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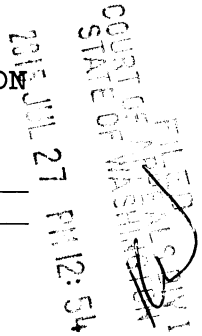
NO. 71518-6-I

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

REPLY BRIEF OF APPELLANT

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STATUTES AND OTHER AUTHORITIES

A. STATEMENT OF FACTS IN REPLY

1. THEORY OF THE DEFENSE

The State agrees defense counsel's theory of the case included that "Adams trespassed by unlawfully staying on the Kayser property after Adams had served legal process and was asked to leave." Resp. Br. at 3.

2. MR. ADAMS'S TESTIMONY

The State agrees Mr. Adams testified that all the shots were fired "into the air," and he "didn't know" if the gun was intentionally pointed at him. Resp. Br. at 10; RP 351. Certainly if Mr. Kayser lowered the gun to the ground after shooting into the air, in passing it may incidentally have been in the direction of Mr. Adams or his car. Such facts would suggest any "pointing" at him was not intentional.

Instead of relying on Mr. Adams's testimony, the State relies on what a deputy testified Mr. Adams said before trial. Compare: Resp. Br. at 10-11 (citing testimony of Deputy King, RP 381-536, not Mr. Adams),[1] with RP 343 (Mr. Adams testified

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[1] *See also*: Respondent's Brief at 20 (Adams's testimony must be "coupled with" statements he made to others to be sufficient to

all the shots were in the air) and RP 271 (Mr. Adams testified he did not see Mr. Kayser point the gun at him).

3. PRETRIAL PLEA OFFERS

Appellant's reference to the State's pretrial assessment of the seriousness of his crime[2] is not an attempt to appeal to this Court's emotions, and does not rely on matters outside the record. Resp. Br. at 5.

The brief properly refers to the portions of the record containing this information, which was before the trial court. App. Br. at 14. The State did not dispute this statement of facts below.

These facts relate to the issue Mr. Kayser raised in his Statement of Additional Grounds for Review: That the mandatory three-year sentence "enhancement" is unconstitutional. *See* SAG at 1-13. Thus they are relevant for this appeal.

4. PROPOSED INSTRUCTIONS

Defense counsel did not initially "propose" "two versions of the instruction defining use of lawful force." Resp. Br. at 2. His proposed

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support the conviction).

[2] Resp. Br. at 5.

instruction on lawful force included the paragraph defining defense of property. CP 100. The court expressed the possibility of giving the instruction on lawful use of force but excluding that one paragraph. The State did not propose an instruction on lawful use of force. The court therefore asked defense counsel to prepare a second version of the instruction, and return with it after the weekend, so the court would have a hard copy of whichever instruction it chose. RP 970. Counsel complied with the court's request. RP 979; CP 107-16; App. Br. at 20 and record there cited.

The court chose to include the defense, but counsel then requested the instruction without it. RP 1057-60. This request is the basis of appellant's claim of ineffective assistance of counsel.

5. THE SHOT THAT WENT OVER THE HEAD OF A NEIGHBOR STANDING ON A LADDER 900 FEET AWAY DOES NOT CORROBORATE A HORIZONTAL SHOT TOWARD MR. ADAMS.

The State argues evidence that Mr. Kayser aimed the gun horizontally at Mr. Adams, despite Mr. Adams saying he didn't see him do that, was corroborated by the testimony of a neighbor who heard a shot. But, remembering back four years,

the neighbor testified he heard a gun shot fly over his head as he stood on a ladder 900 feet away from Mr. Kayser's property. Resp. Br. at 20-21. There was no evidence whether this shot was then traveling upwards or downwards. If the original shot had been at a lower trajectory, it would not have traveled so far at such a height. This testimony did not corroborate the State's theory.

