr. Adams asked Mr. Kayser to sign. He had opened the metal box he was carrying. Mr. Kayser said no, "you have five seconds to get off my property." RP 267-68, 334-35, 342, 738.

Mr. Kayser jogged back to the building and returned with a shotgun. Mr. Adams testified he walked toward his car but did not run. He heard

Mr. Kayser count. At "five," he shot into the air. RP 271.

Mr. Adams walked faster. Mr. Kayser remained where he was. Mr. Adams saw Mr. Kayser lower the gun then lift it up again, to about a 20° angle. When Mr. Adams was in his car but had not yet put the keys in the ignition, Mr. Kayser fired the gun a second time. Mr. Adams started his car as Mr. Kayser was still counting. As the car backed up, Mr. Kayser fired a third shot, again up over the car, at a higher angle than the second shot. RP 272-75.

Mr. Adams testified all the shots were fired into the air. RP 343. He testified he did not see Mr. Kayser point the gun at him. RP 271.

Although he testified the second shot "was kind of pointed in my general direction, I don't think it was intentional at this point." RP 350. During a defense interview, he said the first shot was nearly vertical, the second and third shots were at least at a 45° angle. RP 988-94.

Mr. Adams drove off the property, down the road, and called 911. Police arrived within five minutes. He told the police the second shot had

been at him and his car. He did not tell the police Mr. Kayser shot over the car, as he testified. RP 344-51.

Dawn Demmer and her son were walking past Mr. Kayser's property when they heard a voice counting loudly. Then they heard gunshots. Ms. Demmer saw the gun. It was pointed at the sky. RP 366-74. Jesse Demmer saw the gun pointed to the sky both before and after the second shot. RP 375-78.

Brad Benard lived across the road and two properties over from Mr. Kayser's. At trial he recalled back about four years that he and Randy Weir were outside and heard a whistling sound over their heads. Mr. Benard was on a ladder. It was a gunshot traveling west. The men ducked and got behind a barn. They didn't testify to any other shots. They didn't call the police. People in the area frequently shoot guns. RP 537-51, 606.

Det. Allgire testified as an expert with firearms, ballistics and trajectories. He didn't speak with Mr. Benard until June, 2013 -- 3-1/2 years after the incident. He marked on a map the distance between Mr. Kayser's and Mr. Benard's properties, drew a line from one to the other, and

noted the relative heights of each property. He testified to the distance from Mr. Kayser's property to Mr. Benard's. RP 625-39; Ex. 116.

Det. Allgire met with Mr. Adams twice at the prosecutor's office, but did not keep any records of those meetings or of Mr. Adams's comments. The witness drew diagrams on a whiteboard, which they erased without preserving. He agreed Mr. Adams's drawing at trial was different from his initial statement to the police. RP 681-86. Nonetheless, Det. Allgire testified Mr. Adams did not "change" his testimony about shooting into the air. RP 697-98, 700-01.

c. *Jury Instructions*

The defense proposed a justifiable use of force instruction that included self-defense, defense of others -- and defense of property:

> The use of or the attempt to use force upon or toward the person of another is also lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

CP 100. The defense also proposed instructions defining trespasser. CP 105-06. The State did not

propose an instruction on lawful use of force, but proposed to instruct that it is lawful to enter a property to serve legal process. CP 87.

The court initially indicated it would not give the third paragraph of WPIC 17.02 on defense of property, CP 100. The defense argued at length in favor of that provision. RP 915, 939-40, 948-50. The court directed defense counsel to prepare two versions of WPIC 17.02 -- one with defense of property and one without -- so the court would be prepared with whichever version it chose. RP 970. Defense counsel returned on Monday, November 25, with both versions. RP 979; CP 107-16.

The court now indicated it would give the self-defense instruction **including** the third paragraph on defense of property as Instruction No. 13. RP 1044. The defense excepted to the failure to instruct on trespass, and the court added them. RP 1045, 1048-52; CP 42-43. The prosecutor noted with defense of property, they also needed an instruction defining malicious. RP 1055-56.

> THE COURT: All right. Does anyone object to our numbering the instruction defining malicious as 13A?
> MR. RICHEY: No objection.
> MR. DUARTE: This is certainly not going to be a central focus of our

closing, Your Honor, so if the Court wants to just insert the one with the third paragraph that might be sufficient.

THE COURT: I don't understand.

MR. DUARTE: I did provide the Court a jury instruction that did not include the third paragraph.

THE COURT: It does not include the third paragraph?

MR. DUARTE: If you want to substitute that, if that makes it easier, that will be fine so you don't have to renumber all the instructions.

THE COURT: So you're saying that you would include that Instruction No. 13 without the third paragraph?

MR. DUARTE: Right.

THE COURT: All right.

