No. 46705-4-II

Pierce County No. 05-1-00143-9

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

STATE OF WASHINGTON,

Respondent,

v.

DEMARCUS D. GEORGE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald E. Culpepper, trial judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Dmarcus George was deprived of his Article I, § 3 and 14th Amendment due process rights to a fair trial.

2. The prosecutors committed egregious, ill-intentioned, serious and highly prejudicial misconduct which compels reversal.

3. The trial judge erred and George's rights to a fair trial were further violated by the repeated introduction of extremely prejudicial ER 404(b) evidence of "propensity" over defense objection.

4. The trial court erred in repeatedly denying George's motions for mistrial despite the commission of errors so serious that no fair trial could have been the result.

5. George was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

6. Appellant assigns error to Jury Instruction 24, the "justifiable homicide" instruction, as well as Instructions 25 and 26, all of which relieved the prosecution of the full weight of its burden and set an improperly high standard for self-defense for the felony murder count. CP 369-72.[1]

7. George was deprived of his Article 1, § 9 and Fifth Amendment rights to be free from double jeopardy.

8. Resentencing is required in order to apply the principles of State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process mandates that criminal proceedings comport with notions of fundamental fairness and ensures the accused the right to a fair trial.

   a. At trial and in closing, over defense objection, the prosecutors a) violated orders excluding evidence that there had been a previous trial, b) repeatedly elicited testimony and asked questions designed to

[1]Pursuant to RAP 10.4(c), a copy of the instructions are attached hereto as Appendix B.

inflame the jurors passions and prejudices against the defendant, d) repeatedly misled the jury about the facts and law, and e) displayed an inflammatory "PowerPoint" visual display highlighting improper evidence and misstating the evidence and the law.

Is there more than a reasonable probability that the repeated acts of misconduct affected the verdict when all of the misconduct went directly to the only issue in the case - whether George had acted in self-defense?

b. At trial, the jury heard the opinion of one witness that the defendant was a "monster," testimony that a non-testifying witness had linked George to a shooting a week before, testimony from a second witness that another person had made the same claim and evidence that George had committed the prior crime of unlawfully possessing a gun as a juvenile years before.

Did the admission of all of this improper "propensity" evidence compel reversal especially where the prosecution relied on it as evidence of guilt?

c. Did the trial court err and abuse its discretion in failing to grant a new trial even though the errors were so corrosive to the jury's ability to fairly decide the case that no fair trial could be the result?

2. Because claim of self-defense negates the mental element of the charge, the proper standard of self-defense for felony murder is that which negates the mental element of the underlying felony - in this case, assault in the first- or second-degree.

Were the jury instructions on self-defense improper and did they fail to make the relevant legal standard manifestly clear to the average juror for Count II, the charge of second-degree felony murder, where they told the jury to use the self-defense standard applicable to the mental element of intent to kill even though that was not the standard which applied?

Further, was counsel prejudicially ineffective in both failing to object to the improper instructions applying the more

onerous standard and in failing to propose instructions which contained the proper standard for count II?

3. George was convicted of both second-degree intentional murder and second-degree felony murder based on the very same death. Although the sentencing court only imposed one sentence, it referred to the second count in the judgment and sentence and dismissed that count only "without prejudice." Were George's rights to be free from double jeopardy violated?

4. George was only 20 on the day of the crime. At the time of sentencing, it was generally believed that a sentencing court could not consider the defendant's youth as a mitigating factor and that State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), had so held. In O'Dell, supra, the state Supreme Court recently clarified that Ha'mim did not so hold.

   Is reversal and remand for resentencing required because O'Dell applies to this case and Mr. George's case involves serious questions regarding maturity and age and culpability under O'Dell?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Dmarcus George was charged by amended information with first-degree premeditated murder and second-degree felony murder with a predicate assault, all alleged with a firearm enhancement. CP 9-10; RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(b); RCW 9.94A.510; RCW 9.94A.530. Trial was held before the Honorable Judge Katherine M. Stolz on January 15, 22, 26-19, February 2-5, and 9-11, 2009, after which the jury acquitted George of first-degree murder, were "unable to agree" on a second-degree murder lesser included and convicted of first-degree

manslaughter for Count I, as well as of second-degree felony murder.[2] CP 45-50. George appealed and this Court reversed and remanded for a new trial. State v. George, 161 Wn. App. 86, 94, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011).

Upon remand, a second amended information was filed, charging second-degree intentional murder and second-degree felony murder with a first- or second-degree assault predicate, both with a firearm enhancement. CP 107-108. After multiple continuances and other pretrial proceedings from December of 2011 through August of 2014, a jury trial was held before the Honorable Judge Ronald E. Culpepper on August 11-14, 18-21, 25-28, and September 2-4, 2014.[3] The jury convicted as charged and, on September 19, 2014, the judge imposed a standard-range sentence. CP 338-41, S2RP 1-70. George appealed and this pleading follows. See CP 390-404.

2. Overview of testimony at trial

DMarcus George was just 20 years old in June of 2004 and was asleep in the back of Freddie McGrew's car when it stopped for gas. 24RP 43, 50. McGrew's girlfriend, Tamrah Dickman, then shook George awake, more frightened than George had ever seen her, saying "they're about to do something to" McGrew. 24RP 54-55. George looked out the

[2]The transcript from the first trial, prepared for the first appeal, was transferred to this appeal at George's behest. References to the record from the first trial are explained in Appendix A.

[3]References to the record from this second trial are explained in Appendix A.

window and saw McGrew walking out of the gas station store with a man following behind and another, a heavyset black guy, nearby. 24P 55, 59. He heard Dickman warn McGrew, "Fred, Fred, behind you" but it appeared McGrew did not hear and he kept gong to the car to start pumping gas. 24RP 54-60.

George saw the man following, later identified as Rickie Millender, approach McGrew from behind and come "right up on him" quickly. 24RP 61. Millender wanted answers about the violent street death of Millender's best female friend - a death Millender suspected McGrew was involved in or had knowledge about, and George heard Millender say "we need to talk" about the incident. 24RP 62. Millender's tone was very aggressive and heated and George could see that McGrew was now looking worried. 24RP 62. George also said that Millender grabbed his friend and seemed to be searching his midsection or something. 24RP 65.

McGrew was trying to walk to the pump but to George it appeared that Millender kept trying to block him and George heard Millender say, "you guys are not going to leave here, man," in a very aggressive tone. 24RP 110. George believed that meant Millender was going to retaliate for the death of his friend and what he thought was McGrew's involvement. 24RP 110. He described it as seeming "one of you guys are going to have to pay for this, one of you guys are going to have to die for my friend dying." 24RP 111. George was really scared and started to get

out the passenger side door to try to help his friend on the other side but suddenly the heavyset man was in the way. 24RP 66-67. That man, later identified at Isaiah Clark, started walking towards George and George testified that the man made a gesture with his hand around his waist that made George think the man had a weapon, so George stopped in his tracks. 24RP 70, 72.

McGrew started trying to get in the car and George could see from his expressions that McGrew was scared and really did not want to be there. 24RP 74. George testified that he could hear Millender say, "I told you guys, you guys are not going to leave here," saw the man physically trying to block his friend and trying to confront him still. 24RP 75-76. But McGrew seemed to be getting in so George turned away to get back in the car, relieved. Things then happened "really really fast." 24RP 75. Clark was suddenly behind George, who was partially back in the car, and George was struck in the back of his head with something George thought felt like a piece of metal. 24RP 77-78. George fell into the vehicle, wondering if he had been hit by a gun. 24RP 78.

Convinced he was going to die, feeling Clark's hand gripping on him as if to pull him out of the car, George said, he reached inside, pulled a gun he had under his coat, and pointed it in the direction of Clark. 24RP 79-80. He fired multiple times and shot Clark four times in rapid succession. 24RP 83. Clark died at the scene and George ended up fleeing the jurisdiction, eventually being brought back to the state several

years later.

Clark sustained four gunshot wounds. 16RP 500. One entrance wound was in the upper left back or shoulder and went through into the chest and the left lung. 16RP 502. Another entered the left arm on the back side and went through the left chest and out the right side of the body. 16RP 508. That was not a "contact" wound but there was "stippling" present, indicating some gun powder struck the skin because the gun was close enough. 16RP 508. A third one entered outside the left arm and left the arm near the armpit, going into the left chest and down through the body into the lung and spine. 16RP 509. That wound also had stippling. 16RP 509. The fourth wound entered the front of the chest on the right side, passed under the skin and reentered into the abdomen. 16RP 511-12. Any one of the shots could have occurred first or last and the forensic pathologist could not say whether the shots were fired in self-defense or whether Clark was involved in a fight at the time of the incident. 16RP 541.

There were many witnesses to the incident, some of whom supported George's self-defense claim, some of whom did not. It was confirmed that Clark was much bigger than George physically, built like a "linebacker" and so large that he looked like he was wearing football pads even though he was not. See 21RP 88-107. Some witnesses heard argument, some did not. Laura Devereaux Kitchen, a legal assistant at the Pierce County prosecutor's office, was at the gas station at the time. 18RP

617. She confirmed that, when she arrived, some people were being loud and she saw two men who seemed like they were going to fight. 18RP 622. She thought, however, that those two men came over to the pump behind her car and started facing each other with hands up saying like "[a]re we going to do this," but then there was a gun shot so they all "hit the ground." 18RP 622.

Kitchen got involved and, when she ran out of the gas station after telling the attendant to call police, she saw two people next to Clark, with one of them searching him. 18RP 627. In fact, they were trying to roll him over to check his front pockets. 18RP 631. The man said something like, "[f]uck yes, he has it," and Kitchen objected when they tried to turn him over. 18RP 26. The woman said something like "fuck you, bitch," and threatened that if Kitchen did not leave, what had happened to Clark would happen to Kitchen. 18RP 27, 42.

Monica Johnson was also there to get gas and she heard someone arguing as she headed inside to pay. 18RP 46. The arguing got louder and she could hear it from inside and then she saw someone outside with a gun. 18RP 49. The men who were arguing were a man pumping gas and a man standing in front of him. 18RP 53. The man pumping gas seemed "mellow" and was not saying a lot, but the other man was moving around a lot, talking a lot and had his hands moving. 18RP 54-55. Johnson testified that she heard him say "[y]ou gonna just do me like that?" with an escalating voice. 18RP 54-55. Johnson said she then saw the man exit the

vehicle with the gun drawn and another man shot. 18RP 61.

