

66507-3

66507-3

NO. 66507-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

MERLIN BELL,

Appellant.

REC'D

NOV 29 2011

King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 30 PM 4:27

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural History</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	14
THE TRIAL COURT DENIED BELL HIS RIGHT TO PRESENT A DEFENSE WHEN IT PRECLUDED HIM FROM IMPEACHING STANLEY WITH PRIOR INCONSISTENT STATEMENTS.....	14
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Avendano-Lopez</u> 79 Wn. App. 706, 904 P.2d 324 (1995) <u>review denied</u> , 129 Wn.2d 1007 (1996)	16
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	16
<u>State v. Brush</u> 32 Wn. App. 445, 648 P.2d 897 (1982) <u>review denied</u> , 98 Wn.2d 1017 (1983)	16
<u>State v. Burke</u> 163 Wn.2d 204, 181 P.3d 1 (2008).....	17
<u>State v. Burri</u> 87 Wn.2d 175, 550 P.2d 507 (1976).....	15
<u>State v. Cheatam</u> 150 Wn.2d 626, 81 P.3d 830 (2003).....	14
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	15
<u>State v. Dixon</u> 159 Wn.2d 65, 147 P.3d 991 (2006).....	18
<u>State v. Gefeller</u> 76 Wn.2d 449, 458 P.2d 17 (1969).....	16
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	15, 16
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	7, 16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Reed</u> 101 Wn. App. 704, 6 P.3d 43 (2000).....	15
<u>State v. Thomas</u> 150 Wn.2d 821, 83 P.3d 970 (2004).....	14
 <u>FEDERAL CASES</u>	
<u>Chambers v. Mississippi</u> 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973).....	14
<u>Crane v. Kentucky</u> 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	14, 15, 19
<u>Washington v. Texas</u> 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).....	15
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 404	9
ER 607	17
ER 613	17, 18
K. Tegland, <u>5A Wash. Pract., Evidence</u> , (5th Ed. 2007)	17
RCW 9.41.040	1
RCW 9A.32.030	1
RCW 9A.32.050	1
U.S. Const. Amend. VI	14, 15
U.S. Const. Amend. XIV	14
Wash. Const. Art. 1, § 22.....	14, 15

A. ASSIGNMENT OF ERROR

The trial court denied appellant his right to present a defense by improperly limiting his cross-examination of a prosecution witness.

Issue Pertaining to Assignment of Error

Criminal defendants have a constitutional right to present relevant evidence at trial. Was appellant denied this right where the trial court denied him the opportunity to impeach a State's witness with prior inconsistent statements?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor charged appellant Merlin Bell with first and second degree murder, both with accompanying firearm sentence enhancement allegations, and second degree unlawful possession of a firearm. CP 68-69; RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a), (b); RCW 9.41.040(2)(a)(i). The charges were based on the shooting death of De'von Winston-Park (Park) on September 17, 2009, at the Federal Way Transit Center. CP 3-9.

Bell was found guilty of the firearm possession charge by bench trial on stipulated facts. 19RP¹ 4-22. A jury trial on the murder charges

¹ There are 30 volumes of verbatim report of proceedings referenced as follows; 1RP - 11/6/09; 2RP - six-volume consecutively paginated set for the dates of 3/11/10, 6/4/10, 7/26-29/10, 8/3-4/10, & 1/6/11; 3RP - 8/16/10; 4RP - 8/17/10; 5RP - 8/18/10; 6RP

was held July 26, 2010 through September 23, 2010, before the Honorable Cheryl Carey. 2RP-25RP. The jury convicted Bell of first degree manslaughter (as a lesser included offense of first degree murder) and second degree murder, and found both offenses were committed with a firearm. CP 131, 133, 265, 268; 25RP 48-52.

Bell was sentenced January 6, 2011. 2RP 580-622. The first degree manslaughter charge was vacated. CP 305; 2RP 615. The court imposed concurrent sentenced of 304 months for murder and 12 months for firearm possession. CP 283-912RP 620. Bell appeals. CP 292.