6. MR. KAYSER WAS NOT "MAD" AT BEING SERVED WITH PROCESS, BUT WAS ALARMED BY A STRANGER SNOOPING AROUND HIS PROPERTY WITHOUT IDENTIFYING HIMSELF, POSSIBLY REACHING FOR A GUN, AND REFUSING TO LEAVE WHEN TOLD.

Failing to cite to the record, the State claims Mr. "Kayser himself acknowledged that he was mad at Adams for coming onto his property to serve him legal papers." Resp. Br. at 22. Mr. Kayser never said he was angry at being served with process; he acknowledged ongoing litigation. RP 866-68. Rather he was alarmed that a man was creeping around his property instead of properly presenting and identifying himself, that he was reaching into a metal container, and that he did not leave the property when told to do so. RP 894-96.

B. ARGUMENT IN REPLY

1. DEFENDING PROPERTY DOES NOT REQUIRE DAMAGE TO OR THREATS TO DAMAGE ONE'S PROPERTY TO LAWFULLY USE FORCE.

The State argues *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005), and *State v. Redwine*, 72 Wn. App. 625, 865 P.2d 552 (1994),[3] are "of no assistance to Kayser." Resp. Br. at 25-26. The holdings in those cases, however, demonstrate why defense counsel's decision in this case was unreasonable and below the standard of practice for a reasonable defense lawyer under these facts.

They also demonstrate how the State misconstrues the law on defense of property.

a. *Redwine* and *Bland* Establish the Right to An Instruction on Defense of Property With These Facts.

The State argues counsel's decision to withdraw defense of property was reasonable after the trial court decided to instruct the jury on the definition of "malicious," because "neither [Mr.

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[3] Appellant never represented that the trial court in this case found the evidence was insufficient to support a defense of property instruction. Resp. Br. at 26. His discussion of *State v. Redwine*, App. Br. at 34-36, established that the evidence in this case was sufficient to support an instruction on defense of property. His appeal of the failure to instruct turns on counsel's ineffective. App. Br. at 31-41.

Kayser nor Ms. Young] really expressed concern Adams was **maliciously damaging or threatening to damage their property**." Resp. Br. at 26. The State later refers to "the lack of evidence to suggest Adams trespassed maliciously or threatened damage to any of Kayser's property," and that defense of property "required more than proving simple trespass." Resp. Br. at 28.

The law does not require malicious damage, threats to damage property, or more than simple trespass in order to use force to defend one's property. *Redwine, supra.* The State cites no authority to support such an interpretation. To the contrary, this Court has held: "under certain circumstances necessary force may include putting a trespasser in fear of physical harm." *Bland*, 128 Wn. App. at 517-18.

The State acknowledges Mr. Kayser believed Mr. Adams was trespassing on his property. Resp. Br. at 27; Ex. 105. *Redwine*'s facts directly parallel those here. A process server did not leave Mr. Redwine's property after completing service, despite being told to leave. Mr. Redwine got his shotgun to emphasize his demand that he leave. On

the State's cross-appeal, the Court of Appeals held these facts were sufficient to give an instruction on defense of property and defense of others. *Redwine*, 72 Wn. App. at 630-31; App. Br. at 34-36.

Redwine thus established that failure to leave promptly was a malicious interference with property that justified an instruction on lawful use of force. Indeed, the State does not now argue Mr. Kayser was not entitled to the instruction.

b. Defense of Property Was Entirely Consistent With, But Required Less Evidence Than, Self-Defense and Defense of Others.

The State characterizes defense of property as "an alternative, inconsistent defense." Resp. Br. at 28. But defense of property is not inconsistent with self-defense and defense of others.

In *Bland*, *supra*, Mr. Bland, a senior citizen, used a gun to chase a woman, previously invited into his home, out of his home after he told her to leave and she would not go. This Court held the law did not require him to be in fear for his own safety in order to use force to persuade her to leave. "In defense of property, there is no requirement to fear injury to oneself." *Bland*, 128 Wn. App. at 513.

The State greatly ridicules and minimizes Mr. Kayser's and Ms. Young's testimony that they feared for their personal safety, suggesting the jury would not believe this defense because Mr. Kayser did not include it in his memorandum of the incident. Resp. Br. at 23; Ex. 105 (Appendix A).