MR. DUARTE: So that all the other instructions remain in place.

THE COURT: Is that a workable solution for the State?

MR. RICHEY: Yes, Your Honor.

THE COURT: All right.

RP 1057-60.

The court gave the following instructions:[2]

INSTRUCTION NO. 5

To convict the defendant of the crime of assault in the second degree while armed with a deadly weapon, as charged in count I, each of the following

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[2] The court's instructions to the jury were neither reported nor filed with the clerk. The court and parties reconstructed the instructions. The court amended its initial "Court's Confirmation of Instructions to Jury," CP 20-53, by Order dated 12/4/2014, confirming that Instruction No. 13 did not include the third paragraph on defense of property, CP 57-58; and again by Order Correcting Court's Confirmation of Instructions to Jury as to Instruction No. 7. CP 59-61.

elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 18th day of February, 2010, the defendant assaulted Mark Adams, with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 29.

INSTRUCTION NO. 6

A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

CP 30.

INSTRUCTION NO. 7

An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily harm, and which in fact creates in another a reasonable apprehension and imminent fear of bodily harm even though the actor did not actually intend to inflict harm.

CP 31, 20-21, 59-61.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 35 (proposed by the State, CP 86).

INSTRUCTION NO. 12

The law permits a person to enter upon private property in order to serve legal process (which includes any document required or allowed to be served upon persons or property), if the entry is reasonable and necessary for the service of process.

CP 36.

INSTRUCTION NO. 13

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

The use of or the attempt to use 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, or by someone lawfully aiding a person who he reasonably believes 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 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.

CP 20-21, 37-38, amended by CP 57-58.

No. 17

> A trespasser is a person that remains unlawfully in or upon premises of another.

CP 42.

No. 18

> A person remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so remain.

CP 43.

d. *Closing Arguments*

The jury did not have the written instructions during closing arguments. RP 1058.[3] The prosecutor argued he only had two "elements" to prove, listed in Instruction No. 5. RP 1061. He argued Mr. Kayser intended to scare Mr. Adams because he thought he was a trespasser; but Instruction No. 12 shows he is not a trespasser "because he's serving legal process, he's rightfully on that property." RP 1063-64.

He turned the jury's attention to Instruction No. 13 and read:

> "one is allowed to use force upon another **when one reasonably believes that he or another is about to be injured".** And

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[3] "[Y]ou haven't been handed these instructions yet ... ." RP 1061.

> then "the force is not more than necessary, one can only use the force similar to what a prudent person would use".

RP 1065 [emphasis added].

The prosecutor referred to the "sign" that "this is a very dangerous place" and "armed response" on a sticky note:

> That's presented to show you the defendant's intent. It's trespassing, that's what he thought was his plan, that's what he was thinking about.

RP 1072. He argued Mr. Kayser never mentioned being afraid until he learned from Deputy King that the process server had a right to be on his property. RP 1069-70.

Defense counsel referred to the "right to act with lawful force, and shoot at, even shoot at another human being if they believe they are in danger." RP 1082. He referred to instructions 12, 17 and 18 defining trespassing. RP 1085-86.

Counsel argued Mr. Kayser told Mr. Adams to leave, and he didn't go. He ran and got his gun, returned, and Mr. Adams was still there. He counts, the guy doesn't move, so he shoots in the air. No more force than necessary. RP 1097-98.

"Shooting in the air is an effective way of protecting yourself." RP 1100.

> Jury Instruction No. 13 allows a person like Steven to use lawful force to protect themselves, his wife, **or his residence.**

RP 1100-01 [emphasis added]. But he then read:

> [A] person is entitled to act on appearances in defending himself or another if he believes in good faith and on reasonable grounds that he or another is in actual danger of injury.

RP 1102-03.

No one argued the right to prevent a trespass did not require fear of injury.

e. *Verdict*

The jury deliberated from 3:30 one afternoon until 3:00 the following day. It found Mr. Kayser guilty of second degree assault, as charged, while armed with a firearm. CP 70-71, 5-6.

f. *Sentencing*

At the time of sentencing, Mr. Kayser had lived his 69 years crime-free. RP 1129. He assisted law enforcement much of his professional life. In addition, he had proven himself a generous and magnanimous member of his community. He helped others in need, he took action where

wrongs needed to be made right, and he is extremely devoted to his wife. CP 117-90,[4] 194-205.

Even the State recommended a sentence at the bottom of the standard range. RP 1134; CP 206-08.

The defense moved the court to grant an exceptional sentence below the mandatory 36-month firearm enhancement. It argued the Constitution required the court to consider the characteristics of the individual before it for sentencing, including his age, his long life of being a good citizen, and his genuine belief that he had a right to protect himself, his wife and his property against an unidentified trespasser. RP 1133-34. No one was injured. CP 194-205.