In her statement given just after the incident, she told police she did not see the gun when the first shots were fired, because the victim was standing in front of the shooter and blocking her view. 18RP 137. But maintained, years later at trial, that she had seen his face and the gun and she would never forget the flash from the gun. 18RP 140-41.

D. ARGUMENT

1. THE TRIAL COURT PROCEEDINGS WERE SO PERVADED BY ERROR AND MISCONDUCT THAT REVERSAL IS REQUIRED

Both the state and federal due process clauses mandate that criminal prosecutions comport with prevailing notions of fundamental fairness. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); 14TH Amend.; Art. 1, § 3. In addition, while there is no right to a "perfect trial," the accused is entitled to trial which is fair. See State v. Miles, 73 Wn.2d 67 70, 436 P.2d 198 (1968).

Although both trials in this case were extremely long, there was really only one issue in dispute - whether Dmarcus George acted in self-defense when he fired that gun and killed Isaiah Clark that June day. In the appeal from the first trial, this Court reversed, because George was denied his due process rights to properly present that defense to the jury. George, 172 Wn. App. at 100-101. In this appeal, reversal is also required, because the second trial was far from the fundamentally fair trial to which George was constitutionally entitled. Instead, the entire proceeding was

tainted by the prosecution's repeated, serious and ill-intentioned misconduct and other errors, all of which directly impacted the jury's ability to fairly and impartially decide the case.

a. Relevant facts

The facts regarding these issues are woven throughout trial and do not summarize neatly into categories, so the entire trial and all of those errors must be reviewed at once.

At the beginning of trial, the parties discussed how to refer to to the prior trial, and the prosecutor admitted that "if you call it a prior trial, it's not great for the jury to hear." 16RP 612-13. The judge reserved ruling but a little later, it was agreed that they would use the phrase, "prior hearing." 16RP 612-13; 18RP 5.

Prior to trial, counsel moved under ER 404(b) to exclude evidence "regarding possible involvement in other crimes," "character" evidence and the possession of firearms which had not resulted in charges. CP 159-74; 191-207. At trial, Johnson first testified, over defense objection, about her own emotional reaction to seeing the gun, after which she volunteered, "I'll never forget the look on his face." 18RP 63. The prosecutor asked what the look was and Johnson said, "[i]t was a very menacing" look. 18RP 63. When counsel objected to "that opinion, conclusion" and that it was "improper demeanor testimony," the court overruled. 18RP 63. Counsel continued to object to no avail, and the prosecutor then prompted the witness to explain what she meant when she said the look was

"menacing." 18RP 63-64. Johnson then declared, "[t]here was no fear on the face. It was more - - it was just a nonchalant. It was - - it was a monster. It was nonchalant, like it was nothing to it. I'll never forget it." 18RP 64. Counsel's objection and request to strike were denied. 18RP 64.

Later, with the jury out, when counsel moved for a mistrial, the prosecutor said it was "fair game" that the witness had made the statement, because George was claiming self-defense and acting like he was innocent and Johnson's opinion somehow rebutted that claim. 18RP 83. While concerned that the "monster" comment was "kind of unfortunate," the court denied the motion and noted that the comment had not been really elicited but rather volunteered. 18RP 84.

A few moments later, Johnson was allowed to testify over defense objections that the man going through Clark's pockets had said, "[t]his is the same guys who shot my home boys a certain time ago, a week ago." 18RP 94. The judge then excused the jury sua sponte, and counsel again moved for a mistrial. 18RP 97. While she did not believe that the prosecutor had intentionally elicited the statement, she said, the testimony could not be cured and clearly was so unfairly prejudicial and improper "404(b)" evidence and a "bell that can't be unrung." 18RP 98. The prosecutor tried to minimize the impact, conceding that there was no evidence George was involved in that earlier shooting but saying the jury was going to hear that Millender was there to talk to McGrew about

information on the shooting death of one of Millender's friends anyway and would assume that was what the comment was about. 18RP 99-100.

After a break, the parties spent time talking about a "curative" instruction the prosecutor had proposed, but counsel continued to urge that mistrial was required. 18RP 100-111. She also argued that this evidence was effectively evidence that George had the "propensity" for being "trigger happy and that he goes around and willy-nilly shoots people as recently as last week." 18RP 112. The court denied the mistrial motion and told the jury that they were to "disregard the last statement," that it might be "inaccurate," and that there was no evidence George participated in any shooting prior to that day. 18RP 116.

A short time later, when Clark's brother was testifying, counsel asked whether the man who told him that night that Clark had just been shot was "winded or excited," and the brother responded, "[h]e was upset, saying that **he had shot him like their other friend who had been shot before.**" 18RP 162-63 (emphasis added). The prosecutor moved to strike and the court told the jury to disregard the statement. 18RP 163.

Later, at trial, with the jury out, the prosecutor was discussing what he should be allowed to admit and he repeatedly referred to "what the defendant testified to in the prior trial." 24RP 96. The judge corrected him, "[h]earing." 24RP 96. The prosecutor then declared, "[w]ell, for our purposes it's a trial." 24RP 96.

With the jury in, the prosecutor started his cross-examination by

talking about how scary the situation was but "[t]hese type of events, though, were nothing new to Fred McGrew, were they? Yes or no." 24RP 99. George responded, "[t]he environment that we grew up in, things like this happened a lot." 24RP 99. The prosecutor then showed George what he said was his testimony "from the prior proceeding in this matter," and counsel objected that it was a "prior hearing, wasn't it?" 24RP 99-100. The court said, "[w]ell, he said "proceeding. Let's call it a hearing. So prior hearing in 2009." 24RP 100.

A few moments later, when cross-examining George, the prosecutor asked George if, when he "testified back in 2009," he was "under oath," knew it was important to tell the truth at the time and knew how serious the "stakes" were, after which George said that he was "nervous like in this situation right here" when he made the previous statement, then went on:

> I'm the only person up here being judged, being accused of something, and the only thing I wanted to do – - I didn't want to make it look that bad for about the victim's family, so I might have left things out.

24RP 116. At that point, the prosecutor told the court "this might be a good time for a motion outside the jury's presence." 24RP 116.

With the jury out, the prosecutor then argued that "[w]e've kind of been engaging in this charade with calling it a prior hearing," admitting that "twice at least" it had been referred to as a trial "inadvertently." 24RP 117. He moved to be allowed at that point to start calling it a prior trial, saying the jury needed to know that the "stakes" were "as serious in 2009 that you would testify truthfully and give just as complete a picture as you would

today." 24RP 117-18.

Counsel objected, noting she would have confronted and cross-examined all of the witnesses at trial much differently if the ruling had been that they were going to discuss the fact of the prior trial, but it was far too late as the trial was almost over. 24RP 118. She said "there's a big difference between having people testify that something is simply a prior proceeding than something that is going on in front of a jury to determine guilt or innocence." 24RP 118. She vehemently objected that "all of a sudden" it was being brought out "at truly the 11th hour that this was a criminal prosecution and there was obviously some kind of verdict five years ago" and the stakes are suddenly changed. 24RP 118-19.

The judge agreed:

> B]oth sides at the beginning of this trial said we would refer to this prior trial as a prior hearing and not use the word "trial." Both agreed. I'm not going to change it now with what would probably be the last witness of the trial. **We're now in, what the 12th day of this trial and we're going to change the ground rules? No, we're not.** It's a proceeding or hearing.

24RP 119 (emphasis added). The prosecutor backed off, not wanting to argue with the court, he said, and the judge told him not to and then brought the jury back in. 24RP 119.

One moment later, however, the prosecutor started questioning George about the crucial facts of what George had thought at the time of the crime, eliciting that it had appeared to George that Clark had a weapon in his hand when Clark was trying to grab him after Clark had knocked George down. 24RP 130. The prosecutor then engaged in the following

questioning:

A: Again, this is the weapon **you didn't mention at the prior trial, right?**

Q: Can you rephrase the question?

A: The weapon you're saying he had, now that you're saying he had, **you didn't say that at the prior trial?**

[COUNSEL]: Objection, Your Honor. I have a motion to make outside the presence of the jury.

THE COURT: Well, I'll hear that later.

[COUNSEL]; Your Honor, this is deliberate misconduct and counsel knows it.

THE COURT: I'm going to overrule the objection.

24RP 129-30. The prosecutor then referred to the "prior time you testified in '09" and continued on his theme. 24RP 129-30.

Once he was through, and the jury was out, counsel moved for a mistrial and also asked for sanctions. 24RP 141-43. She pointed out that it was only "[f]ive minutes after the Court instructed him specifically in response to his misconduct in referring to this as a trial" that the prosecutor had repeated it. 24RP 142-43. And she noted that the very experienced prosecutor had asked to be allowed to use the term, been specifically refused by the court and then had simply gone ahead and done it anyway, "not once but twice." 24RP 141-43.

The prosecutor claimed that his violations of the court's order just moments after the court had ruled were not "intentional" or "misconduct" but "simply a slip of the tongue in the heat of questioning." 24RP 143. He

tried to excuse it by saying he must have "had it on the brain subconsciously." 24RP 143. He also tried to minimize his acts, saying jurors were not "morons" and would already know there was a prior trial. 24RP 147.

Neither of the experienced prosecutors could think of a curative instruction that "wouldn't just highlight the problem" or "re-emphasize the point." 24RP 149.

After a brief break, the court denied the motion for mistrial. 24RP 149. The judge also denied the request for a curative instruction, but said "[i]t's unfortunate" that the comments had been made. 24RP 151. The judge renewed his ruling on the mistrial when counsel again moved for one the next day of trial. 25RP 5, 11-12.

That was the day of closing arguments. In initial closing, the prosecutor told the jury that the defendant's reasons for what he did were irrelevant, saying "[w]e don't care what the defendant says" about why he did it because he might not be a "reasonably prudent person." 25RP 72. He then told the jury policy reasons why, as a society, people should not be "engaging in self-defense every day," declaring that, "[w]e want the professionals to handle it," "[w]e want the police to respond" and decide whether to arrest, "[w]e want prosecutors to make charging decisions," and "[w]e want judges and juries to decide" whether someone was actually a danger, so that the person "accused of being a threat to have all the due process that's been afforded to this defendant." 25RP 73-74. Counsel's

objection that the argument was contrary to law was overruled. 25RP 74.