But, as the State admits, Mr. Kayser's memorandum referred to Mr. Adams trespassing on his property. Thus the jury likely would have put more credence in the defense consistent with the limited thoughts he expressed immediately after the event.

Defense of property did not defeat self-defense or defense of others. It did not require evidence of danger to oneself or others. It was a theory completely consistent with self-defense, and required less evidence to establish -- evidence already in this record.

c. There Was No Advantage to Relying Solely on Self-Defense Instead of Also Presenting Defense of Property.

Despite its summary dismissal of self-defense evidence as "incredible," Resp. Br. at 23, the State nonetheless argues the "self-defense, defense of others theory" was "the stronger theory" than defense of property. Resp. Br. at 26.

This argument is unreasonable because the State relies on an inaccurate analysis of what defense of property requires: that Mr. Adams "was maliciously damaging or threatening to damage [Mr. Kayser's] property." Resp. Br. at 26, 28. To the extent defense counsel made the same decision, it was equally unreasonable.

Defense counsel argued Mr. Kayser told Mr. Adams to leave, and he didn't go, he reached into a metal container. Mr. Kayser ran and got his gun, returned, and Mr. Adams was still there. "He counts again the guy doesn't move, so he shoots in the air. And he used no more force than necessary." RP 1097-98. This was the only evidence necessary to establish defense of property. *Redwine, supra*. Despite withdrawing the instruction, counsel still argued to the jury his client's right to defend his residence. RP 1100.

This record demonstrates that counsel did not strategically abandon this defense; he continued to argue it. Thus looking at counsel's perspective at the time of trial, it was unreasonable for him to withdraw the requested instruction. *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009).

2. *GRIER* AND *HASSAN* DO NOT CONTROL THIS CASE.

The State relies on *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011), and *State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009). Resp. Br. at 27-28. But those cases challenged counsel's decision not to propose instructions on lesser included offenses. The courts concluded they could not determine on direct appeal whether counsel's decision was deficient performance or a reasonable tactical decision.

This case is not analogous to the question of submitting instructions on lesser included offenses.

> A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but she also has more to gain if the strategy results in acquittal.

Grier, 171 Wn.2d at 39. Similarly,

> The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal.

Hassan, 151 Wn. App. at 218.

Unlike a lesser included, instructing on defense of property did not give the jury another

means of **convicting** Mr. Kayser of a crime. Instead, it gave the jury only another avenue to acquit him. It added an element the State had to disprove. It in no way detracted from self-defense or defense of his wife. It added a theory that required less evidence, different evidence, and for which he had presented sufficient evidence. There was no downside to avoid by instructing on this defense theory.

3. EVEN ON APPEAL, THE STATE FAILS TO ACCEPT ITS BURDEN TO PROVE THE ABSENCE OF SELF-DEFENSE.

In arguing sufficiency of the evidence, the State again, as it did by failing to propose an instruction on lawful use of force and again in closing argument to the jury, RP 1061, concludes it has proven all the elements -- without considering its obligation to prove the absence of self-defense. *See* Resp. Br. at 18-21. "This testimony and the evidence below therefore sufficiently supports each element of the jury verdict beyond a reasonable doubt." Resp. Br. at 21. And again: "Here, the 'to convict' instruction included all of the essential elements of the charged crime." Resp. Br. at 31.

This recurring omission by the State demonstrates the critical need to include this essential element in the to-convict instruction. When the State itself functions as though it had no duty to disprove this element, this Court cannot expect jurors to conclude differently. This is especially true when they have the "duty to return a verdict of guilty" without considering lawful use of force.

The State also relies on an incorrect analysis of the defense burden for self-defense: The defense need only present "some evidence" of self-defense, *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993), not a "preponderance of the evidence." Resp. Br. at 31.