The Court noted its frustration when the law imposes a mandatory sentence that "may not be what the Court would have chose to do," but concluded it had no option with the 36-month enhancement. RP 1138. The judge commented the Court of Appeals may feel differently, so she would watch the Court of Appeals decision with interest. RP 1138-40. She imposed sentence at the bottom of the standard

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[4] The letters attesting to Mr. Kayser's character are extensive, detailed, and compelling. RP 1133.

range, three months, plus the enhancement for a total of 39 months in prison. CP 10-19. The court released Mr. Kayser pending appeal. CP 191.

C. SUMMARY OF ARGUMENT

The complaining witness's trial testimony was insufficient as a matter of law to support the conviction. Although he told the police Mr. Kayser shot at him, he testified he only shot into the air and did not intentionally aim the gun at him.

Mr. Kayser was denied effective assistance of counsel and his constitutional rights to present a defense, due process, and a jury trial when his lawyer and the court removed defense of property from the jury instructions, when that was a primary theory of the defense.

The court's to-convict instruction did not include as elements the absence of self-defense or intent, yet required the jury to return a verdict of guilty without considering whether the State had proved those elements beyond a reasonable doubt.

The court erroneously admitted into evidence a handwritten sign improperly seized from the defendant's office and having no relevance to the

case, which permitted the State to argue it was evidence of Mr. Kayser's intent to assault.

The court commented on the evidence and improperly vouched for the testimony of a detective whom it identified as representing the State.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

In considering the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.[5]

This charge was brought based on Mr. Adams telling the police that Mr. Kayser shot directly at him and his car. In fact, at trial, he acknowledged that Mr. Kayser shot in the air, RP 343, and he didn't think Mr. Kayser intentionally pointed the gun at him or his car. RP 350. Two independent eyewitnesses corroborated the gun was pointed to the sky. RP 372-73, 376-78.

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[5] *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); U.S. Const., amend. 14; Const. art. I, § 3.

Gunshots into the air in a public place or that endanger someone may constitute unlawful discharge of a firearm, a misdemeanor. RCW 9.41.230 (quoted in App. B). These shots, however, were not in a public place nor did they endanger Mr. Adams. Thus the evidence was insufficient to support the misdemeanor. A felony assault requires even more.

The State also had the burden of proving Mr. Kayser did not act in defense of himself, his wife, or his property. There was insufficient evidence to prove the absence of these defenses.

> One noted commentator recognizes the distinction between the use of deadly force and a threat to use deadly force: "But merely to threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force, so that one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger."[6]

Similarly, a person might be justified in shooting into the air to get someone to leave when he would not be justified in shooting the person.

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[6] *State v. Walden*, 131 Wn.2d 469, 474 n.2, 932 P.2d 1237 (1997), citing 1 LaFave, Wayne R. & Scott, Austin W., Jr., SUBSTANTIVE CRIMINAL LAW § 5.7(b) (1986).

> Although the use of deadly force is not justified to expel a mere nonviolent trespasser, **under certain circumstances necessary force may include putting a trespasser in fear of physical harm.**[7]

Particularly in view of Mr. Adams's refusal to identify himself, his skulking around Mr. Kayser's property, and his failure to leave promptly upon having completed his service of process despite being told to leave, these three warning shots into the air were insufficient to constitute the crime of assault with a deadly weapon. The State did not prove the absence of self-defense and defense of property beyond a reasonable doubt. This Court should reverse and dismiss this charge.

2. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, THE RIGHT TO PRESENT A DEFENSE AND TO A JURY TRIAL WHEN HIS LAWYER AND THE COURT WITHDREW DEFENSE OF PROPERTY FROM THE JURY INSTRUCTIONS.[8]

a. *Defense of Property*

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[7] *State v. Bland*, 128 Wn. App. 511, 517-18, 116 P.3d 428 (2005) (elderly man used gun to convince woman to leave his property). Our courts have found victims particularly vulnerable: in a rural setting because of age (52) and stature (5'2"), *State v. Sweet*, 138 Wn.2d 466, 482, 980 P.2d 1223 (1999); and merely due to advanced age (67), *State v. Clinton*, 48 Wn. App. 671, 741 P.2d 52 (1987).

[8] *See* U.S. Constitution, amends. 6, 14; Constitution, art. I, §§ 3, 21, 22 (Appendix A).

As with self-defense, "[t]he instruction on defense of property must be manifestly clear." *Bland*, 128 Wn. App. at 515.

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> ...
>
> (3) Whenever used 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 other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary; ....

RCW 9A.16.020; Laws 1909, ch. 249, § 164.