A moment later, the prosecutor talked about Johnson's having correctly picked George out of a montage as showing how good her memory was of the incident, saying it showed she could "accurately recall what happened that day[.]" 25RP 76. The prosecutor then went on:

> She also describes for you the look on the defendant's face as the shooting is happening. And, again, like I said before, are we to believe that she could identify his face but she didn't know what his face looked like, **the emotion on his face as he's shooting Isaiah's [sp] Clark?** What does she say? Here is her vantage point. Here is the photographs [sic] she viewed. **What does she say about the look on the defendant's face? "No fear in his face; nothing to it; at ease; menacing;" and "like a monster." These are the terms she used to describe the emotion and his state of mind as he's firing that gun. These are the expressions of a man who's murdering someone in cold blood. Nothing about fear here, nothing about him being attacked.**

25RP 77-78 (emphasis added).

Apparently at the same time, he projected a "PowerPoint" slide declaring "This is Not Self-Defense," citing Johnson. CP 316. A moment later a slide came up citing Johnson's claim of "[t[he look on defendant's face as he comes out of the car to shoot." CP 319. The next slide displayed a picture of the crime scene, the booking photo showing George, and the following words below:

The look on the defendant's face:

"No fear" **"At ease"**

"Like a monster"

"Nothing to it" **"Menacing"**

CP 320.[4]

Continuing on, the prosecutor referred to Millender not testifying but said that "thankfully we have testimony from 2009 under oath covering the same subject matter." 26RP 81. He also said that, regarding the defendant's credibility, by George's "own acknowledgment, when he testified, he was under oath; he understood how serious it was; he understood how serious - - -" at which point the court held a sidebar at counsel's objection and request. 26RP 89. When they returned, the prosecutor emphasized his theme that even knowing how serious it was, "the need to fully articulate everything that happened that day, understanding **the need to explain here's why I murdered this man, he[George] just leaves out the fact that the victim had a gun, the most important fact**." 26RP 89-90 (emphasis added). The following exchange then occurred:

> If there's a more important fact when you're claiming that you were justified in what you were doing, let's hear it.
>
> In 2009 he leaves out the most important fact. And why is that? **Because in 2009 his testimony was not self-defense. In 2009 - -**
>
> [COUNSEL]: Your Honor, I'm going to ask for a sidebar again. I ask for the instruction that I previously asked for. Counsel has opened the door about as wide as he can, and the curative instruction needs to be given to correct his misstatement of - -

[4]The exhibit containing the powerpoint does not include transitions or other techniques of emphasis which might have been used. See CP 307-337. A supplemental filing is being requested.

THE COURT: I'm going to deny the request for the curative instruction that we discussed earlier. I'll let Mr. Williams go on. I hope he'll maybe move on.

25RP 90-91. During this part of the prosecutor's argument, he projected a "PowerPoint" slide for the jury which provided "**Defendant's Testimony in 2009,**" used an equal sign with a slash mark through it, then "**Self Defense**." CP 335 (emphasis in original).

Once the prosecutor finished, with the jury out, counsel moved yet again for a mistrial. 25RP 97. She pointed out that the prosecutor had repeatedly violated the prohibition on referring to the previous trial as a "trial" as soon as George took the stand, and then again, in closing, emphasized that in 2009 it was "the most important statement the defendant would ever make and he didn't say this." 25RP 98.

Counsel was especially concerned with the prosecutor's "deliberate attempts to mislead the jury" by declaring that George had not claimed self-defense in the first trial, as the entire reason the case was being retried was because the prosecutor prevented the jury from hearing a self-defense instruction and George had been precluded from fulling raising that claim at that trial. 25RP 99-100. And counsel pointed out that the misstatement of the crucial fact of whether George had raised self-defense at the previous trial was so prejudicial as to deny George "at the 11th hour, a fair trial," because there was no way to cure the extreme damage which had been done. 25RP 100-101.

The prosecutor minimized the issue, saying he could have just relied

on statements of George saying that when he testified in 2009 his life was on the line. 25RP 102-103. Next, the prosecutor declared, "I did not say that the defendant **didn't claim it was self defense in 2009.**" 25RP 103 (emphasis added). Instead, he claimed, he just said that one important fact had been omitted, but "never said anything about the defendant claiming in 2009 that this wasn't an issue of self-defense." 25RP 103.

Counsel pointed out that the only time anyone would be testifying about or claiming self-defense would be at a trial where they were defending against a conviction. 25RP 104-105. And again, she noted that the prosecutor had told the jury that George had not claimed self-defense at the previous trial, which was "flat out wrong" and a deliberate attempt to mislead the jury. 25RP 99. The court was not sure what the prosecutor had said but denied the mistrial motion and refused to give a curative instruction which would have told the jury that the case was back for retrial because of the self-defense instruction issue. 25RP 106.

When the parties came back, counsel renewed her motion, pointing out the PowerPoint slide that said "2009 does not equal self-defense" and had been displayed to the jury during the offending remarks. 25RP 107. The prosecutor then claimed that the point of the slide was that George's "2009 testimony did not equal *justifiable* self-defense." 25RP 108 (emphasis added). Through the discussions, the court continued to believe that the prosecutor had not really said that George "didn't claim self-defense in 2009 and that now he's claiming it," preferring to think the prosecutor was

only saying the "facts in 2009 didn't establish self-defense." 25RP 109. The judge admitted he might be wrong in his understanding of the argument and also said the jury might believe something different. 25RP 109.

Counsel asked to be allowed to reopen and put George on the stand to establish what had actually been said and claimed at the first trial but the court just told her she could do her own PowerPoint "if you think those are so powerful to the jurors." 25RP 110.

The next day, counsel renewed the motion, this time armed with the actual transcript showing that the prosecutor had, in fact, declared to the jury that George had left out "the most important fact" in his testimony in 2009, and that this was "[b]ecause in 2009 his testimony **was not self-defense.**" 25RP 112-13 (emphasis added). She pointed out that the prosecutor had presented as fact "something that he knows is just false," in violation of his duties as a quasi-judicial officer, and that making such a "gross misrepresentation of what happened in the last trial" was "misconduct of the highest order." 25RP 113-14.

In addition, counsel noted, not only was the prosecution well aware that self-defense had been the claim at the prior trial, it was also aware that the defense had been precluded from fully exploring the facts and evidence regarding self-defense at the first trial, because the court had held no self-defense claim could be made and the prosecutors had objected repeatedly to defense efforts to go into relevant evidence. 25RP 117.

The prosecutor again complained he had not said anything wrong, that defense counsel was "misunderstanding" and that what he had said was "in 2009, the facts he presented through his testimony did not establish justifiable self-defense." 25RP 115-16. He again repeated, despite what the transcript showed, "I didn't say he didn't claim self-defense." 25RP 115-16. Counsel maintained, given the PowerPoint and the transcript supporting her, that the prosecutor had explicitly told the jury that George's testimony in 2009 "was not self-defense" and the only way that could be read was to convey that he had not claimed self-defense in the first trial but was raising it for the first time at this trial. 25RP 117-18.

The judge denied the motion, refused to allow counsel to tell the jury that George was not allowed to present the claim of self-defense to the jury, and told counsel she could say George had testified about self-defense in 2009 but not raise anything about the Court of Appeals decision. 25RP 120.

In rebuttal closing argument, the second prosecutor described the felony murder charge as existing "to protect people from criminals who commit crimes, armed with dangerous weapons" by making them "strictly liable." 25RP 169. She then went on:

> Dmarcus George hung out with his friend, Freddie McGrew, and Freddie McGrew attracted trouble. Many times when he was out with Freddie McGrew, his life was put in a dangerous situation and that was his expectation: "People are going to try to shoot a me when I'm with Freddie McGrew because it's happened before."
>
> Maybe he even thinks that everybody else is armed with a gun because he's armed with a gun. That's his expectation.

25RP 171. Counsel objected, said the argument suggested "404(b) evidence and impermissible inferences about Mr. George's other behavior" and needed to be "stricken." 25RP 171. In response, the judge said, "[w]ell, it's an inference from the evidence that can be drawn," and counsel again objected, "[i]t's an inference of ER 404(b) evidence and it's improper." 25RP 171. The court overruled the objection.

A few minutes later, the prosecutor told the jury that, in 2009, George had said, "I didn't see a gun," but "[w]hat you heard from him in this trial is 'I perceived a gun'" and "there was "considerable difference" between those claims. 25RP 175. Counsel objected to the misstatement and said George did not say he saw a gun in this trial, either, but the objection was overruled. 25RP 175.

The prosecutor then told the jury that "either he's lying in 2009 or he's lying, and I submit to you he's lying now," that George had changed his claims at this trial to show fear of great personal injury in order to try to fit self-defense and that he could not do that without changing his testimony to claim he had seen a gun, because "**[u]nless you have him [Grant] armed with a gun, you don't have the risk of severe pain and suffering**" required to claim self-defense. 25RP 176 (emphasis added). Counsel's objection to the "misstatement of the law" was overruled. 25RP 176.

When the prosecutor finished her rebuttal and the jury was out, counsel moved, yet again, for a mistrial. 25RP 108. She raised the prosecutor's declarations about inadmissible 404(b) evidence talking about George

being used to being involved in violence and carrying a gun on those prior occasions as evidence to disprove self-defense. 25RP 180.

Counsel also asked for a mistrial based on the prosecutor's declarations in rebuttal which she said were "serious and egregious misstatements of the law." 25RP 181. She argued that George's due process rights to a fair trial were thoroughly violated, once again, when the prosecutor said the only way to be authorized to use "lethal self-defense" was to prove that Clark had a firearm, or that "there has to be some injury against the slayer. . .that is more than a knock on the head." 25RP 181.

The court denied the motions, unconvinced that the prosecutor had "intentionally" or "negligently" misstated the law. 25RP 183. It also denied a similar motion for arrest of judgment and new trial at sentencing. S2RP 1-70.

b. The egregious, ill-intentioned misconduct and improper "propensity" evidence and arguments would compel reversal standing alone but together completely deprived George of a fair trial

There is no way that Mr. George received a fair trial below. Indeed, the sheer amount and scope of prosecutorial misconduct was so egregious and prejudicial that reversal would be required on that basis alone. But that misconduct was repeatedly compounded with the introduction of such corrosive, prejudicial "propensity" evidence. Taken together, the scope, magnitude and complete pervasiveness of all of the misconduct and prejudicial evidence was so corrosive and complete that it ensured that no jurors could possibly have fairly determined the only real issue in the case -

whether the prosecution met its burden of proving, beyond a reasonable doubt, that George did not act with self-defense.