2. Substantive Facts

At about 3:20 pm on September 17, 2009, Bell and Park got into an altercation at the Federal Way Transit Center. 10RP 44. The altercation was witnesses by several bystanders and recorded by the Transit Center's video security system. Ex. 37; 6RP 46-74; 7RP113-22; 8RP 84-103; 9RP 63-68, 145-52; 10RP 16-34; 16RP 62-67; 19RP 106-24, 145-47; 22RP 42-66. The altercation concluded when Bell shot Park and then fled.

8/19/10; 7RP 8/23/10; 8RP - 8/24/20; 9RP - 8/25/10; 10RP - 8/26/10; 11RP - 8/30/10; 12RP - 8/31/10; 13RP - 9/1/10; 14RP - 9/2/10; 15RP - 9/7/10; 16RP - 9/8/10; 17RP - 9/9/10; 18RP - 9/13/10; 19RP - 9/14/10; 20RP - 9/15/10; 21RP - 9/16/10; 22RP - 9/20/10; 23RP 9/21/10; 24RP9/22/10; and 25RP 9/23/10.

Park died approximately an hour after the shooting. 17RP 125. At about the same time, Bell was arrested by Federal Way police within a few blocks of the Transit Center. 18RP 21. Bell gave a recorded statement to police, most of which was played for the jury. Ex. 227²; 18RP 26, 41.

Bell initially denied having anything to do with the shooting. Ex. 229 at 11-44. He eventually admitted, however, that he did shoot Park, but claimed it was done in self defense. Ex. 229 at 45-82. Bell explained how a few days before the shooting, Park and a couple of other people robbed him at gunpoint of his marijuana and a necklace, and Park told Bell that if he came around the area again Park would kill him. Ex. 229 at 45-47, 68, 80. When Bell saw Park at the Transit Center on September 17th, Park came at him with his backpack, claiming to have a gun and threatening to "blast" and "pop" Bell "right now." Ex. 229 at 48. When Bell saw Park reaching in his pack, he thought Park was going for a gun to shoot him with, so he hit Park and then shot him once before fleeing. Ex. 229 at 50-53, 55-57, 59. Bell admitted he never saw a weapon in Park's hand, but reacted the way he did because of what Park said during the armed robbery and his threats on September 17th to kill Bell "right now."

² A transcript of the police interview of Bell was provided to the jury to follow along with when the interview video was played. Ex. 229; 18RP 37, 40-41. Although not formally admitted, for convenience this brief cites to transcript instead of the video to refer to specific statements from the interview.

Ex. 229 at 60. Bell was not trying to kill Park, "just trying to back him up off me because he threatened that he was going to kill me so I know there were people watching, I just shot it once and ran." Ex. 229 at 62.

The Transit Center video of the incident, Exhibit 37, which has no audio, does not conflict with what Bell told police. Rather, it shows Park at the Center when Bell arrives on a bus, and Bell initially walking away from Park but looking back in his direction. A few moments later Bell returns in the company of another person to the area where Park is and then Park approaches Bell carrying a backpack,³ at which point it appears words are exchanged between Bell and Park. The video shows that when Park turning away from Bell and bends over, as if to reach into his backpack, Bell quickly moves towards Park, appears to strike him, and then quickly backs away while extending an arm, at which point he appears to shoot Park once and then flee the area.⁴ Ex. 37.

Several associates of Park were at the Transit Center when he got shot and testified at trial about what they claimed they saw. For example, Anthony Leonard routinely hung out with Park at the Transit Center. 6RP

³ The State noted in closing remarks that Ex. 37 shows Park holding his backpack in front of him during the altercation with Bell. 23RP 34.

⁴ Special software is required to play Ex. 37, which was unavailable to appellate counsel. Bell's trial counsel, however, provided appellate counsel with the opportunity to view the

9. He testified he was aware Bell had been robbed by Park and a couple of others a few days before Park died, and claimed Bell had made threats to kill Park and others as a result. 6RP 12-13, 33, 131-33. Leonard was at the Transit Center when Park was shot and had warned Park that Bell was present before the shooting occurred. 6RP 42, 143. According to Leonard, upon learning Bell was present, Park removed a gun from inside his backpack and put it in one of the mesh side pockets of his backpack wrapped in a bandanna. 6RP 46-48, 143-44; 22RP 49-50.