Despite the many clauses in this statute,[9] "[i]n defense of property, there is no requirement to fear injury to oneself." *Bland*, 128 Wn. App. at 513.

> It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such

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[9] WPIC 17.02 contains many bracketed phrases with less-than-helpful instructions to "use bracketed material as applicable."

> force he is not liable either criminally or civilly.[10]
>
> Whether the use of force used in the defense of property is greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions. ...
>
> A reasonable jury could conclude that Bland, an elderly man, used a reasonable means available to him at the time to convince Moore to leave his property. Although the use of deadly force is not justified to expel a mere nonviolent trespasser, **under certain circumstances necessary force may include putting a trespasser in fear of physical harm.**

Bland, 128 Wn. App. at 517-18 (emphasis added). Mr. Bland carried his gun and chased the trespasser, but never pointed the gun at her.

It thus is lawful to display a weapon to prevent a trespass, i.e., to convince someone to leave who has been asked to leave and who is not leaving one's property.[11]

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[10] *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 506, 125 P.2d 681 (1942), *quoted with approval* in *State v. Ladiges*, 66 Wn.2d 273, 276, 401 P.2d 977 (1965). *See also* 16 DeWolf, David K. & Allen, Keller W., WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 13.45 (2d ed. 2000) (explaining that reasonable force may be used by a property owner to prevent an unprivileged person from trespassing).

[11] *State v. Redwine*, 72 Wn. App. 625, 865 P.2d 552 (1994) (defendant displayed shotgun to urge process server to leave property after serving papers); *State v. Murphy*, 7 Wn. App. 505, 500 P.2d 1276, *review denied*, 81 Wn.2d 1008 (1972)

It is reversible error for the court to fail to instruct on the defendant's two theories:

> that they were not guilty if the force used by them was reasonable under the circumstances, regardless of actual danger to their persons or property, if they reasonably believed [1] they were about to be injured or [2] that there was about to be a malicious trespass or interference with property in their possession.

Ladiges, 66 Wn.2d at 276-77.

b. *The Evidence Supported Defense of Property.*

In *State v. Redwine*, *supra*, a case remarkably similar to the facts here, the defendant was convicted of assault in the second degree. Mr. Hines, a process server, came on Mr. Redwine's farmstead. When Mr. Redwine refused the papers, Mr. Hines left them on his porch. Mr. Redwine testified he ordered Mr. Hines off his property, but he didn't leave; instead, he picked up a case that appeared to contain a pistol. Mr. Redwine ran into his house and grabbed his shotgun. Back

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(defendant carried handgun to emphasize request that inspectors leave his property when they had not first requested permission to enter); *State v. Mierz*, 72 Wn. App. 783, 798, 866 P.2d 65 (1994), *affirmed*, 127 Wn.2d 460, 470, 901 P.2d 286 (1995).

outside, he found Mr. Hines had backed down the driveway but had not left the property.

Mr. Redwine testified he only raised the shotgun over his head so Mr. Hines could see it. He never pointed the gun at Mr. Hines, "but stood ready to defend himself and the women and children on his property from a man he believed had a pistol." Mr. Hines testified Mr. Redwine leveled the shotgun at him. 72 Wn. App. at 626-28.

The Court of Appeals reversed the conviction because the instructions did not unequivocally place on the State the burden of proving the absence of self-defense.

But the State also cross-appealed that there was insufficient evidence for an instruction on self-defense and defense of property. The Court concluded Mr. Redwine produced evidence both that Mr. Hines remained on the property, refusing to leave after serving the papers; and that he believed Mr. Hines was reaching for a pistol. This evidence was sufficient to require an instruction on lawful use of force, both as to defense of property and defense of self and others. 72 Wn. App. at 630-31.

As in *Redwine*, the evidence here was that Mr. Kayser ordered Mr. Adams to leave his property after he had served the papers, but he didn't move. He saw him reach into a box which he believed contained a gun. Even after he ran into this office and returned with his shotgun, Mr. Adams had made no move to leave the property or step away from his wife. He also testified he never pointed the shotgun at Mr. Adams. This evidence was sufficient for both theories: defense of self and others, and defense of property.

Thus Mr. Kayser was entitled to have the jury properly instructed on his theory of the defense, the right to defend his property.[12]

c. *Counsel's Withdrawal of Defense of Property Denied Appellant Effective Assistance of Counsel.*

"If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review."[13]

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[12] U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

[13] *State v. Kyllo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009), citing *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Rodriguez*, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004).

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); U.S. Const., amends. 6, 14; Const., art. 1, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

> Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'

Hinton v. Alabama, 571 U.S. ___, 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014).

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 466 U.S. at 686.

i. *Deficient Performance*

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant

law." *Strickland*, 466 U.S. at 290-91; *Kyllo*, 166 Wn.2d at 862.