First, the extent and nature of the misconduct in this case it, to be blunt, staggering. In general, prosecutors are unlike other attorney and enjoy special status as "quasi-judicial officers." See State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Along with the status, however, comes responsibility, including the duty to ensure that a defendant receives a constitutionally fair trial and to seek a verdict free of prejudice, based on reason and law. See, State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

A prosecutor must act in seeking justice instead of making himself a "partisan" who is trying to "win" a conviction at all costs." See State v. Rivers, 96 Wn. App. 672, 674, 981 P.2d 16 (1999). Like every other advocate, prosecutors have a duty "not to intentionally introduce prejudicial, inadmissible evidence." See State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 167 (2008). And it is without question that it is misconduct for a public prosecutor, with all the weight of his office behind him, to mislead the jury as to the relevant law, especially in a way which deprives a defendant of his rights, such as the due process right to have the prosecution disprove self-defense beyond a reasonable doubt. See, e.g.,

State v. Davenport, 100 Wn.2d 757, 763, 675 P.3d 1213 (1984).

In this case, the prosecutors fell far, far short of honoring these duties. They repeatedly misstated crucial law and facts on the only issue in the case - self-defense. Regarding the law, George did *not* have to prove that Clark had a gun in order to be able to use deadly force in self-defense, as the prosecutor declared. Indeed, as this Court noted in the original appeal, there did not actually have to be even a real threat of great bodily harm, "so long as a reasonable person in the defendant's situation could have believed that such threat was present." George, 161 Wn. App. at 97.

Further, it is not the law that "[w]e don't care what the defendant says" about why he fired the gun because the standard is only what a reasonable person would do (25RP 72); self-defense in fact *requires* consideration of not only objective facts but also the defendant's *subjective* beliefs, so that what he says about why he did it was, in fact, essential. See State v. Werner, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2011).

The jury's verdict turned on understanding the true law of self-defense, yet the experienced prosecutors here misstated that law in ways which seem, in hindsight, deliberately designed to ensure the jurors did not have the proper understanding of the actual law. Where, as here, there is an objection to misconduct below, reversal is required if, within reasonable probabilities, the misconduct could have affected the verdict. See State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). The misstatements of the law went directly to the only issue before the jury - the claim of self -

defense. Even standing alone, this misconduct would compel reversal.

But it was not alone. The prosecutors also made repeated, egregious misstatements of the facts most at issue and mislead the jury about the true evidence at the first trial. Over and over, the prosecutors hammered at the theme that George had somehow failed to claim self-defense at the first trial - even *telling the jury that in closing* and displaying a Power Point slide to that effect. And the prosecutors repeatedly told the jury that George should be found guilty and his claim of self-defense not believed because he had not truly claimed it in his first trial or made statements the state said he would have made then if the claims of self-defense were true.

This misconduct is more than troubling - it casts serious doubt on the integrity of the prosecutor's office. The record of the first trial exists. And the appeal occurred. See George, supra. Yet the prosecutors here clearly made the strategic decision to misstate the facts in an effort to win this trial - even though one of the prosecutors below had been at the first trial and *handled the appeal.*

In fact, at the first trial, George did not fail to make any mention of perceiving a gun, as the record makes abundantly clear. George said that he felt "a powerful blow" on the back left of his head which made George fall down, dizzy and "not very aware." 1RP 1071-72, 1093-94, 1224, 1226-27, 1233, 1287-92, 1324-25, 1327. He also explicitly said that, given how hard he was hit by Clark, he was sure Clark must have hit him "with something." 1RP 1288. While George testified that did not know for sure

if Clark had a gun, he specifically said he thought that Clark might, in fact, have a gun. 1RP 1341-42.

But even more, it was the rulings of the first trial judge *at the prosecution's behest* which prevented George from testifying fully about his fear of Clark and suspicion that there might be a gun at the first trial. For example, when discussing how Clark reacted when he saw that George now had a gun, George was precluded from saying that he perceived Clark's lack of fear as Clark acting "like he had one of his own" - i.e., a gun. 1RP 1235. The prosecution's objection was sustained and the judge then struck the declaration in front of the jury as "speculation." 1RP 1235. The court also sustained an objection as to "speculation" when George tried to refer to the reason that the men appeared to be there to confront McGrew, saying "[w]hat they came there for was really serious." 1RP 1324.

And in fact, the prosecutor repeatedly prevented Mr. George from expressing the full depth and scope of his fear of Clark during the first trial, objecting as to "speculation" over and over when trial counsel tried to ask about George's subjective belief. For example, the prosecutor objected when George was asked if he had seen either Clark or Millender with a gun and George said that, while he did not see a gun, he "knew somebody had something." 1RP 1339. The court sustained the objection and struck the last part of the answer as speculative. 1RP 1339. Counsel then tried to ask if George felt like someone was armed and the prosecutor objected that it

was "irrelevant and speculative what he was feeling," after which the court responded, "[h]e's testified he hasn't seen any gun." 1RP 1339.

Indeed, the first trial court's refusal to allow George to fully develop the record on George's fear of Clark and the others was specifically raised in George's first appeal as a violation of his constitutional rights to present a defense. See Brief of Appellant George in first appeal ("BOA"), at 2, 38-41. He argued that he was deprived of his right to present a defense when the trial court repeatedly sustained the prosecutor's objections to testimony from George about his fears that Clark, Millender and the man with them, the "white guy," were armed, and similar objections to Dickman's testimony about her fear. BOA at 2, 38-41.

And George had *tried* to testify about what Clark had said to George when he first approached - words that stopped George where he was and prevented him from going towards where his friend was being confronted by Millender, which would have further showed his fears. 1RP 1197-99. After that, the court admonished the witnesses that they were not allowed to testify as to "hearsay" or "what somebody else said," and the witnesses did not relate what was said in Millender's confrontation of McGrew, or Clark's confrontation of George when George tried to go to the back of the car. 1RP 1063, 1066-67, 1211-12, 1263, 1265.

Despite the fact that the prosecution knew that George had been precluded from fully developing the record on self-defense and fear of a gun *because of the prosecution's own acts*, the prosecutors then repeatedly told the jury that they should not believe George's self-defense claim now

because George *would* have raised *all* of the parts of that claim at the first trial if the claim was real. At the moment they were making that claim, the very same prosecutors were fully aware that it was their own motions which prevented him from fully testifying at the first trial. Yet they repeatedly misled the jury, telling the jury George *would have given that testimony if it were true*, even though George was not allowed to give the testimony because of the prosecution's own acts. And further, George did, in fact, talk about fears that Clark or one of the others had a gun at the first trial, to the extent that was allowed.

These repeated misstatements the law and facts are unbecoming of quasi-judicial officers and the duties they have to justice. Alone, the misstatements of the crucial facts would compel reversal because, again, those misstatements went to the only real issue before the jury in this case. Together with the misstatements of law, there is more than a reasonable probability that the verdict was affected, as all of the errors affected the ability of the jurors to fairly and impartially decide the case

But again, the misconduct did not stand alone. Entwined with it was the repeated misconduct of the prosecutors violating the court's order and making it clear *during George's testimony* that there was a previous trial. It is difficult to conceive how, after so many discussions and after the prosecutor specifically moved to be allowed to discuss the prior trial and *lost that ruling* that the two violations of that ruling which occurred immediately thereafter were somehow "inadvertent" or "slips of the tongue," as the prosecutor claimed. Regardless of the motive, the damage

was clearly done. And the trial was almost complete without counsel having the same opportunity to examine the witnesses as the prosecution suddenly enjoyed, because reference to the first trial was unexpectedly allowed. Yet George had the right to full and meaningful confrontation of the witnesses, which included cross-examination. See, e.g., State v. Price, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006).

But again, that was not the end of the misconduct and errors below. Over repeated objection, the jury heard completely improper, irrelevant ER 404(b) "propensity" evidence so prejudicial that, again, standing alone its admission would compel reversal. Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible unless the court first not only identifies the purpose for which the evidence will be admitted but also then finds that evidence "materially relevant to that purpose." State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The reason for these requirements is the highly prejudicial nature of such evidence and the need to limit its admission to those cases where it is determined to be necessary. See id.

Evidence such as that admitted in the case - that George was believed by Millender to have been involved in a shooting just a week before with his "guys," that George had been shot at before, that he was so "used" to violence that he would not be scared, and that he had possessed a gun in the past - is improper "propensity" evidence because it essentially tells the jury that the defendant is probably guilty of what he is charged with simply because of his "propensity" or "character," i.e., "who he is." See, e.g., State

v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994). Further, such evidence has such a strong emotional component that it is unlikely it can be erased even by curative instruction. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948).

Indeed, the Supreme Court has noted that such evidence is akin to "superglue" for jurors' minds, so likely is it to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is "by propensity" a probable perpetrator of the crime. Id.; see also, State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). That is why there are such stringent requirements before such evidence is admissible even when relevant. See Kilgore, 147 Wn.2d at 292; see, State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (must not just be "relevant" but in fact have "substantial probative value" to prove a necessary part of the state's case).

Here, the prosecution used this evidence just for that improper purpose. They emphasized that George carried a gun and had been shot at in the past, to make the point that George was so street-wise and used to violence that this incident would not have really caused him fear. They thus used his "propensity" or "character" to prove the essential element of its case that George was not acting in self-defense.

The prosecution's exploitation of Johnson's unsolicited declaration that George looked like a "monster" during the shooting is of special concern. One reason the trial court had not granted a mistrial after that

statement and other derogatory opinions from Johnson had come out was because it was not elicited by the prosecution itself. The court was concerned about the "unfortunate" comment but appeared to believe it was a one-time passing reference which would not repeat and thus no new trial was required. But then, in closing argument, the prosecution specifically included that objectionable material not only in passing, as part of their oral submissions, but *in the PowerPoint*, so that the use was planned, and drafted in advance. And just to make sure the jury would never forget that "monster" claim, they included in their oral statements but in emphasis, with a booking photo of George, the scene with bullet markers and apparent bloody rags, underlined, bolded and highlighted in its PowerPoint.

Our courts have condemned this same prosecutor's office for misconduct in exploiting PowerPoint presentations. See In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012), cert. denied, __ U.S. __ (2013); State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014). And for years, it has been well-recognized that visual images such as those displayed in a PowerPoint have an enduring, disproportionate impact on juries. See Belli, "Demonstrative Evidence: Seeing is Believing," Trial, July 1980 at 70-71 (visual images resonate with jurors in a deep way which "no amount of verbal description by itself could").