Consistent with Ex. 37, Leonard recalled Bell walking away from Park after arriving at the Transit Center, before returning to the area in the company of another person. 6RP 50, 142-43. Inconsistent with Ex. 37, however, Leonard claimed it was Bell who approached Park, and that Park did not have his backpack with him during the confrontation, claiming instead that Park left it on a bench behind him. 6RP 55, 62, 145, 147-48; see Ex. 37 (showing Park is holding his backpack in front of him during the altercation with Bell). Leonard claimed Bell was "flashing" a gun in his waistband and demanding that Park return the items taken from him during the robbery. 6RP 56-57, 150; 22RP 65.

exhibit on trial counsel's laptop computer, which does have the necessary software. The description of the video provided herein is based on counsel's notes of that viewing.

Leonard claimed he never heard Park make any threats to Bell. 6RP 62. He did recall, however, that when Park turned away from Bell, Bell pulled his gun from his waist and hit Park with it. 6RP 63-66. Park responded by pushing Bell back, at which point Bell aimed his gun at Park and shot him in the neck. 6RP 65-68. According to Leonard, after shooting Park, Bell said something like "that's what you get" before running away.⁵ 6RP 69, 157.

Leonard recalled that after the shooting, but before police arrived, Park's told one of his associates, Tyler Irwin, to take his backpack from the scene so police would not find the gun Park had. 6RP 81, 161; 7RP 40-41.

Consistent with Leonard's testimony, Irwin confirmed he was present when Bell shot Park, and that he took Park's backpack from the scene after the shooting. 8RP 75, 109, 170. Unlike Leonard, Irwin testified that it was Park who approached Bell, not the other way around. 8RP 84. Like Leonard however, Irwin incorrectly claimed Park did not have his pack with him when he confronted Bell, having left it on a bench. 8RP 88-89. Like Leonard, Irwin also said he never heard Park threaten

⁵ Leonard admitted the first time he ever claimed Bell told Park "that's what you get" was at trial. 7RP 45.

Bell during the altercation. 8RP 89, 97. Irwin claimed Park's gun was not in one of the mesh side pockets of the backpack wrapped in a bandanna, but instead in a zipped pocket. 8RP 111, 175-76.

Another associate of Park, Demaris Jones, was also at the Transit Center when Bell shot Park. Jones testified it was Park who confronted Bell. 7RP 113, 169. But like Leonard and Irwin, Jones erroneously claimed Park did not have his pack with him when he approached Bell, having left it on a bench behind him. 7RP 117-19, 171. According to Jones, Bell first hit and then shot Park as Park was reaching into his backpack. 7RP 118-20. Despite claiming to have been a "close" friend of Park's, Jones claimed he was unaware Park carried a gun. 7RP 62-63, 177.

The State called two witnesses not associated with Park who claimed to observe the altercation and eventual shooting; commuters Ferdaws Abbasi and Flora Black. According to Abbasi, Park and Bell initially engaged in a fistfight, with Park taking swings at Bell and Bell blocking the punches with his left hand. 9RP 147-48, 174. Abbasi recalled Park having a pack on his back the whole time, and that he never saw Park attempt to get anything out of the pack during the altercation. 9RP 154, 169-70.

According to Black, it was Park who confronted Bell by asking, "I hear you want to see me, nigger?" Bell replied by asking "'see you? See you?' Then he just turned around and let off fire. And then he said, 'that's seeing you, nigger.'" 10RP 21. Black also recalled Bell complaining that Park had robbed him the night before, which Park apparently denied. 10RP 34. Black initially testified Park had a backpack nearby that he never reached before being shot. 10RP 25. But later she claimed Park was wearing a backpack when shot. 10RP 33.