In *Kyllo*, counsel proposed an instruction that incorrectly stated the "act on appearances" standard for self-defense. He also argued in closing that his client was entitled to act on appearances if he reasonably believed he was in danger of death or great bodily injury. But his client had used non-deadly force: he was entitled to defend himself so long as he believed he was about to be injured at all. The legal standard counsel applied was higher than the law required. *Kyllo, supra*.

The Supreme Court held counsel's inaccurate instructions were deficient performance when legal authority stated the correct standard.

> Failing to research or apply relevant law was deficient performance here because it fell "below an objective standard of reasonableness based on consideration of all the circumstances."

Kyllo, 166 Wn.2d at 868-69. The Supreme Court held there was no valid tactical or strategic purpose:

> The Court of Appeals said that "there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law [and] eased the State of its proper burden of proof on self-defense. ... [T]he court could

> not conceive of any reason why the defendant's lawyer would propose the defective instructions, since they decreased the State's burden to disprove self-defense. We agree.

Kyllo, 166 Wn.2d at 869.

Nor could these failures have been legitimate trial strategy or tactics. There can be no

> strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law [and] eased the State of its proper burden of proof ... .[14]

Certainly it is not reasonable for counsel to abandon a defense theory and decrease the State's burden of proof merely to avoid renumbering the instructions. RP 1057-60. It also was not a reasonable response to an instruction on malice:

> Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty.

RCW 9A.04.110(12). Mr. Adams had no cause or excuse not to leave after serving Mr. Kayser, much less after he went to his office and returned. Mr. Adams "betrayed" social duty from his initial

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[14] *Id.*, citing *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). *See also Rodriguez*, *supra* (court could not conceive of any reason why counsel would propose defective instructions).

entrance onto the property, refusing to identify himself or his purpose, peering into boarded windows, trying locked doors and walking around behind buildings instead of presenting himself at the office or residence door.

The instructions defining trespasser, which counsel also proposed and the court gave, were only relevant to defense of property. Insisting the court give these instructions is inconsistent with abandoning the defense theory. CP 42-43.

Under *Strickland*, where there can be no reasonable tactical purpose for counsel's conduct, failure to object is deficient performance. *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

In *Kyllo*, self-defense was the defendant's "entire case." Here, self-defense and defense of property were Mr. Kayser's entire case. By removing the instruction on defense of property, which did not require a reasonable perception of imminent bodily harm, defense counsel decreased the State's burden to disprove this defense theory.

Counsel had the basic duty to research the law and propose accurate instructions on his defense

theory. *Redwine* demonstrated his client's right to this defense; and *Bland* demonstrated feared injury is not required for defense of property.

ii. *Prejudice*

> The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

Kyllo, 166 Wn.2d at 862; *Strickland*, 466 U.S. at 687. The State argued Mr. Kayser's professed fear of injury to himself or his wife was not reasonable; and specifically that he had not mentioned such a fear in his Memo on Trespassing Incident. RP 1069-70; Ex. 105. That argument was not available for defense of property. As in *Redwine* and *Bland*, Mr. Kayser was entitled to an instruction on this clear theory of the defense, which defense counsel himself had so eloquently argued was necessary. RP 948-50.

As in *Kyllo*, this Court must reverse Mr. Kayser's conviction and remand for a new trial.

3. THE INSTRUCTIONS FAILED TO INCLUDE EVERY ELEMENT OF THE CHARGED CRIME.

The State charged Mr. Kayser with:

> **ASSAULT IN THE SECOND DEGREE WHILE ARMED WITH A DEADLY WEAPON**

> That on or about the 18th day of February, 2010, the said defendant, STEVEN LEO KAYSER, then and there being in said county and state, ***did intentionally assault*** another person, to wit: Mark Adams, with a deadly weapon, to wit: Shotgun; and furthermore, at the time of the commission of the crime, the Defendant or an accomplice was armed with a firearm; ... .

CP 3 (emphasis added). The defense was self-defense and defense of property.

a. *The Elements Instruction*

Due process requires the court to fully instruct the jury on every essential element of the charged crime.

> The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. ... It is reversible error to instruct the jury in a manner that would relieve the State of this burden.[15]

An "element" of a crime is any fact that must be proven to constitute that crime.[16]

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[15] *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). *See also: State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997); *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); U.S. Const., amend. 14; Const. art. 1, § 3.

[16] *See also: Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 145 (2000); *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2158-59, 186 L. Ed. 2d 314 (2014).

The Supreme Court rejected the argument that the "other instructions" are enough to supply elements missing from the "to convict" instruction.