Indeed, more than 20 years ago caution was raised about the use of computer aids such as animations and Power Points in criminal justice. See Chatterjee, "Admitting Computer Animations: More Caution And A New Approach Are Needed," 62 Def. Couns. J. 34, 36 (1995). This is because

"juries remember 85 percent of what they see as opposed to only 15 percent of what they hear." Id. And it is well-settled that it is completely improper for a prosecutor to appeal to the passions and prejudices of the jury, thus inviting them to decide the case on improper grounds. Belgarde, 110 Wn2d at 507-509. The false declarations that George had not claimed self-defense or seeing a gun in the first trial and the "monster" slide were only cemented in the jury's mind by the use of the slides to ensure it.

Again, reversal would be required on this misconduct alone. Because counsel objected repeatedly at trial, this Court must reverse if it finds that there is simply a "substantial likelihood" that misconduct affected the verdict. See State v. Boehning, 127 Wn. App. 511, 513, 111 P.3d 899 (2005). It is almost impossible to imagine how the incredibly corrosive misstatements and inflammation of the jury's passions could not meet that relatively low standard.

Each of these errors, taken alone, would require reversal. The improperly admitted and exploited "character" evidence that George was involved in a prior shooting, that he was used to be shot at when with McGrew, that he had carried a weapon in the past, that Johnson's opinion was George looked like a "monster" at the time of the shooting. The prosecutors' violation of the ruling ordering the parties to refer only to the prior proceeding, coincidentally timed just when George was being cross-examined and then, unbelievably, repeated only moments after the prosecution lost a motion to reconsider that order. The deliberate misstatements of George's testimony at the previous trial when in fact he

had *tried* to discuss his fears of a gun but been precluded by the motions of the prosecutors themselves. The exhortation to the jury that George could not claim self-defense unless he put a gun in Clark's hand, misstating the crucial law. And the further misstatement that George's reasons for the shooting were irrelevant.

Counsel's repeated objections throughout trial and the repeated motions for mistrial make it clear how objectionable the misconduct and improper evidence was at the trial. Further, the cumulative effect of the misconduct and errors was so extreme that it deprived George of a fair trial. See, e.g., State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). There was no question that George shot Clark, or that Clark died. The only issue before the jury was whether he acted in self-defense. Over and over, the prosecutors committed misconduct which directly affected that question. Again and again, the jury heard improper ER 404(b) evidence which inflamed the jury against George. Any one of these errors had more than a reasonable probability of affecting the jury's verdict. Taken together, they were so pervasive, ill-intentioned and corrosive that yet again Mr. George was deprived of his state and federal constitutional rights to a fundamentally fair trial. Reversal is required.

2. THE JURY INSTRUCTIONS WERE CONSTITUTIONALLY INSUFFICIENT TO CONVEY THE PROSECUTION'S PROPER BURDEN OF PROOF OF SELF-DEFENSE FOR COUNT II AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Even if reversal and remand for a new trial were not already

required because of the extremely serious violations of George's due process rights, the pervasive misconduct and the highly prejudicial ER 404(b) evidence, reversal would still be required on Count II, the felony murder, because the jury instructions on self-defense were constitutionally insufficient for that count. Further, counsel was prejudicially ineffective in failing to object or propose proper instructions and proposing instructions which suffered from a similar error.

Both the state and federal due process clauses require the prosecution to bear the burden of proving "beyond a reasonable doubt. . . every fact necessary to constitute" the charged crime. State v. W.R., Jr., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a result, when there is a defense which simply excuses the relevant conduct, there is no due process concern. See W.R., Jr., 181 Wn.2d at 761-72. Where, however, a defense negates one of the elements of the offense, due process requires the burden of proof to remain with the state. See Dixon v. United States, 548 U.S. 1, 6, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006); W.R., Jr., 181 Wn.2d at 762. Put another way, the government may not shift the burden of proving a defense to the accused when that defense directly eliminates an element of the crime, because otherwise the defendant is being forced to effectively *disprove* part of the prosecution's case, in violation of due process. See, State v. Acosta, 101 Wn2d 612, 617, 683 P.2d 1069 (1984); see also, State v. Fry, 168 Wn.2d 1, 7, 228 P.3d 1 (2010) (distinguishing between defenses which negate an element and do not).

It is well-settled that self-defense negates the essential "mental" element of the crime against which the defense is leveled. Acosta, 101 Wn.2d at 619. As a result, to be sufficient, jury instructions on self-defense must make clear that the prosecution bears the burden of disproving it, beyond a reasonable doubt See, Werner, 170 Wn.2d at 336-37. Further, because of the crucial function of self-defense, jury instructions on that claim must make the proper legal standard "manifestly apparent to the average juror." State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quotations omitted)

In this case, the jury was properly instructed that the burden of proof rested with the prosecution and was "beyond a reasonable doubt." CP 369-72. But the jury instructions misstated the law and required a far higher perceived threat of harm than legally required for self-defense for the felony murder count.

The degree of threat required is not the same for every claim of self-defense. See, e.g., State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007). The force justified in self-defense is what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. State v. Bailey, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979). Self-defense is "defined by statute as a lawful act," so that it is "impossible for one who acts in self-defense to be aware of facts or circumstances 'described by a statute defining an offense.'" Acosta,101 Wn.2d at 617-18 (quotation omitted).

Because self-defense negates the mental element which the

prosecution is required by due process to prove, it is necessary to look at the *mens rea* of the relevant crime. And it is *not* the same every time there is a death and a resulting charge. See State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013). For felony murder, there is no separate *mens rea*. State v. Bryant, 65 Wn. App. 428, 828 P.2d 1121, review denied, 119 Wn.2d 1015 (1992). Instead, the felony murder scheme "substitutes the incidents surrounding certain felonies" for the mental state the prosecution would otherwise be required to prove for the death - such as premeditation or intent to kill. See State v. Craig, 82 Wn.2d 777, 781, 514 P.2d 151 (1973) . As a result, "[t]he state of mind necessary to prove felony murder is the same state of mind necessary to prove the underlying felony." State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984).

And this affects the standard of self-defense which will apply. For self-defense, the defendant must have subjectively feared that he was in imminent danger of a specific degree of harm, that belief must be objectively reasonable, and the defendant must not have exercised more force than reasonably necessary. Werner, 170 Wn.2d at 337-38. But the degree of force necessary and the harm which he had to perceive is different where, as here, he is accused of unintentional killing of another while in the course and furtherance of an assault. McCreven, 170 Wn. App. at 463-64; see State v. Slaughter, 143 Wn. App. 936, 942, 186 P.3d 1084, review denied, 164 Wn.2d 1033 (2008). In such cases, to prove guilt, the prosecution need only show that the defendant intentionally assaulted

the victim and either recklessly inflicted substantial bodily harm or assaulted the victim with a deadly weapon. McCreven, 180 Wn. App. at 465. The prosecution need not prove intent to cause death, or great personal injury, severe pain and suffering or serious physical injury in order to prove guilt; but the corollary is that the defendant need not *fear* such injuries or death in order to lawfully use force in self-defense. See Slaughter, 143 Wn. App. at 942.

Indeed, in closing in this case, the prosecution exploited this lesser burden of proof, pointing out that felony murder had "no intent to kill element" and all that had to be proven was first- or second-degree assault. 25RP 169-70.

For a person to act in self-defense in committing an assault, he must reasonably fear only injury. RCW 9A.16.020(4). Here, however, the jury instructions applied a far higher standard for self-defense. Instruction 24 provided the "justifiable homicide" instruction, as follows, in relevant part:

> It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the slayer and/or another when:
>
> 1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
>
> 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
>
> 3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into

> consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

CP 369. Instruction 25 defined "[g]reat personal injury as an injury "the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person." CP 370. Instruction 26, the "act on appearances" instruction, required the defendant to believe there was "actual danger of great personal injury[.]" CP 371.

These instructions were proper for the intentional murder charge. But nothing in them told the jury the proper burden and standard for self-defense for the felony murder. Thus, the jury was not properly instructed on the crucial law of self-defense on one of the two charges for which it ultimately found guilt.

Reversal is required. Where, as here, the verdict turns on which version of the incident the jury believes, the failure to properly instruct on self-defense clearly prejudices the defense. See, Werner, 170 Wn.2d at 337-38. Further, although the instruction give was proposed by the prosecution, counsel was ineffective in her handling of the issue, as she herself proposed and instruction which improperly conflated the burden of the prosecution for the intentional murder count and the count of felony murder as the same. See CP 276-304.

Counsel's act in proposing an instruction with the wrong standard for one of the counts and her failure to propose separate, proper instructions for Count II were ineffective. Both the Sixth Amendment and Article 1,

§22, guarantee the right to effective assistance of counsel. See State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Counsel is ineffective if her performance falls below an objective standard of reasonableness, given a strong presumption of effectiveness, and if that deficient performance prejudiced the defendant. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Regarding jury instructions, counsel is ineffective if she proposes instructions which misstate the law, especially if those instructions improperly lower the state's burden of proof. See State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009). Counsel is clearly ineffective in proposing an instruction which applies the higher, deadly force standards to a case where the felony in question is assault. See State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). This is especially true because the net effect is to decrease the State's burden to disprove self-defense, the only real issue in the case. 121 Wn. App. at 187.

It could not be a legitimate tactical decision to allow George to face a higher burden for his only defense, especially given the law. In addition to reversing based on the instructional error, this Court should also find that counsel's failure to object and her proposing of an instruction with the same error was ineffective assistance. Reversal of the felony murder conviction is required.

3. GEORGE'S RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED

Both the state and federal double jeopardy clauses protect against,

inter alia, multiple convictions or punishments for the same offense. See In re Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); Ball v. United States, 470 U.S. 856, 864-65, 105 S. Ct. 1668 , 84 L.Ed. 2d 740 (1985); Fifth Amend.; 14th Amend.; Art. I, § 9. When there are convictions for charges brought under two criminal statutes, double jeopardy prohibitions are violated if the two crimes constitute the "same offense." See Orange, 152 Wn.2d at 816. Further, the trial court is limited to imposing sentence on only one of the two such charges. Id. In this case, George's rights to be free from double jeopardy were violated.

At the outset, the issue is properly before the Court. A violation of the constitutional guarantee against double jeopardy is manifest constitutional error which may be raised for the first time on appeal. See State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

In general, principles of double jeopardy do not prohibit the state from prosecuting a defendant for alternative means of committing a crime. See State v. Fuller, 169 Wn. App. 797, 832, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006 (2013). But he cannot be subject to multiple punishments. Id. Nor can there be multiple convictions even if only one punishment is imposed. See State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

Here, George's rights to be free from double jeopardy were violated. In determining this issue, this Court applies de novo review. State v. Womac, 160 Wn.2d 643, 649-50, 160 P.3d 40 (2007).