The only other witness who observed the encounter between Park and Bell was Bell's friend Kenneth Martin, who was the person standing to Bell's right when he shot Park. Ex. 37; 19RP 101. According to Martin, when Bell remarked to Park that "you didn't think you was gonna see me," Park replied, "fuck you, Nigga', I didn't -- I didn't jack you, Nigga'". 19RP 106-07. Park also told Bell, "I'll smoke you over that." 19RP 107. At some point, according to Martin, Bell and Park started to wrestle. 19RP 109, 114, 146-47. Martin implied Park may have started to retrieve something from his backpack during the altercation, but was never certain about that. 19RP 108-09, 112-14, 116-17.

One of the State's final witnesses was Jonathan Stanley, another associate of Park, who Stanley considered to be his best friend, and who

claimed at trial it was he, not Park, who robbed Bell at gunpoint several days before Park's death. 17RP 21, 23-30. Before Stanley testified, defense counsel inquired about the extent to which he would be allowed to cross examine Stanley about his relationship with Park and inconsistencies in Stanley's statements to police and the defense. 16RP 143-47, 153-57; see Exs.220 & 222 (Stanley's Statement to Detective Richard Kim on August 20, 2010) and Ex. 221 (Defense Interview of Stanley on September 2, 2010). Counsel argued the defense should have wide latitude to cross examine Stanley on his relationship and activities with Park and his current legal troubles in order to establish that he had a motive to protect Park's reputation and to present testimony favorable to the State. 16RP 155-57. In particular, defense counsel wanted to question Stanley about other robberies he and Park had engaged in, and on Park's apparent desire to be like Stanley such that he could brandish a gun and use it with confidence when the circumstances called for it. 16RP 143-45.

The court rejected the defense request to question Stanley about robberies other than the robbery of Bell, holding they constitute "improper [ER] 404(b) evidence." 16RP 162. The court stated the defense could "properly impeach Mr. Stanley as to his relationship with Mr. Bell and so on, so long as it is proper." 16RP 162. The court concluded however, that

absent the State making it relevant during direct examination, much of what the defense sought to introduce was not relevant to Bell's self defense claim. 16RP 163; 17RP 7-8.

On direct examination, Stanley explained he had known Park for about five years, having met in high school, and that they were best friends. 17RP 20-21. Stanley admitted his involvement in the armed robbery of marijuana from Bell a few days before Park was killed, claiming Park set it up and he carried it out on his own, then split the take with Park. 17RP 23-24, 26, 31.

On cross-examination, defense counsel asked Stanley whether he told police the last time he spoke to Bell was the day Park died. After Stanley replied "No", the State objected and requested a sidebar. 17RP 47. At the next break, defense counsel reiterated the sidebar discussion for the record, noting that prior to the side bar he had been about to ask Stanley about statements made to police on August 20, 2010, in which Stanley said the robbery of Bell occurred the same day Park was killed. 17RP 58-59. Defense counsel explained that the court initially indicated it would allow the defense to pursue that line of examination, but cautioned against revealing evidence of another unrelated robbery committed by Stanley and Park the day Park died, which had previously been excluded by the court.

17RP 59; see 2RP 332-43 (discussion and ruling excluding evidence of "Green incident"). The court subsequently directed the defense not to pursue this questioning until after the court and the parties had an opportunity to discuss it further. 17RP 59.

The State said it objected because it believed the defense was unfairly claiming Stanley said the robbery of Bell occurred the same day Park died. The State argued that a reasonable interpretation of the statement shows Stanley was simply confused. 17RP 59-61. According to the prosecutor, the defense wanted to create this false impression because in order to logically explain the apparent confusion, the State would have to open the door to otherwise inadmissible evidence about the other unrelated robbery. 17RP 60.

The court explained it sustained the State's objection in order to prevent evidence of the other robbery from being admitted. 17RP 61. The court stated it would allow the defense to impeach witnesses with inconsistent statements, but that it would not allow impeachment of Stanley with his inconsistent statements that the robbery of Bell occurred both four days before Park was shot and the same day Park was shot, because, as the State had argued, it was too likely to lead to testimony about evidence that had already been excluded. 17RP 61-62. The court

then inquired of defense counsel about how he expected to delve into this area with Stanley without violating the prior ruling. 17RP62-63.