The State also refers to circumstantial evidence that "apprehension of fear" [sic] may be inferred from a pointed firearm. Resp. Br. at 21. But the essential element is **intent to cause** apprehension or fear. *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995). And, as in *Byrd*, the disputed fact was whether Mr. Kayser pointed the gun at Mr. Adams -- which Mr. Adams himself denied seeing. RP 271.

4. DUE PROCESS REQUIRES THE "TO CONVICT" INSTRUCTION TO INCLUDE EVERY ELEMENT THAT MUST BE PROVEN, INCLUDING THE ABSENCE OF SELF-DEFENSE.

a. This Case Presents a Manifest Constitutional Error.

Due process requires a jury's verdict to be based on finding every essential element of the charge proven beyond a reasonable doubt. U.S. Const., amends. 5, 14; Const., art. I, §§ 3, 22; App. Br. at 42-44 and cases there cited.

The State argues that Mr. Kayser challenges "definitional instructions." Resp. Br. at 37. But he challenges the to-convict elements instruction and the definition of the charged crime itself, not just definitions of tangential legal terms. AOE 4-5; App. Br. at 1; CP 29-30.

Here instruction No. 5 required the jury to return a verdict of guilty without requiring it to find Mr. Kayser "intentionally" assaulted Mr. Adams, and without finding the State had disproved self-defense and defense of property.

Requiring a jury to return a guilty verdict without finding every element proven beyond a reasonable doubt is a manifest constitutional error that can be raised for the first time on appeal.

RAP 2.5. The practical and identifiable consequence was that the instructions relieved the State of its burden of proving two essential elements of the crime: intent and unlawful force. The element of intent is particularly crucial where the complaining witness acknowledged he "didn't know" if the gun was "intentionally" pointed at him. RP 351.

b. The State Relies on Inapplicable Legal Authority.

The State erroneously cites *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), to claim "the term 'assault' itself encapsulates the element of intent." Resp. Br. at 33. *Scott* held where the to-convict instruction included the element of knowledge, the court was not required to instruct on the definition of that term. It did not involve omitting essential elements from the to-convict instruction.

The State confuses the adequacy of a charging document with the sufficiency of jury instructions. Resp. Br. at 33-34.[4] It does not distinguish *State*

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[4] Citing *State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992); *State v. Hopper*, 118 Wn.2d 151, 822 P.2d 775 (1992); and *State v. Taylor*, 140 Wn.2d 229, 242, 996 P.2d 571 (2000), all reviewing the

v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996): "The standard for clarity in a jury instruction is higher than for a statute." App. Br. at 46 n. 21.

c. The Two Missing Elements Are Interdependent and So Magnify the Error.

The State suggests the jury could understand the analysis of *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984), that self-defense negates intent, and therefore if it found an intentional assault it rejected self-defense. Resp. Br. at 32. This argument is particularly inapplicable where the to-convict instruction omitted the element of intent as well as unlawful force.

The *Acosta* Court explained its analysis that the "intent" element of assault incorporates the lack of self-defense, which imposes on the State the burden of proving its absence. Resp. Br. at 10-11. But jury instructions must be more explicit than an appellate opinion's analysis.

> The jury should be informed in some **unambiguous way** that the State must prove absence of self-defense beyond a reasonable doubt. The defendant is entitled to a correct statement of the

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adequacy of the charging document.

> law, and should not be forced "*to argue* to the jury that the State [bears] the burden of proving absence of self-defense." ... Rather, the defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is.

Acosta, 101 Wn.2d at 621-22 (bold emphasis added; Court's italics; citation omitted). The *Acosta* Court also did not address the "duty to return a verdict of guilty" at the end of the to-convict instruction.

Instruction No. 5, standing alone, is unambiguous. But Instruction No. 13 conflicts completely with No. 5's duty to return a verdict of guilty without regard to Instruction 13.

> When instructions are inconsistent, it is the duty of the reviewing court to determine whether "the jury was misled as to its function and responsibilities under the law" by that inconsistency. ... [W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.

State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977); *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). These inconsistent instructions require this Court to reverse the conviction and remand for a new trial.