Applying such review here, George's rights were violated. Both

counts I and count II were for the same act- the shooting death of Clark. At sentencing the prosecutor conceded that the convictions had to "merge" and the court could only impose sentence for one of the two convictions. SRP 3-4. But the prosecutor then relied on the fact of both convictions in arguing that the court should impose a high-end sentence, declaring that the jury had "spoken" and reminding the court that "[t]hey found this defendant guilty both of felony murder and of intentional murder." SRP 8.

In addition, the judgment and sentence provided, in section 3.2, as follows:

> [X] The court DISMISSES without prejudice count II, the guilty verdict for Murder 2nd w/FASE . . .on double jeopardy grounds given the conviction for Count I.

CP 343. The trial court erred and George's rights to be free from double jeopardy were violated. It is not enough for the trial court to conditionally dismiss a lesser charge. Turner, 169 Wn.2d at 462. If a court holds the lesser guilty verdict "in abeyance. . .lest the. . .other conviction[] fail" on appeal, that amounts to retaining the validity of that lesser conviction - and that is a violation of double jeopardy protections. Turner, 169 Wn.2d at 463.

Put another way, a trial court violates double jeopardy by either "reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." Turner, 169 Wn.2d at 464. As the U.S. Supreme Court has made clear, retaining a separate conviction for the same crime is improper,

because that conviction "has potential adverse collateral consequences that may not be ignored." Ball, 470 U.S. at 858.

George's conviction for count II remains due to the dismissal "without prejudice" of the trial court below. His rights to be free from double jeopardy were violated, and this Court should so hold.

4. IN THE ALTERNATIVE, REVERSAL AND REMAND FOR RESENTENCING SHOULD BE ORDERED IN LIGHT OF O'DELL

Even if reversal and remand for a new trial was not required, reversal and remand for resentencing should be ordered, in light of O'Dell, supra, because Mr. George was just 20 years old when the crimes occurred and his youth and the situation would have supported requesting an exceptional sentence below the standard range under O'Dell, supra.

To understand why, it is necessary to discuss the cases upon which O'Dell relied and the case it "clarified," Ha'mim, supra. In Ha'mim, the Supreme Court appeared to reject a defendant's youth as a mitigating factor for the purposes of supporting an exceptional sentence below the standard range. 132 Wn.2d at 836-37. Ha'mim was consistent with then-holdings of the U.S. Supreme Court rejecting the idea that youth mattered when it came to sentencing. As recently as 1989, the U.S. Supreme Court had upheld imposing even the ultimate penalty of death on a juvenile, finding no difference for Eighth Amendment purposes when the defendant was adult or a youth. See, Stanford v. Kentucky, 492 U.S. 391, 109 S. Ct. 2969, 106 L. Ed.2d 306 (1989).

But in 2005 the U.S. Supreme Court started to recognize the flaws

in this reasoning and reversed the imposition of the death penalty on a juvenile, finding that "our society's evolving standards of decency" had led to "evidence of a national consensus against" such a punishment in *any* juvenile case. Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In reaching its conclusion, the Roper majority noted three "general differences" between juveniles and adults, which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" and thus subject to the death penalty. 543 U.S. at 569-70. The first difference was the "lack of maturity and an underdeveloped sense of responsibility" of youth, which "often result in impetuous and ill-considered actions and decisions." 543 U.S. at 569, quoting, Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). A second significant difference was the fact that "juveniles are more vulnerable" and "susceptible to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. This also made juveniles less culpable than adults who engaged in the same conduct, because of the relative lack of control and experience juveniles have over themselves and their own environment. Id. The third difference was that "the character of a juvenile is not as well formed as that of an adult," and a juvenile has personality traits which are "more transitory, less fixed." 543 U.S. at 569.

These differences led the Roper Court to conclude that juveniles do not fall among the "worst offenders." Id. Because of their susceptibility to "immature and irresponsible behavior," the Court noted, the "irresponsible"

conduct of a juvenile is not the same as adult. Id. Further, the Court noted, juveniles "still struggle to define their identity" so that it is "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id.

The Roper majority concluded that, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult" and that youth is a "mitigating factor" because its "signature qualities" can be "transient." Roper, 543 U.S. at 570 (quoting, Johnson, supra, 509 U.S. at 368). Further, the Court held, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity" - even when the result was another person's death. 543 U.S. at 571.

In 2010, the Court extended this same reasoning to a sentencing scheme mandating life without the possibility of parole for juveniles who commit non-homicide offenses. See Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court agreed with the concern in Roper that trial courts could be overwhelmed by the "brutality or cold-blooded nature of any particular crime" so that it would "overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require" a less serious punishment. Graham, 560 U.S. at 72. The Court also noted that the characteristics of juveniles could put them "at a significant disadvantage in criminal proceedings." Id.

Put simply, the Graham Court declared, "[a]n offender's age" is "relevant to the Eighth Amendment," so that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 560 U.S. at 76; see also, Martin Guggenheim, GRAHAM V. FLORIDA AND A JUVENILE'S RIGHT TO AGE-APPROPRIATE SENTENCING, 47 HARV. C.R.-C.L. L. REV. 457 (2012).

Then, in 2012, the U.S. Supreme Court extended the reasoning of Graham to cover cases in which a juvenile has been convicted of the most heinous of crimes - murder. Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012). In Miller, one defendant had been drinking and doing drugs with a man who fell asleep, after which the defendant robbed the sleeping man, used a baseball bat to beat the man to death after the man woke up, shouted he was "God" while he beat the victim and then later returned to try to set the home on fire to hide the crime. 132 S. Ct. at 2462-63. A juvenile court remanded him to adult court after considering things like his "mental maturity," and he was sentenced to life without the possibility of parole - a sentence upheld in the state appellate court as "not overly harsh when compared to the crime." 132 S. Ct. at 2463. The other 14-year old defendant had been involved in a robbery in which a man was shot and killed. 132 S. Ct. at 2461-62.

Despite the severity and even horrific nature of these crimes, the U.S. Supreme Court reversed imposition of automatic sentences of life without the possibility of parole. Just as in Graham, in Miller the majority focused on the basic "precept of justice that punishment for crime should

be graduated and proportioned" to both the offender and the offense." Miller, 132 S. Ct. at 2463, quoting, Roper, 543 U.S. at 560 (quoting, Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)).

The Court then relied on the "distinctive attributes of youth," the *inherent* "diminished culpability and greater prospects for reform" because of the transitory nature of youth and development and that the immaturity and attributes of juveniles such as recklessness, vulnerability to outside pressures, and impetuousness made their conduct less "blameworthy" than adults, as well as the fact that juveniles are unlikely to consider the consequences of their acts. Miller, 132 S. Ct. at 2465. Further, the Miller Court noted, "a child's character is not as 'well formed' as an adult's: his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]." Id., quoting, Roper, 543 U.S. at 570.

The Miller Court made it plain that it was not relying just on "what 'any parent knows'" but also on the same studies, research and "social science" that had convinced the Court to issue its rulings in Roper and Graham. Miller, 132 S. Ct. at 2462. Specifically, the Miller Court cited the studies in Roper establishing that a "relatively small proportion" of the adolescents who were involved in illegal activity were shown to later "'develop entrenched patterns of problem behavior.'" Id., quoting, Roper, 543 U.S. at 570. The Miller Court noted that the evidence of "science and social science" supporting Roper and Graham had actually "become even stronger" since those cases were decided. Miller, 132 S. Ct. at 2465 n. 5.

The Miller Court made it plain that the issues of juvenile development it had discussed and relied on in Graham extended beyond the specific facts of that case. Miller, 132 S. Ct. at 2466-69. Instead, the Miller Court noted, the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juveniles set forth in Graham were not "crime-specific." 132 S. Ct. at 2465.

In this case, Mr. George was only 20 when he woke up from the backseat of McGrew's car to the confrontation started by Millender and his friends. At the time of both sentencing hearings in this case, the controlling authority was Ha'mim, supra. And in that case, the Supreme Court had held that "the age of the defendant does not relate to the crime or the previous record of the defendant" and is not a mitigating factor. 132 Wn.2d at 847. Indeed, in Ha'mim, the Court found that it "borders on the absurd" to suggest that a defendant's youth might have had an effect on his ability to appreciate the wrongfulness of his acts. And the Court rejected the idea that it could "seriously be" claimed that a person's age had an effect on the maturity of their judgment. 132 Wn.2d at 847.

In O'Dell, supra, the majority recognized that its decision in Ha'mim contained "reasoning that some . . .have understood as absolutely barring any exceptional downward departure sentence below the range on the basis of youth." The Court expressly disavowed that reasoning, finding that it had been "thoroughly undermined by subsequent scientific developments." 183 Wn.2d at 364, 366-67.

The Court looked at all of the same theories and research relied on

by the U.S. Supreme Court in Miller and concluded that, in fact, relative youth *does* matter in sentencing of an adult. First, the Court found that Ha'mim was limited only to the question of whether age was a factor which, by itself, was sufficiently "substantial and compelling" to elevate the particular defendant's crimes above similar crimes of others. Id. Next, the Court held that our state's legislature *did not* necessarily consider youth when it set forth the standard-range sentences in our adult sentencing scheme, so that consideration of youth as a mitigator was not precluded, despite the broad language of Ha'mim. Id.

In reaching this conclusion, the Court declared, "[t]he legislature has determined that all defendants 18 and over are, *in general*, equally culpable for equivalent crimes." 183 Wn.2d 366-67 (emphasis in original). But the Court also found that the Legislature had not necessarily considered all that we knew about youth and the particular youth in question in each case, so that an individual's "particular vulnerabilities - for example, impulsivity, poor judgment, and susceptibility to outside influences" may be relevant and support imposition of an exceptional sentence below the standard range. Id.

Thus, under O'Dell, it is now clear that, to the extent that youth affects a person's culpability, it may be relied on in imposing and exceptional sentence below the standard range. At the time of both sentencing hearings in this case, however, that did not appear to be the law. Indeed, in the sentencing after the first trial, counsel threw out the idea that George should receive an "exceptional downward" but "at a minimum,"

asked for the low end. S1RP 9.