Defense counsel explained he intended to ask whether Stanley told police he robbed Bell the day Park died, and that if Stanley said "no", he would confront him with his statement to police. Counsel argued that failing to question Stanley to highlight the inconsistencies in his statements was tantamount to ineffective assistance of counsel. 17RP 64-65. When the State replied that it could not find any inconsistencies in Stanley's statement, defense counsel read verbatim from Stanley's statement in which he states the robbery of Bell occurred the day Park was killed. 17RP 65-68; see Ex. 222 at 7-9.

The court stated it did not interpret Stanley's statements as inconsistent. 17RP 68. The court also opined that allowing the defense to question Stanley as proposed would force Stanley to respond in a manner that would violate the ruling excluding evidence of unrelated robberies. The court therefore refused to allow the defense to question Stanley about whether he told police he robbed Bell the same day Park died. 17RP 68-69.

In subsequent cross examination, Stanley claimed Park did not have a gun the day Bell was robbed. 17RP 71. Stanley admitted telling

the defense that Park always carried a gun, but claimed that was not the case the day Bell was robbed. 17RP 72; see Ex. 223 at 28-29 (Stanley recalls a conversation with Park in which Stanley said to Park, "You always got a gun every time I see you, ever since I've known you, you've always had a gun.").

In closing arguments the State described as the "linchpin" of Bell's self defense claim, that it was Park who threatened him at gunpoint and stole his marijuana and necklace days before Bell shot Park. 23RP 21. The State argued, however, that the evidence presented lent no support to this claim, and that without this, there was no basis for Bell to have had a reasonable belief that Park was about "to use deadly force against him on September 17th." 23RP 21-22. The State noted that the only two "living witnesses" to the robbery of Bell (besides Bell) were Stanley and one of Park's other associates and that they both claimed it was Stanley who brandished the gun, not Park. 23RP 21.

During the defense closing, counsel pointed out reasons for the jury to question Stanley's testimony about how Bell was robbed. For example, counsel noted Stanley's testimony was inconsistent with known facts, such as that phone records show it occurred on a Sunday rather than

a school day as claimed by Stanley. 23RP 61-64. Defense counsel urged the jury to question Stanley's credibility. 23RP 63.

C. ARGUMENT

THE TRIAL COURT DENIED BELL HIS RIGHT TO PRESENT A DEFENSE WHEN IT PRECLUDED HIM FROM IMPEACHING STANLEY WITH PRIOR INCONSISTENT STATEMENTS.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920

(1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), define the expanse of an accused's right to present evidence in his defense. The accused is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for exclusion. Darden, 145 Wn.2d at 612.

Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16; see also State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest."). For evidence with high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22."

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Hudlow, 99 Wn.2d at 16).

Notably, under the "open door" doctrine, otherwise inadmissible evidence may become relevant and admissible when the opposing party raises an issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008); see also State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982) (open door doctrine trumps evidentiary rules), review denied, 98 Wn.2d 1017 (1983). The doctrine preserves the fairness of proceedings by preventing a party from raising a subject to gain an advantage and then barring the other party from further inquiry. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)), review denied, 129 Wn.2d 1007 (1996).

The foundation for Bell's self defense claim was that Park had robbed him at gun point only days earlier and threatened to kill Bell if he ever showed up again. Ex. 229 at 45-47, 68, 80. Bell claimed that during the subsequent altercation at the Transit Center, Park claimed he had a gun and would "pop" Bell "right now." Ex. 229 at 48. Martin's testimony corroborated Bell's claim that Park was threatening to kill Bell. 19RP 107.

Fearing Park was retrieving a gun from his backpack to shoot Bell with, Bell first hit Park and then shot him before Park could shoot him. Ex. 229 at 62.