The *Acosta* Court's analysis is instructive. As here, *Acosta* was a case of second degree assault. As here, the court gave a "to convict" instruction with the essential elements -- without stating the need for "unlawful force" or the absence of self-defense.

> As noted above, the trial court instructed that "to convict" the defendant, the jury must find (1) that the defendant "knowingly assaulted" the victim; (2) that the acts occurred in Clark County; and either (3) that the assault was committed with intent to rape, or (4) that the defendant "knowingly inflicted grievous bodily harm". ... The court further instructed the jury that the State must prove beyond a reasonable doubt elements 1 and 2, and either element 3 or 4.

Acosta, 101 Wn.2d at 622. As here,

> Immediately following this, the court instructed:
>
> > It is a complete defense to the charge of second degree assault that the defendant acted in self-defense.
> >
> > If you find from the evidence, and in accordance with these instructions that the defendant acted in self-defense, then it shall be your duty to return a verdict of not guilty.

Id. at 622-23. The Court found these instructions required reversal.

> We believe that these instructions, when read together, did not adequately

> inform the jury that the State must prove absence of self-defense. ... **[T]he jury was not told in the "to convict" instruction that the force used must be unlawful, wrongful, or without justification or excuse.**

Acosta, 101 Wn.2d at 623 (emphasis added). As in *Acosta*, here the jury was not told in the "to convict" instruction that the assault must be committed with unlawful force.

In *Acosta*, the Supreme Court reversed.

> The jury should be informed in some **unambiguous** way that the State must prove absence of self-defense beyond a reasonable doubt.

Id. at 621 (emphasis added).

Acosta may endorse having a separate instruction, **in addition to** the "to convict" instruction that clearly imposes on the State the burden of proving the absence of self-defense. But without including this mandatory element of unlawful force in the "to convict" instruction, a separate instruction conflicts with its duty to return a verdict of guilty.

Given this ambiguity, this internal inconsistency in the instructions on the essential element of unlawful use of force, this Court should reverse this conviction and remand for a new trial.

d. Instructions "Read As a Whole" Do Not Correct Instructions that Omit an Element.

The State repeatedly claims the jury instructions must be considered "in their entirety" or "as a whole." Resp. Br. at 28-31. These phrases, however, do not simply mean reducing the instructions to a pile of words or sentences with no relationship to one another, from which either party may pick and choose phrases from which to argue their theories of the case. The instructions are language with meaning, placed in specific pages, with words that refer to and incorporate others. The "to convict" instruction in particular, is self-contained: it **requires** the jury to convict if it finds **each element listed there** is proven.

Our courts have long recognized the requirement that the "to convict" instruction include every "element" of the offense.

> The "to convict" instruction carries with it a special weight because the jury treats the instruction as a "yardstick" by which to measure a defendant's guilt or innocence. ...
>
> **We review the adequacy of a challenged "to convict" jury instruction de novo.** ... Though, as a general matter, "[j]ury instructions are sufficient if they are supported by

> substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law," ... and we review jury instructions "in the context of the instructions as a whole," ... **the reviewing court generally "may not rely on other instructions to supply the element missing from the 'to convict' instruction."**

State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005) (emphases added). *See* App. Br. at 42-44.

The State knows assault in the second degree requires the element of intent. It charged that element in the Information: "did intentionally assault another." CP 3; App. Br. at 41-42. Yet the to-convict instruction did not include that element.

Here, Instruction No. 5 went beyond telling the jury it "could" convict appellant if it found all the listed elements; it told the jury it had a "duty to return a verdict of guilty." Instruction No. 5 referred to "assault" as an element, but did not include that the assault was intentional or done with "unlawful force." Instruction No. 6, which separately defined assault, similarly omitted "intentional." The instructions thus relieved the State of the burden of proving Mr. Thomas committed an intentional assault with unlawful force.

> 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.