Reversal and remand for resentencing under O'Dell should be ordered even if a new trial is not. There is ample evidence that would support imposing an exceptional sentence below the standard range based on George's relative youth, life circumstances and their potential effect on his culpability. Even at the first sentencing, George expressed remorse and noted that he had been "young" and had clearly made a very serious mistake. S1RP 13. George's mom talked about how he had run away against her advice after the crime because "being a child, he acted as a child and he did things that a child would normally do." S1RP 15. George's family pastor talked about how as a youth he had never been an aggressor but would "get involved with people and be put in certain situations to where they just kind of go along with things." S1RP 16-17. And while the sentencing court clearly faulted George in the second sentencing for being at the gas station with a gun in the car, the pastor explained that this was unfortunately a common part of the life of a young black man growing up on the east side of Tacoma like George at the time, even though that did not make it "right." S1RP 16. She talked a little about the "lifetimes of tragedy" in the neighborhood where George had been raised, and "what happens with out young folks" in the African-American community. S1RP 17.

Further, there is ample evidence that the judges in both cases dismissed the idea that George's age and circumstances of youth had any relevance except maybe to make him *more* culpable. At the first

sentencing, the judge declared that "you don't shoot an unarmed man because he hit you," that "George was not a child" as he was 20 years old, that "young men have been making stupid choices since Cain killed Abel," and that "once you start to pick up a gun and you start hanging around with people you are hanging around with, you are headed for prison." S1RP 19. At the sentencing at the second trial, when counsel tried to argue that the court should impose a low-end sentence, the court was very focused on how George "apparently had a loaded gun in the car," and that "[a] lot of people go to the gas station without loaded guns in the car," and that compassion is a "real good thing" and there should be compassion for the survivors, too, and that the case was "a classic case" of a "senseless, completely senseless killing" of another African-American man, and that such men were "killed at a higher rate than their population." S2RP 28-29, 41.

Finally, there was also evidence to show that, in fact, George *had* changed as he had aged. He had no problems whatsoever - not a single infraction - in prison. S2RP 15; 33-34, 39. He was such a model prisoner in jail that he was asked to serve as a mediator by guards. S2RP 15-16. He had grown up. SRP 45-49.

Studies show that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities" develop entrenched patters which create ongoing problem behavior. See Lawrence Stenberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile*

Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). It is especially important the thoughtful, well-supported arguments are presented in cases where the crime is of the type which characterize the recklessness and irresponsibility inherent in child development, such as the tragic incident in this case. In imposing the sentence in this case, the judge said all he could do was sentence within the standard range, not impose lower or suspended sentences on "young, dumb males who do stupid, terrible things." S2RP 55. In fact, under O'Dell, the judge now has the authority to consider - and the defense the authority to present - evidence regarding how George's youth at the time, his personal situation and disabilities, and the transitory nature of the immaturity of youth in light of how our country's highest court has now held. Reversal and remand for resentencing should be granted even if remand for a new, fair trial were not required.

E. CONCLUSION

For the reasons stated herein, this Court should grant appellant relief.

DATED this 30th day of November, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EMAIL AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this Court's upload service at pcpatcecf@co.pierce.wa.us, and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Mr. Dmarcus D. George, DOC 870911, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 30th day of November 2015.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

APPENDIX A

The verbatim report of proceedings in this case consists of the proceedings from the first trial in 2009, which was transferred to this cause number at George's behest. Unfortunately, the record is not chronologically paginated or consistent throughout. In an effort at some clarity, the volumes will be referred to as follows:

First trial:

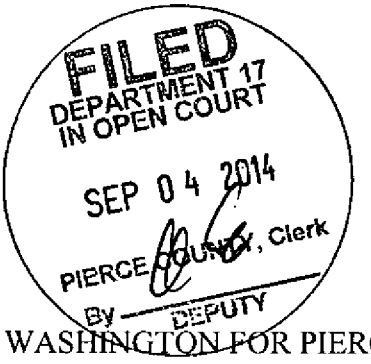
the chronologically paginated proceedings of January 15, 22, 27 and 29, February 2, 3, 4, 5, 9 and 10, 2009, as "1RP;"
January 26, 2009, as "2RP;"
the chronologically paginated proceedings of February 10 and 11 (closing), as "3RP;"
sentencing proceedings as "S1RP;"

Current trial:

December 7, 2011, as "5RP;"
June 19, 2012, as "6RP;"
September 9, 2012, as "7RP;"
January 22, 2013, as "8RP;"
January 28, 2013, as "9RP;"
April 15, 2013, as "10RP;"
September 18, 2013, as "11RP;"
the chronologically paginated volume containing October 1 and October 3, 2013, as "12RP;"
November 6, 2013, as "13RP;"
November 12, 2013, as "14RP;"
the chronologically paginated volume containing March 7, April 24 and May 2, 2014, as "15RP;"
the chronologically paginated volumes of August 11, 12, 13 and 14, 2014, as "16RP;"
August 18, 2014, as "17RP;"
August 19, 2014, as "18RP;"
August 20, 2014, as "19RP;"
August 21, 2014, as "20RP;"
August 25, 2014, as "21RP;"
August 26, 2014, as "22RP;"
August 27, 2014, as "23RP;"
August 28, 2014, as "24RP;"
the chronologically paginated proceedings of September 2, 3 and 4, 2014, as "25RP;"
sentencing on September 19, 2014, as "S2RP."

APPENDIX B

ORIGINAL



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DMARCUS DEWITT GEORGE, Defendant.	CAUSE NO. 05-1-00143-9

COURT'S INSTRUCTIONS TO THE JURY

DATED this 2nd day of September, 2014.

JUDGE

RONALD E. CULPEPPER

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room. Exhibits that have been admitted for illustrative purposes only will not go back to the jury with you.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 6

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

INSTRUCTION NO. 2

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

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 7

A person commits the crime of murder in the second degree when with intent to cause the death of another person, he causes the death of such person unless the killing is justifiable.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

To convict the defendant of the crime of murder in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 21, 2004, the defendant acted with intent to cause the death of Isaiah Clark;

(2) That Isaiah Clark died as a result of defendant's acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

The defendant is charged in Count I with murder in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt, that the defendant is guilty or are unable to agree, then you will consider whether the defendant is guilty of the lesser crime of manslaughter in the first degree.

INSTRUCTION NO. 11

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person unless the killing is justifiable.

INSTRUCTION NO. 12

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 13

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 21, 2004, the defendant engaged in reckless conduct;

(2) That Isaiah Clark died as a result of defendant's reckless acts;

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another with a firearm.

INSTRUCTION NO. 15

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

An assault is an intentional touching or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 18

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 19

A firearm, whether loaded or unloaded, is a deadly weapon.

INSTRUCTION NO. 20

A person also commits the crime of murder in the second degree when he commits either assault in the first degree or assault in the second degree, and in the course of and in furtherance of such crime he causes the death of a person other than one of the participants unless the killing is justifiable.

INSTRUCTION NO. 21

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a "participant" in that crime.

INSTRUCTION NO. 22

To convict the defendant of the crime of murder in the second degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 21, 2004, the defendant committed:

(a) assault in the first degree; or

(b) assault in the second degree; and

(2) That the defendant caused the death of Isaiah Clark in the course of and in furtherance of such crime or in immediate flight from such crime;

(3) That Isaiah Clark was not a participant in the crime of assault in the first degree or assault in the second degree; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (2), (3), (4), and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

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

INSTRUCTION NO. 23

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.

INSTRUCTION NO. 24

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

Homicide is justifiable when committed in the lawful defense of the slayer and/or another when:

1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

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

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

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

INSTRUCTION NO. 25

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

INSTRUCTION NO. 26

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

INSTRUCTION NO. 27

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

INSTRUCTION NO. 28

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 29

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

When completing the verdict forms for Count I, you will first consider the crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of murder in the second degree for Count I, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of manslaughter in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You will also be given special verdict forms for each of the charged offenses. If you find the defendant not guilty on any count, do not use the special verdict form for that count. If you find the defendant guilty on any count, you will then use the special verdict form for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must fill in the blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to the answer, you must leave the special verdict form blank.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The

presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DMARCUS DEWITT GEORGE, Defendant.	CAUSE NO. 05-1-00143-9 STATE'S POWERPOINT PRESENTATION USED IN CLOSING ARGUMENT

On September 2, 2014, the State gave its closing argument in this matter. The State's closing argument included a PowerPoint presentation. Attached to this cover sheet is a true and correct copy of the slides using during that presentation.

Dated this 2nd day of September, 2014.

MARK LINDQUIST
Pierce County Prosecuting Attorney

JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB # 35543

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

State v. Dmarcus George

Proof Beyond a Reasonable Doubt

- Doubts as to elements
- Doubts which are reasonable
- Think of it like a puzzle

Count I: Murder 2 (Intentional Murder)

Did the defendant act
intending to kill Isaiah Clark?

↓

When we act, we intend the natural and foreseeable consequences of our actions

↓

4 shots. Into his chest.
Defendant came out of the car ready to fire.

Lesser Crime for Count I:

Manslaughter 1

Count II: Murder 2 (Felony Murder)

Did the defendant commit Assault 1 or Assault 2, and did Isaiah Clark die?

Assault 2: Assault w/firearm

Assault 1: Assault w/firearm + intent for great bodily harm

Special Verdict Forms:

Use of a Firearm

Self Defense

Self Defense:

- What would a reasonably prudent person do?
  - Look at all the circumstances
  - Was it necessary?
  - Was the amount of force used proportional?

    i.e., death or great personal injury

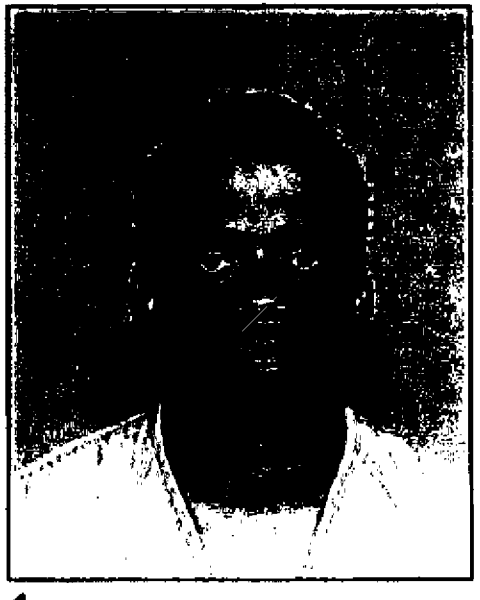
This was not Self Defense

- Monica Johnson

Pierce County Sheriff's Dept

Lineup ID: 27734

06 Jul 200



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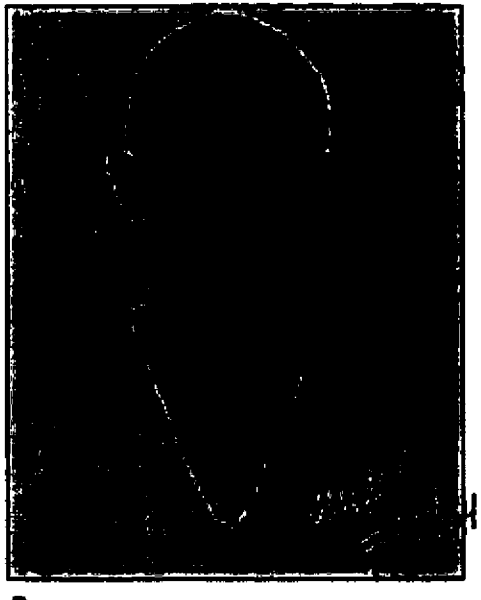

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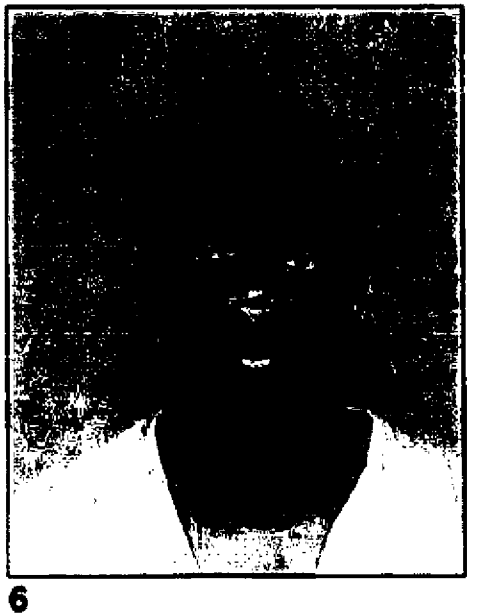

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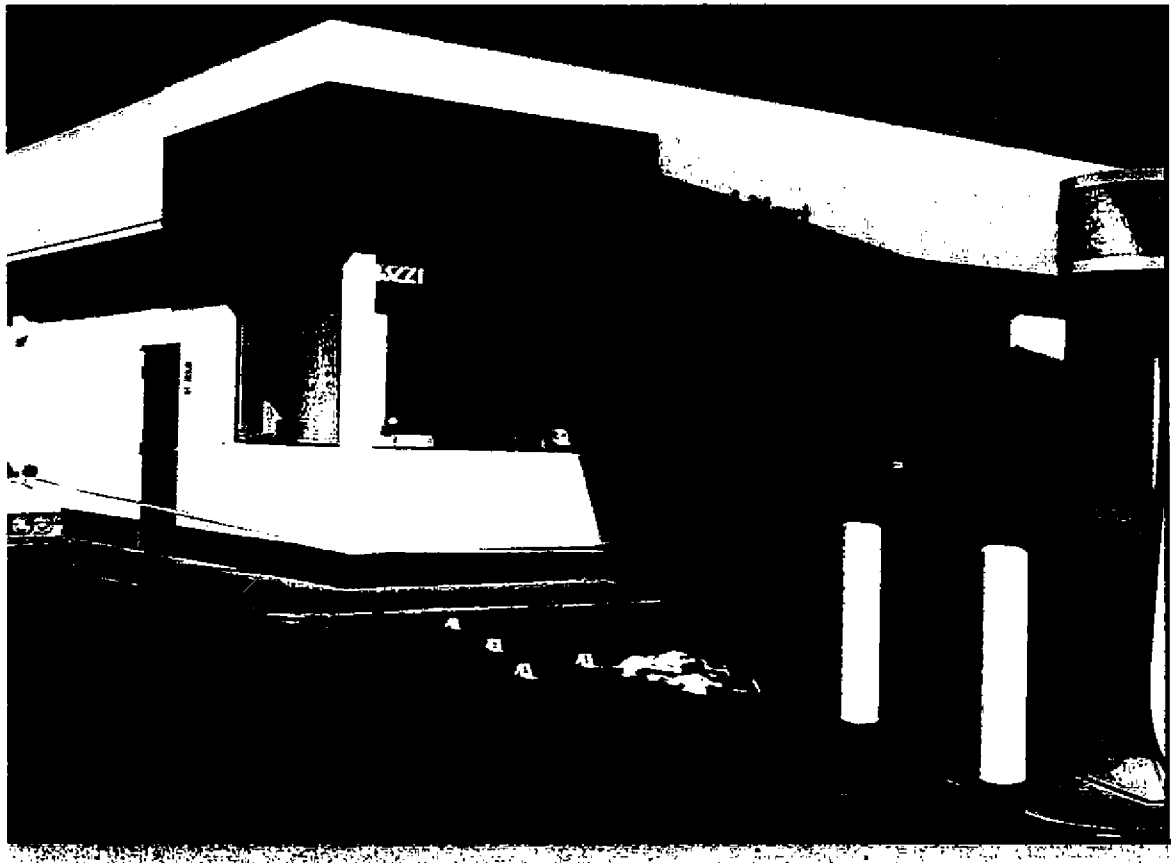
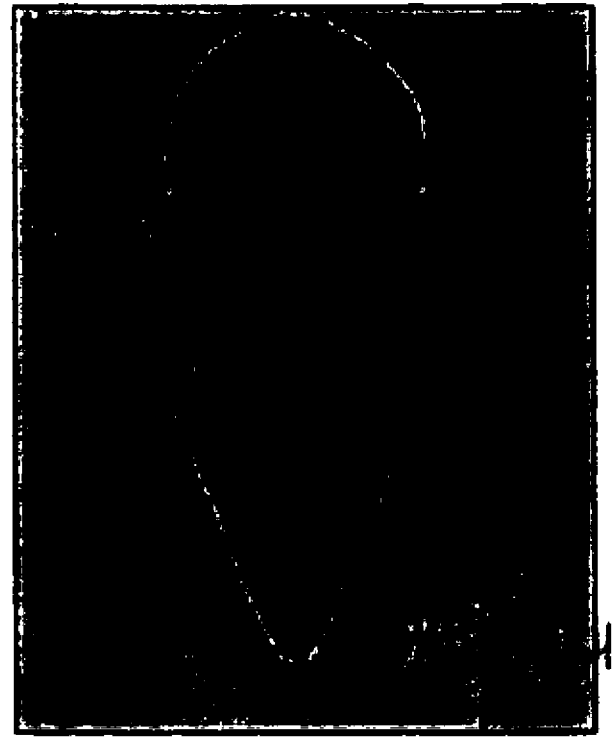
FOR OFFICIAL USE ONLY

Monica Johnson

- Isaiah just standing there
- Isaiah shrugs when asked what's going on
- Defendant in backseat
- She's in store for only seconds when:
  - Commotion gets louder
  - Defendant comes out of car w/gun in hand
- Isaiah not doing anything when he is shot
- Isaiah does not touch or act aggressively to anyone
- Isaiah shot & fell forward from where he was standing
- The look on defendant's face as he comes out of the car to shoot





3

The look on the defendant's face:

"No fear"

"At ease"

"Like a monster"

"Nothing to it"

"Menacing"

This was not Self Defense

- Monica Johnson
- Laura Devereaux

Laura Devereaux

- Confrontation did not appear serious:
  - Thought they were joking and goofing around at first
  - Not concerned for her safety until shots
- Isaiah standing to left of store doors
- Never saw Isaiah:
  - make an aggressive move
  - say anything
  - have anything in his hands
- Isaiah fell forward from where he was standing
- Male (McGrew): "Dog, what did you just do?"

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks
- Rickie Millender

Rickie Millender

- Isaiah standing towards back of car, standing by himself, not talking to anyone
- Isaiah not involved. This was not his "beef."
- Defendant reaching for a gun under the seat while he is confronting McGrew
- Sees defendant standing over Isaiah with gun

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks
- Rickie Millender
- Defendant flees the state

Consistent Points

- No one but defendant had weapon
- Confrontation between McGrew/Millender not alarming
- At worst, this was a fistfight between McGrew/Millender
- Isaiah a bystander
- Isaiah Clark:
  - never touched anyone
  - never an aggressive act
  - never said anything
- Defendant inexplicably comes out of backseat with gun
- Shooting immediate

Defense Case

- Dave Moore
- Tamrah Dickman
- Defendant

Dave Moore

- Never sees Defendant or Dickman outside car
- Never sees Clark touch Defendant or Dickman
- Isaiah not involved in confrontation
- Best he can say:
  - Isaiah appears angry at some point
  - Walks around backside of car
  - Leans into passenger side and shots ring out

Tamrah Dickman

June 23, 2004	2009 testimony	2014 testimony
Car w/2 black men. One confronted Fred.	→	Car filled w/black men looking to "jump" Fred
Isaiah just standing there	→ Isaiah just standing there	→ Isaiah aggressively posturing
Isaiah did not punch Defendant	→ Isaiah punches Defendant	→ Isaiah punches Defendant

Dan Brooks

- Memory not entirely accurate
- The confrontation:
  - "nothing to draw my senses"
  - "nothing to draw my attention"
- Isaiah Clark standing at trunk of car doing nothing when defendant comes out of backseat w/gun
- Hears female (Tamrah Dickman): "don't shoot him, don't shoot him"
- Isaiah never took any aggressive acts
- Sees Isaiah hit by 4 shots

Tamrah Dickman

- Story constantly evolves to benefit Defendant
- Her story v. Defendant's story
- Interview on June 23, 2004

Defendant

- 10 years to rehearse
- 5+ years to try again
- 2009 testimony v. Now

Defendant's Testimony In 2009

$\neq$

Self Defense

Defendant

- 10 years to rehearse
- 5+ years to try again
- 2009 testimony v. Now
- No one sees punch
- Clark standing over him when shots fired???
- Time to unjam gun
- No blood inside car
- Tamrah: "Don't shoot him"
- Fred: "Dog what did you just do?"
- Defendant has no injuries
- Defendant flees
- Defendant gets rid of evidence

RUSSELL SELK LAW OFFICES

November 30, 2015 - 4:57 PM

Transmittal Letter

Document Uploaded: 3-467054-Appellant's Brief~2.pdf

Case Name: State v. George

Court of Appeals Case Number: 46705-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Corrected, includes appendices

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

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pcpatcecf@co.pierce.wa.us