To counter this defense, the State introduced Stanley's testimony that it was he, and only he that carried out the armed robbery of Bell. If the jury believed Stanley, then Bell's self defense claim could not succeed because the primary basis for Bell's concern that Park was about to shoot him at the Transit Center -- being robbed by him at gun point days before - - would be invalid. As such, the State's case theory opened the door to any evidence impeaching Stanley's veracity. State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). Stanley's inconsistent statements to the police and to defense counsel did just that.

Either party may impeach a witness with a prior inconsistent statement. ER 607; ER 613. Such impeachment is allowed because the jury should be permitted to consider a witness's prior inconsistent statements in determining the witness's credibility. See generally, K. Tegland, 5A Wash. Pract., Evidence, §§ 613.3 613.10, at 581-83 (5th Ed. 2007). The value of impeachment depends on the jury's determination of whether a prior statement is inconsistent. "The effectiveness of impeachment by prior inconsistent statement depends largely upon the

skills and techniques of the cross-examiner." Tegland, *supra*, at § 613.9, p. 591.

ER 613 governs the admissibility of impeachment evidence involving a prior inconsistent statement. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). The rule provides that "[i]n examination of a witness concerning a prior statement made by the witness . . . the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel." ER 613(a). It provides further that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." ER 613(b).

This is precisely the procedure defense counsel sought engage in with regard to what Stanley told police on August 20, 2010, versus what he said at trial. 17RP 62-68. The trial court denied defense counsel this opportunity out of concern it would result in the introduction of evidence about the armed robbery Stanley and Park committed hours before Park was shot by Bell (the "Green incident"), which the court had previously excluded. 17RP 68. It appears to have rationalized this decision by concluding Stanley's testimony on direct, that he robbed Bell at gunpoint

several days before Park's death, was not inconsistent with his statement to police weeks earlier that the robbery and shooting occurred on the same day. 17RP 68. This was simply wrong.

As defense counsel set forth in the record, at least one reasonable interpretation of Stanley's statement to police was that the armed robbery of Bell was committed the same day Bell shot Park. 17RP 66-68 (quoting Ex. 223 at 8-9). Stanley testified during direct examination, however, that he robbed Bell four days before Bell shot Park. 17RP 23. Clearly, these two statements are inconsistent.

By calling Stanley to disprove Bell's claim Park robbed him at gunpoint, the State opened the door for the defense to impeach Stanley with prior inconsistent statements. Refusing to allow the defense to confront Stanley with his prior inconsistent statements deprived Bell "of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The court was apparently most concerned that allowing Bell to impeach Stanley with his prior inconsistent statements would necessitate the State introducing evidence about the previously excluded "Green incident" in order to try explain Stanley's apparent confusion. An instruction limiting the jury's use of the proposed impeachment evidence,

however, would have resolved that concern. Unfortunately, the trial court, with urging from the prosecutor, chose instead to simply ignore the inconsistency in Stanley's statements. 17RP 65-66, 68. This was error.

The State cannot show the error was harmless. As both parties correctly noted in closing remarks, the only contested issue was whether Bell was justified in shooting Park. 23RP 21-22, 61-64. If the jury believed, as Bell told police shortly after his arrest, that days before the shooting Park held a gun to Bell's head, robbed him of his marijuana and necklace and told him he would kill Bell if he saw him around again, then it was more likely to accept Bell's claim that he reasonably believed Park was about to shoot him during their altercation at the Transit Center and therefore justifiably acted in self defense.

If, however, the jury believed Stanley's claim that Park was not even present for the robbery of Bell, much less wielding a gun, then there was virtually no chance it would accept Bell's self defense claim. By precluding Bell from fully attacking Stanley's credibility, the trial court deprived Bell of his right to present a defense and therefore this Court should reverse.

D. CONCLUSION

For the reason presented, this Court should reverse Bell's murder conviction.

DATED this 30th day of November 2011.

Respectfully submitted,

Nielsen, Broman & Koch



CHRISTOPHER H. GIBSON

WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66507-3-1
)	
MERLIN BELL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MERLIN BELL
NO. 347047
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2011.

x *Patrick Mayovsky*