State v. Fondren, 41 Wn. App. 17, 23, 701 P.2d 810 (1985); *see also Redwine*, *supra*, 72 Wn. App. at 628 ("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.")

f. *State v. Hoffman* Does Not Control This Case.[5]

The State relies on *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Resp. Br. at 32. *Hoffman* involved a charge of aggravated first degree murder and first degree assault. The Court concluded there was no prejudicial error to exclude the lack of self-defense from the "to convict" instruction for murder. The Court did not address the instructions either defining or setting out the

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[5] The State's reliance on *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988), is entirely misplaced. *Ng* involved the defense of duress to a murder charge, which the Court noted was not permitted but the State had not opposed. The Court expressly cautioned: "Our discussion is limited to the facts and law of this case." *Id.* at 40.

elements of assault; the appellant did not challenge the sufficiency of those instructions.

The Hoffman Court did not address the language instructing the jury it had a "duty to return a verdict of guilty" without considering self-defense. Not surprisingly, neither does the State address that language in its brief. But this Court must.

Other case law developments completely undercut the viability of *Hoffman*. Hoffman was convicted of killing and shooting at two police officers who were trying to arrest the defendants. Under *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997), decided six years later, the law does not permit self-defense in such a case. Thus any discussion of self-defense instructions is at most dictum.

The law of self-defense also has changed enormously in the nearly quarter-century since *Hoffman*, requiring that its holding be reconsidered. *See, e.g.*: *State v. Janes*, *supra*; *State v. LeFaber*, *supra*; *State v. Walden*, *supra*; *State v. Kyllo*, *supra*. And *State v. Mills*, *supra*, reaffirmed *State v. Emmanuel*, 42 Wn.2d 799, 819,

259 P.2d 845 (1953), which squarely conflicts with this language in *Hoffman*.

Hoffman, a murder case since undercut by authority on self-defense and due process, does not control this assault case.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse Mr. Kayser's conviction. It should dismiss it for insufficient evidence. The other errors require reversal and remand for a new trial.

DATED this 27th day of July, 2015.

LENELL NUSSBAUM, WSBA No. 11140

APPENDIX A

MEMORANDUM ON TRESPASSING INCIDENT

FROM: STEVEN L. KAYSER
DATE: FEBRUARY 18, 2010

Today at approximately 4:00PM, Gloria called me from the house to tell me she was very concerned that someone was snooping around our buildings and wanted to know if I had an appointment with someone. I was in my office in the warehouse.