> The Court of Appeals erred in looking to the other instructions to supply the element missing from the "to convict" instruction. We have held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions. In *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953), this court held that a "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. The court emphasized that **an instruction purporting to list all of the elements of a crime must in fact do so.** ...
>
> ... **[T]he jury has the right under *Emmanuel* to regard the "to convict" instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.**

Smith, 131 Wn.2d at 262-63 (emphases added).[17]

The reason for these consistent holdings is found here in the to-convict instruction itself. The court instructed the jury it had **a duty to return a verdict of guilty** if it found the two elements listed in Instruction No. 5 proven beyond a reasonable doubt.

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[17] *Accord*: *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995); *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005).

While a jury never has a "duty to return a verdict of guilty,"[18] it certainly violates due process to tell the jury it has such a duty **without** finding every element of the charged crime. The instruction here did not require the jury to find the State proved the absence of self-defense or that the assault was intentional, as charged in the Information. These failures require reversal.

b. *The Court Failed to Include the Absence of Self-Defense in the To-Convict Instruction.*

A person is entitled to an instruction on self-defense if there is "some evidence" that he acted according to the statute. RCW 9A.16.020; *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993). The state then bears the burden of proving the defendant's use of force was not lawful or justified.

> [B]ecause the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on

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[18] *See* Statement of Additional Grounds for Review.

> self-defense that misstates the law is an error of constitutional magnitude.[19]
>
> If the evidence supports the giving of an instruction defining excusable or justifiable [use of force], we believe the better position is to revert to the standard elements instruction ... and include those issues there.[20]

Instruction No. 5 required the jury to return a verdict of guilty without finding the State had proved beyond a reasonable doubt that Mr. Kayser did not act in self-defense. This error requires reversal.

c. *The Court Failed to Instruct the Jury on the General Intent Required for Criminal Assault.*

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> ...
>
> (c) Assaults another with a deadly weapon; ... .

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[19] *Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). *Accord: State v. LeFaber*, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996) (citations omitted); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

[20] *State v. Fondren*, 41 Wn. App. 17, 23, 701 P.2d 810 (1985). *See also Redwine, supra*, 72 Wn. App. at 729. "Instructions 4 and 5 explained the elements of second and fourth degree assault, but did not include **as an element** the absence of lawful force."

RCW 9A.36.021(c). The crime of assault includes the mens rea of criminal intent as an essential element.[21]

> [T]he statutory definition of intent requires that the defendant act "with the objective or purpose to accomplish a result which constitutes a crime", RCW 9A.08.010(1)(a), that is, that the defendant act "unlawfully".

State v. Acosta, 101 Wn.2d 612, 617, 683 P.2d 1069 (1984). *See* Instruction No. 11, CP 35 (defining "intent" and "intentionally").

Self-defense negates the general criminal intent element of a charged crime. "A person acting in self-defense cannot be acting intentionally as that term is defined in RCW 9A.08.010(1)(a)." *McCullum*, 98 Wn.2d at 495; *Acosta*, 101 Wn.2d at 616.

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[21] *State v. Robinson*, 35 Wn. App. 599, 794 P.2d 1293 (1990); *State v. Jones*, 34 Wn. App. 848, 850, 664 P.2d 12 (1983); *State v. Sample*, 52 Wn. App. 52, 757 P.2d 539 (1988); RCW 9A.08.010(1)(a). In *State v. Hopper*, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992). The Court concluded under a liberal construction of a charging document challenged for the first time on appeal, that the word "assault" conveyed the element of intent. This standard of construction does not apply to the adequacy of a jury instruction. "The standard for clarity in a jury instruction is higher than for a statute." *LeFaber*, 128 Wn.2d at 902.

The court did not instruct the jury it must find Mr. Kayser "intentionally" assaulted another, i.e., "with the objective or purpose to accomplish a result that constitutes a crime." The State included this element in the charging document. Due process requires the State to prove this element. It was constitutional error to omit it from the to-convict instruction.

In the instruction defining "assault," the court properly instructed that the definition included "intent to create in another apprehension and fear of bodily injury." Instruction No. 7, CP 31; *State v. Byrd, supra*. While this specific intent also is required to prove this particular kind of assault (assault without battery), in a case of self-defense it is not adequate to prove the crime.

"[U]nder certain circumstances necessary force may include putting a trespasser in fear of physical harm." *Bland, supra*, 128 Wn. App. at 517. A person may well act in self-defense and specifically intend "to create in another apprehension and fear of bodily injury," as the means of preventing that person from committing the

harm the defendant fears. Thus if the jury finds this specific intent, it does not negate self-defense; indeed, it is consistent with self-defense.

Self-defense negates the criminal intent, i.e., acting "with the objective or purpose to accomplish a result that constitutes a crime." *McCullum, supra; Acosta, supra.* The specific intent to scare someone away from one's wife before he might harm her, or to scare someone off one's property, is not the same as intending to accomplish a result that constitutes a crime.

The omission of this element from the to-convict instruction requires this Court to reverse Mr. Kayser's conviction.

4. THE COURT ERRED BY ADMITTING EVIDENCE OF THE HANDWRITTEN "SIGN" IN MR. KAYSER'S OFFICE.

Evidence Rule 404[22] prohibits using evidence of someone's character or evidence that someone has done something wrong before "to show action in conformity therewith."

> When evidence is admitted under [ER 404(b)], it must be shown to be logically relevant, and its probative value must be

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[22] Quoted in full in Appendix C.

> shown to outweigh its potential for prejudice.[23]
>
> ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The State introduced in its case in chief the photograph of a handwritten piece of paper supposedly warning of an armed response inside Mr. Kayser's office. Nothing connected this note with the facts of this case. It was not displayed for the public. Mr. Adams never saw it.

The *Hanson* court reversed a felony assault conviction because the prosecutor cross-examined the defendant about fiction he had written that included incidents of violence. In that case, the defendant had testified he had never committed a crime and had never killed anyone, despite serving in Vietnam. This Court held his writings were

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[23] *State v. Hanson*, 46 Wn. App. 656, 662 & n.7, 731 P.2d 1140, *review denied*, 108 Wn.2d 1003 (1987); *State v. Mee*, 168 Wn. App. 144, 154, 275 P.3d 1192 (2012); *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

irrelevant to rebut this evidence, even assuming it was character evidence.

> In this context, "unfair prejudice" means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.
>
> ...
>
> Even if we were to assume that Hanson's writings were probative of his character, any probative value would be overwhelmed by the danger of unfair prejudice. The crime charged was a random, brutal act of violence for which there was no apparent motive. By suggesting that the defendant's character conformed to the violent acts in his writings, the State supplied the jury with an improper explanation for why the defendant would have committed the crime charged.[24]

Here the State conveyed that Mr. Kayser had a proclivity to shoot people for no apparent reason. There was no issue he fired a gun. The question was whether he assaulted someone with it, or used it as a warning in defense of himself, his wife, and his property. This piece of paper suggested Mr. Kayser responded to anyone with an "armed response," regardless of whether he believed the person was a threat.

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[24] *Hanson*, 46 Wn. App. at 661-62. *See also: State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984) (conviction reversed for admitting evidence of sexually oriented writings in rape trial).

The court acknowledged the prejudice, stating it could not "unring the bell." Once the jury learned of this note, it could not be instructed to disregard it. The prosecutor argued the note was evidence of Mr. Kayser's intent: to respond with arms to trespassers, suggesting he did this routinely instead of only when necessary. Exhibits 90-91 were highly inflammatory and of no relevance--particularly because the original text cannot be seen. ER 401, 402, 403. Yet Deputy King told the jury what it said. The court abused its discretion by admitting the exhibits.

In a close case of justified use of force, this error unfairly prejudiced the defense. It suggested the jury could decide Mr. Kayser's criminal intent based on one of many pieces of paper in his office that had no relevance to this particular incident. This Court should reverse the conviction.

5. THE COURT COMMENTED ON THE EVIDENCE AND VOUCHED FOR A WITNESS BY TELLING THE JURY A DETECTIVE REPRESENTED THE STATE OF WASHINGTON.

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not

> authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615. The rule permits a corporate party to designate an officer or employee to represent it. Nothing in the rule refers to witnesses sitting at counsel table.

> It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.

United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981).

> Whether the witnesses have testified truthfully, of course, is entirely for the jury to determine; it is improper to communicate that a credibility determination has been made by the AUSA, law enforcement agents, or the court, or that the government knows whether the witness is being truthful and stands behind the veracity of the witness's testimony.

United States v. Ortiz, 362 F.3d 1274, 1279 (9th Cir. 2004); *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007).

In *Moore v. State*, 299 Ark. 532, 773 S.W.2d 834 (1989), the trial court permitted three police officers who had testified for the State to sit within the rail of the courtroom, an area normally reserved for parties, during closing arguments. The Supreme Court reversed the conviction.

> This case presents the appearance of manipulation of the seating arrangement so as to keep the presence and testimony of certain witnesses, but not others, before the jury. We take every precaution in this jurisdiction to keep the court from commenting on the evidence. Ark. Const. art. 7, § 23;... . In *Watkins v. State*, 222 Ark. 444, 261 S.W.2d 274 (1953), we noted that where a judge, by language or conduct expresses an opinion as to the credibility of a witness there is a palpable violation of our constitution. There we cited and quoted from several cases stating that "remarks **or conduct**" (emphasis added) expressing or intimating the opinion of the judge as to the credibility of a witness constitutes error.
>
> We have found no case where we have held the actions of the court, as opposed to its words, amounted to a comment on the evidence. Here, however, we cannot ignore the truism that actions speak louder than words. The motion to have the policemen moved behind the rail where they could sit with other spectators should have been granted, and we hold it was prejudicial error to have overruled it.

Moore, 299 Ark. at 538 [Court's emphasis; citations omitted]. Similarly, in *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993), the Court again reversed a

conviction where the trial court permitted the complaining witness to sit at counsel table with the prosecutor after she testified. "The occurrence was tantamount to the Trial Court expressing an opinion on the credibility of witnesses." *Id.*, 314 Ark. at 31.

As in Arkansas, Washington's Constitution prohibits the trial court from commenting on the evidence.

> **Charging Juries.** Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Constitution, art. 4, § 16. As in Arkansas, our ER 615 does not provide for any non-party witness to sit at counsel table.

Here it was not merely the court's conduct, but also its words, that improperly vouched for the credibility of Detective Allgire. The court explicitly told the jury he was "also representing the State of Washington," placing the imprimatur of the government and the prosecutor's office on this witness. These actions and comments violated Mr. Kayser's right to have the jury determine the credibility of witnesses, and his right for the court not to comment on that credibility.

Det. Allgire testified he was trained "through [his] CSI work in ballistics and trajectories." RP 625-26. He testified Mr. Kayser's shotgun had a range of 900 feet, depending on the angle of the shot, the influence of gravity, wind, etc. Using Exhibit 116, a Whatcom County aerial photo, he testified the distance from Mr. Kayser's property to Mr. Benard's property was about 500 feet. RP 671-80. The final witness in the State's case in chief, he sat through all the evidence presented, and testified Mr. Adams did not change his testimony. RP 700-01.

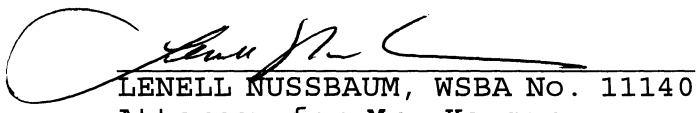
Furthermore, by endorsing this member of the sheriff's office as being a "representative of the State," the court similarly endorsed the other witnesses from the sheriff's office.

It was improper for the court to endorse to the jury this witness as a representative of the State, and so to vouch for his credibility. His testimony was critical to the jury's assessment of Mr. Adams's credibility, as well as to the angle at which Mr. Kayser fired his third shot. This Court should reverse the conviction.

E. CONCLUSION

This Court should reverse and dismiss for insufficient evidence. It should reverse and remand for a new trial for the other reasons here stated.

DATED this 23d day of February, 2015.



LENELL NUSSBAUM, WSBA No. 11140
Attorney for Mr. Kayser

APPENDIX A

CONSTITUTIONAL PROVISIONS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence.

U.S. Const., amend. 6.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. 14.

> No person shall be deprived of life, liberty, or property, without due process of law.

Const., art. 1, § 3.

> The right of trial by jury shall remain inviolate ... .

Const., art. I, § 21.

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, ... to have a speedy public trial by an impartial jury ... .

Const., art. 1, § 22.

APPENDIX B

STATUTORY PROVISIONS

9A.04.020. Purposes--Principles of construction

(1) The general purposes of the provisions governing the definition of offenses are:

(a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;

(b) To safeguard conduct that is without culpability from condemnation as criminal;

(c) To give fair warning of the nature of the conduct declared to constitute an offense;

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

RCW 9A.04.020(1).

9.41.230. Aiming or discharging firearms, dangerous weapons.

(1) For conduct not amounting to a violation of chapter 9A.36 RCW, any person who:

(a) Aims any firearm, whether loaded or not, at or towards any human being;

(b) Willfully discharges any firearm, air gun, or other weapon ... in a public place, or in any place where any person might be endangered thereby. [sic] A public place shall not include any location at which firearms are authorized to be lawfully discharged;

...

although no injury results, is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

APPENDIX C

COURT RULES

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

...

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a trial court may admit evidence of other crimes or misconduct, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) determine whether the evidence is relevant to a material issue, (3) state on the record the purpose for which the evidence is being introduced, and (4) balance the probative value of the evidence against the danger of unfair prejudice.

ALEXANDRA FAST declares:

On this date I caused a copy of this document to be served on the following entities by depositing them in the United State Mail Service, postage prepaid, address as follows:

Kimberly Anne Thulin
Whatcom County Superior Court
311 Grand Avenue, Suite 201
Bellingham, WA 98225

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

2·23·2015 - SEATTLE, WA
Date and Place

Alexa Fast
ALEXANDRA FAST

COURT OF APPEALS
STATE OF WASHINGTON
2015 FEB 23 PM 12:33