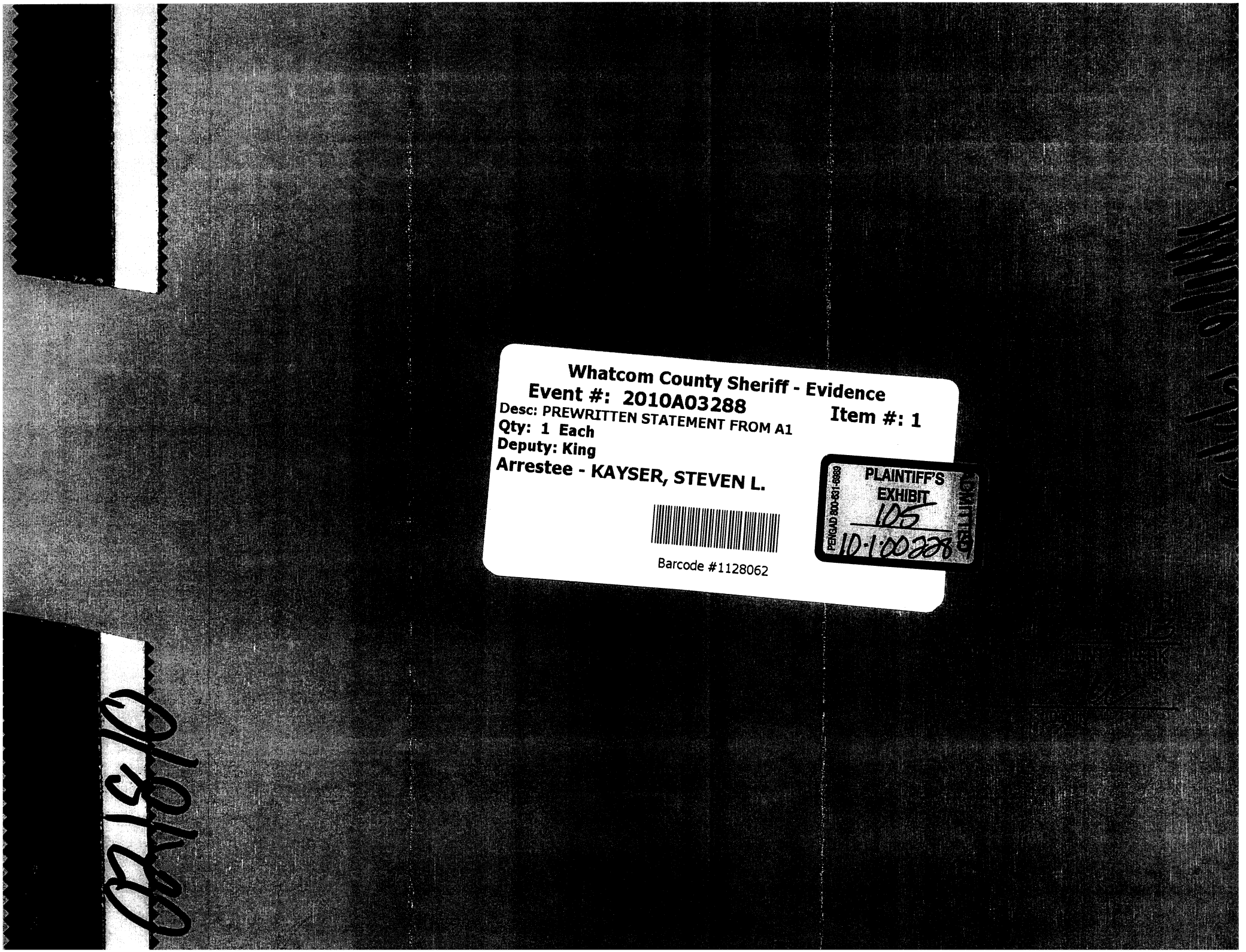
I walked outside by the corner of the garage and Gloria looked afraid and was standing several feet from a large man with long flowing hair. I walked up within several feet of the man and asked what he wanted and told him he was trespassing. He did not speak his name and never did provide his name. The man asked me if I was Steven Kayser and I answered I was and I again told him he was trespassing. He moved toward me and handed me something. I backed away without looking at what he had handed me.

At that point, I again told him he was trespassing and told him he had 5 seconds to get off my property and away from my wife. He did not leave but instead asked me to sign something he had and he started opening a clipboard-type of metal container and started reaching for something. At that point I again told him he had the count of five to get off my property and counted to five. I then told him I was going to my office for my shotgun and turned away from him and walked quickly to get my shotgun as I was concerned that he was standing too close to Gloria.

I got my shotgun and quickly walked back to the corner of the garage where he was standing and he had not left but was still standing too close, about 5ft from Gloria. I again told him he had the count of five to get off my property. He still did not move. I counted to five.

I then fired one warning round from my shotgun in the air. At that point, the man started walking slowly back to his car, which he had parked about 30ft from the yellow entrance gates, a clear indication that he had read the No Trespassing Signs.

He halted at his car and I fired another warning shot into the air. He got into his car and made a gesture at me with something in his hand. I fired a third warning shot while he was still on my property and he then accelerated his car and squealed his tires backing out onto the road and left.


Whatcom County Sheriff - Evidence
Event #: 2010A03288
Item #: 1
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Qty: 1 Each
Deputy: King
Arrestee - KAYSER, STEVEN L.
Barcode #1128062
PLAINTIFF'S EXHIBIT
105
10-1-00228
DEFENDANT'S EXHIBIT
0818

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:

Ms. 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.

7·27·2015 - SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST