

No. 73949-2-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

BRIAN T. DECKER, Appellant,

v.

STATE OF WASHINGTON, Respondent/Cross-Appellant

BRIEF OF APPELLANT

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I
INTRODUCTION

Mr. Decker appeals:

- (a) His conviction on Count 2 (of 2) – Assault 3^o and;
- (b) The award of his reasonable attorney’s fees and on appeal seeks the following relief:
 - (a) To have his conviction reversed, and;
 - (b) His attorney’s fees as claimed before the trial Court ordered awarded, and those on this appeal. Mr. Decker, furthermore, respectfully requests that his matter be granted oral argument.

Mr. Decker was subjected to a trial based on a judicial determination of probable cause; Before the trial Court, Mr. Decker was denied substantive due process, was denied an entitled jury instruction, denied his right to confront his accuser, and due process discovery rights, and; on Count 1, was found not guilty, then *innocent* by special verdict and awarded his reasonable attorney’s fees. Subsequent to the delivery and filing of a *Lodestar* affidavit of reasonable attorney’s fees, the

matter was heard and the trial Court awarded only 15% of what was reasonably claimed.

It is Mr. Decker's position, supported by fact and law, that each and every one of these errors individually provide the basis for his request for relief, and that together, they most certainly had a cumulative effect of denying him a fair trial. Mr. Decker respectfully requests that in addition to the Court's consideration of his brief(s), that he be granted oral argument in this matter.

II ASSIGNMENTS OF ERROR

Assignments of Error:

No. 1: Whether Mr. Decker was deprived of his Right to confront his accuser when the State failed to produce as a witness at or before trial the affiant of the Certification for Determination of Probable Cause? – YES, and;

No. 2: Whether Mr. Decker was denied his substantive due process rights when Mr. Decker was denied a continuance when the State amended its Complaint on the day of trial? – YES, and;

No. 3: Whether Mr. Decker was denied his due process rights when he was denied portions of a WPIC jury instruction? – YES, and;

No. 4: Whether the trial Court erred as a matter of law when it made a judicial finding of probable cause? – YES, and;

No. 5: Whether the trial Court erred as a matter of law and abused its discretion in determining Mr. Decker's reasonable attorney's fees? – YES, and;

No. 6: Whether the State's repeated violations of discovery denied Mr. Decker his due process rights? – YES.

No. 7: Whether these errors had the cumulative effect of denying Mr. Decker a fair trial? – YES.

Issues Pertaining to Assignments of Error:

No. 1: If a case goes to trial from a judicial finding of probable cause based on hearsay affidavit, then at or before trial, must the State produce the affiant for cross-examination? – YES, and;

No. 2: To be sufficiently prepared, must the trial Court grant a continuance to the defense upon the amendment of a Complaint on the day of trial? – YES, and;

No. 3: Are judicial admissions of fact by the State supporting a Defendant's testimony that he believed he was dealing with malicious trespassers sufficient to warrant a jury instruction to that effect? – YES, and;

No. 4: Can a judicial finding of probable cause be made when the Certification for Determination of Probable Cause defines a complete (statutory) defense? – NO, and;

No. 5: Was an 85% downward adjustment to a timely and properly presented *Lodestar* affidavit tenable? – NO, and;

No. 6: Can the State repeatedly violate the rules of discovery without sanction and at the expense of Mr. Decker's trial preparation? – NO, and;

No. 7: For the cumulative effect of these errors, was Mr. Decker denied a fair trial? – YES.

III STATEMENT OF THE CASE

Mr. Decker was arrested and a judicial determination of probable cause was made (CP 6-9) and charged with one count of Assault 3^o (CP 1-5). On the day of trial, the Information against him was *amended* whereby the State reimagined the allegation against Mr. Decker to magically construe *two* counts of Assault 3^o (CP 93-4) From arraignment to the conclusion of trial, the State never produced the affiant of the Certification for Determination of Probable Cause (PC) (CP 3-5) Upon the State *amending* their Complaint on the day of trial, the trial Court denied Mr. Decker's motion for a continuance (RP 127).

During the trial, it was acknowledged through the State's own witnesses, that summaries of their contacts with the State were never delivered to the Defense as is required by court rule. The trial Court determined that Mr. Decker failed to support his theory of self defense (property/malicious trespasser) to the extent that Mr. Decker was denied the portions of the WPIC which provides for the jury to decide facts relating to self defense (property/malicious trespass). The jury found Mr. Decker guilty on what was then Count 2 – Assault in the third degree, (CP 195-6) and (a) found Mr. Decker not guilty of assault on Count 1. (CP 195-5) The jury, furthermore, and by special verdict, declared (a) that Mr. Decker had proved more probably than not that he was acting in self defense and/or with lawful use of force when he defended himself regarding Count 1, and: (b) That he was to be paid his reasonable attorney's fees for having to defend against Count 1 (CP 196). Accordingly, Mr. Decker submitted a timely and proper affidavit of

reasonable attorney's fees (CP 217-19) which the trial Court amended downward by 85%.

Mr. Decker now appeals his conviction on Count 2, and the decision of the trial Court regarding the award of attorney's fees, asking that the full amount claimed per affidavit is the lawful and reasonable amount to be paid to Mr. Decker, and for those incurred on this appeal. Mr. Decker, furthermore, respectfully requests the opportunity to present oral argument in this matter.

IV SUMMARY OF ARGUMENT

Procedure

From the same set of facts supporting the original single count of Assault, the jury spoke clearly and: (a) found Mr. Decker not guilty, and; (b) by special verdict, the jury sent a message to the State that it was more probable than not that Mr. Decker was not only acting lawfully and consistent with the law, but that before filing charges, the State was to have

understood that Mr. Decker was INNOCENT. For the State having wrongly sought the exercise of the Court's authority over Mr. Decker at his expense - the jury directed that the State compensate Mr. Decker and pay to him his reasonable attorney's fees; After a deadlock on count two was broken, Mr. Decker was found guilty. While Mr. Decker timely and properly and pursuant to the well-established law, submitted his affidavit of reasonable attorney's fees incurred, the trial court erred as a matter of law and did not award even remotely a reasonable amount.

It will be explained as a matter of fact and law that this case should not have moved forward beyond the judicial finding of probable cause – and, to include, but not limited to, (and while waiving no rights, claims or objections) - and that Mr. Decker's substantive Constitutional Rights were violated repeatedly by the State and at the hands of the trial court. Mr. Decker now appeals the trial court's decision regarding attorney's fees, and his conviction, because:

Background

Mr. Decker was at his residence (an apartment complex on Mercer Island, Washington) at night and outside in the parking lot adjacent to his unit when he noticed two individuals sitting, and, apparently, smoking in a parked car. Not only was Mr. Decker's curiosity piqued, but he was also concerned by the presence of these strangers, for he, along with many other tenants, were aware that this parking lot was the site of trespassers and vehicle prowlers/vandals, *etc.*.

Mr. Decker cautiously approached the suspicious car and from a safe distance, pointed the beam of a flashlight Mr. Decker had with him at their car. Instead of prompting these unwelcome and suspicious individuals to leave peacefully, they exited their vehicle and - according to the Mercer Island Police Department's (MIPD) probable cause statement in this matter (CP 3-5) – rapidly approached Mr. Decker and yelled and screamed at him, *i.e.*, “confronted” Mr. Decker. Mr. Decker took no steps to escalate the situation, but instead, remained

passive, and walked away whereupon the two individuals went back to their car. Mr. Decker then happened upon a neighbor of his (who had her car previously vandalized in the parking lot) who was entering the parking lot in her car. Mr. Decker briefly explained to her what had taken place, and asked that 911 be called which was done. Mr. Decker continued to walk away and was on the exit road to the parking lot when the two individuals (now travelling in separate cars) reared up on him. Mr. Decker turned around/froze when (according to the MIPD probable cause statement) the two individuals “confronted” Mr. Decker for a second time (RP 3-5), to include exiting a vehicle and running up on Mr. Decker and yelling and screaming profanity laced threats at him.

Mr. Decker, as he testified, (a) felt physically threatened, and; (b) felt that his property (*e.g.*, his car) was threatened with damage, and (c) that these two individuals were trespassers, and, with a “pepper-spray” dispenser that he had, Mr. Decker proceeded to (lawfully) defend himself, (*i.e.*, lawfully use force)

against the individuals and “pepper-sprayed” them. (RP 938-78) The two miscreant trespassers then attempted to flee with one driving across a lawn and getting stuck and the other exiting the parking lot only to then bash into cars of other residents at the complex. The MIPD - called at Mr. Decker’s request – arrived to find all three – Mr. Decker, and the two trespassers – there. Mr. Decker was fully cooperative, but somehow the police arrested Mr. Decker for assault, and proceeded to coddle the two trespassers who had threatened Mr. Decker and his property and neither arrested nor had the two miscreants charged with any criminal activity, much less as trespassers which they admittedly were. Subsequently, he was summonsed to Court to be arraigned on - as referred to by the MIPD’s probable cause statement and the information – one count of assault in the third degree (felony.) Mr. Decker retained private counsel who promptly, timely, and properly submitted a Notice of Appearance and Demand for Discovery *before* arraignment (CP 11-14). Upon arraignment, the

discovery *packet* given to Mr. Decker identified and confirmed possession by the State of, *e.g.*, recordings and photographs that were not delivered to Mr. Decker despite the duty of the State to disclose and deliver, and Mr. Decker's demand for just such discovery (RP: p.6, lines 19-22; p.10, lines 9-22; p.11, lines 3-7; p.11, lines 12-16) (CP 11-14). Having merely stated the obvious, *i.e.*, because the State's own discovery identified that the recordings and photographs had been withheld, Mr. Decker, having appeared timely and properly and promptly, was required to give up one constitutional right (time for trial) to preserve his due process right to discovery, and was told that he (not the State) would need to ask for a continuance to give the State time to comply with disclosure of the discovery, and, thereby, re-set the time for trial. (RP: p.13, lines 1-6; p.15, lines 8-9; p. 15, lines 13-16; p.17, lines 2-4/8-11)

These unsanctioned (but rather, *rewarded*) discovery violations became part of a pattern that persisted throughout the forthcoming trial whereby, *e.g.*, (virtually) each witness for the

State acknowledged on the stand that they had multiple meetings and conversations with counsel(s) for the State prior to testifying, (RP: p.566, lines 8-16; p.567-68; p.319 lines 9-19; p.567, line 25; p.568, lines 1-2; p.678, lines 10-15; p.655, lines 6-11; p. 772, lines 11-20) and that it was confirmed that counsel for the State had not complied with CrR 4.7 in summarizing those discussions/meetings and producing them to Mr. Decker.

At his trial, Mr. Decker had his constitutional rights violated and the Court committed legal error when:

A. Mr. Decker's was denied his right to confront his accuser when the State; (i) submitted, and the Court accepted into evidence, hearsay testimonial evidence to serve as the accusation against Mr. Decker (the Certification for Determination of Probable Cause (P.C. statement),) (CP 3-5) and then; (ii) being put on trial without the State ever putting his accuser (via the hearsay P.C. statement) on the stand, and when:

B. On the day of trial, the State moved, and - despite the objections/exceptions/request for continuance - of the defense that it would be prejudicial to do so, and the court granted leave to the State to so-to-speak, *amend* the Information against Mr. Decker, and, when:

C. The Court *doctored* the self-defense jury instruction removing the section that addresses when the use of force is lawful against *malicious* trespassers, and, when:

D. The Court committed error in finding probable cause, and, when:

E. The Court committed legal error in a manifestly untenable manner [mis] calculating Mr. Decker's reasonable attorney's fees, and when:

F. The State repeatedly violated the rules and constitutional rights regarding production of discovery whereby State withheld (nondisclosure) discovery and Mr. Decker was required to choose to preserve one constitutional right at the expense of another, and; It was revealed at trial that the State

had numerous contacts with numerous witnesses for the State that were not disclosed to the Defendant, to include it being admitted by the State that one witness had been “coached,” and when:

G. Cumulatively, all of these violations established that Mr. Decker’s “trial” was not fair.

V
ARGUMENT
INNOCENT

It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished. ... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever.

- John Adams

Mr. Decker respectfully submits that as a matter of fact and law that his appeal before this Court is that of a man that notwithstanding the errors of law and violation(s) of Mr. Decker’s Rights committed at his expense - but especially

because of them - acutely demonstrate that Mr. Decker has at all times been *innocent* of the “charges” against him, because;

A. VIOLATION OF RIGHT TO CONFRONT ONE’S ACCUSER:

Mr. Decker’s Sixth Amendment Confrontation Clause

Rights were violated when:

(1.) The Certification for Determination of Probable Cause (PC) (CP 3-5) hearsay testimony affidavit was admitted before the Court and served as the basis for a judicial determination of probable cause, and;

(2.) The State failed to produce the affiant, for cross-examination at or before trial.

In Washington, a judicial determination of probable cause may be found four-ways; grand jury indictment, preliminary hearing, an inquest, and filing a case with Superior Court (*See* CrR 2.2 and *State v. Berry*, 31 Wn. App. 408, 641 P.2d 1213 (1982); *State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971).) CrR 2.2(a)(2) specifies the process for the State to

follow when opting, as the State did - to file in Superior Court, and allows for an “affidavit - a document as provided in RCW 9A.72.085 or any law amendatory thereto, . . .” *i.e.*, a testimonial hearsay statement, to be admitted against Mr. Decker and serve as the basis for a judicial finding of probable cause. In this case, not only is this evidence hearsay, and testimonial, but it is also designed and composed and reviewed by counsel for the State and submitted to - and accepted by - the trial court as the actual accusation made against Mr. Decker (CP 3-5/6-9) Of the four ways to arrive at a judicial determination of probable cause (*supra*), this method is the only one that (a) allows for a testimonial hearsay accusation to be admitted, and; (b) deprives the Defendant the opportunity to confront that witness’s accusation when it is admitted. Accordingly, CrR 2.2(a)(2) acknowledges this and incorporates a safeguard to the deprivation of this Constitutional Right by stating that this process “shall be subject to constitutional limitations” CrR 2.2(a)(2),

Crawford v. Washington, 541 U.S. 36 (2004) sets forth the procedural safeguard, *i.e.*, the constitutional limitation on the State's use and admission of testimonial hearsay evidence pursuant to CrR 2.2(a)(2), stating:

If a statement is deemed testimonial, its introduction into evidence will violate the Sixth Amendment unless the prosecution produces the declarant as a witness or shows that the declarant is unavailable and that the defendant had a prior opportunity for cross-examination.

Crawford at 53-54

The same standard was adopted by our Supreme Court in *State v. Beadle*, 173 Wn.2d 97, 265 P.3d 863 (2011), establishing the precise evil to be avoided has occurred at the hands of the State, wherein it states:

In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. St. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the confrontation clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross examination. *The Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" 541 U.S. at 68. However, it noted that "[a]n accuser who makes a formal statement to government

officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51.

State v. Beadle, 173 Wn. 2d 97 at 107

There is no dispute that the PC statement is testimonial:

We need look no further than the U.S. Supreme Court addressing the King County Prosecuting Attorney’s Office (KCPAO) use of a sworn affidavit as the basis for finding probable cause, stating:

Even when the person who makes the constitutionally required “Oath or affirmation” is a lawyer, the only function that she performs in giving sworn testimony is that of a witness,

Kalina v. Fletcher, 522 U.S. 118, 131 (1997)

Because the State (a) entered into evidence hearsay testimonial evidence, (CP 3-5) and (b) did not produce the witness for cross-examination at-or-before trial, (c) Mr. Decker’s Sixth Amendment Confrontation Clause rights were violated, and; (d) the PC statement is inadmissible, and, therefore, there could be no judicial finding of probable cause requiring - and as relief sought from this Court - that this matter

be remanded to the trial court with instructions to reverse Mr. Decker's conviction, award him any/all sanctions, terms, *etc.*, allowable under the law, and all reasonable attorney's fees already claimed and those on appeal, and have this entire matter stricken from the record.

B. IMPROPER "AMENDMENT" VIOLATION OF DUE PROCESS

On the day of trial, the State brought a motion to amend the information. (CP 93-4) Over Defendant's objections, the "Amendment" was granted and the Defense asked for a continuance and was denied. (RP: p. 118, lines 17-20; p.121-22, lines 25/1-3; p.122, line 13, et al.,; p.127, lines 19-22; p.129, lines 22-24)

Under *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986), the Court states:

We find as a matter of law that substantial rights of the defendant were violated by amending the charge on the day of trial without granting a continuance when one was requested.

State v. Purdom, 106 Wn.2d 745, 748

The Court goes on to tell us that:

The defendant must be given the opportunity when it is requested to prepare to meet the actual charge made against him when it is made for the first time on the day trial is to begin. We remand for a new trial.

State v. Purdom, 106 Wn.2d at 749

The record reflects that (a) the State made its motion on the day trial was to begin, (CP 91-2) and Mr. Decker asked for a continuance and was denied, (RP 127) in violation of his Sixth Amendment Due Process Rights. Accordingly, and as the Supreme Court held in *Purdom*, Mr. Decker respectfully requests that the Court here “reverse the conviction, and remand for a new trial” *per Purdom*, 106 Wn.2d at 746, and with instructions awarding Mr. Decker all reasonable attorney’s fees claimed and incurred on appeal.

C. COURT ERRED AS A MATTER OF LAW BY DOCTORING WPIC JURY INSTRUCTION UTTERLY CONFUSING THE JURY AS TO SELF DEFENSE BY REFUSING TO GIVE FULL JURY INSTRUCTION

Before trial, the State’s own discovery showed that the State possessed evidence that the two individuals that Mr.

Decker was alleged to have assaulted were trespassers (CP 3-5)
Mr. Decker introduced exhibits showing that the property
where Mr. Decker resided was posted as a place where one
would be trespassing if they (a) did not live there, and (b) were
there past 6:00 o'clock p.m.. Mr. Decker testified that he was
concerned about the individuals being at his residence/property
as trespassers, and a possible threat to his property. (RP:
p.940, lines 7-9; p.941, lines 4-10; p.941, line 14; p.943, line 3;
p. 945, lines 1-3; p.945, line 16; p.945-46, lines 25/1-3)

Under the law set forth in *State v. Bland*, 128 Wn. App.
511 (2005), this Court states:

Whether the use of force used in the defense of property is
greater than is justified by the existing circumstances is a
question of fact for the jury to determine under proper
instructions.

State v. Bland, 128 Wn. 511, 516 (footnote omitted, *see State v. Peasley*, 13 Wn.2d at 506; *State v. Murphy*, 7 Wn. App. at 514)

The trial Court erred as a matter of law when it ruled that
Mr. Decker did not have any property rights (nor had he
presented sufficient evidence that Mr. Decker could reasonably

believe the two individuals were malicious trespassers) when it *doctored* and omitted from the WPIC jury instruction (and denied Mr. Decker argument to the jury thereunder,) the paragraph(s) justifying the use of force against a (malicious) trespasser (RP: p.898-99, lines 25/1-6; p.899, lines 15-23). In doing so, the trial Court not only *confused* the jury as to what counts as self defense, it flat-out denied them the opportunity to weigh the facts regarding self defense and/or defense of property/malicious trespassers.

From at or before the first day of this case, Mr. Decker made it clear to the Court and the State that Mr. Decker was not guilty *and* innocent of the charges declaring that Mr. Decker was acting in self defense, *i.e.*, acting lawfully. This defense (self defense) sustained itself until the conclusion of trial, and Mr. Decker's request for a self defense jury instruction was granted, *but*, the Washington Pattern Jury Instruction (WPIC) submitted by the defense was not given to the jury in its entirety. Instead - and despite the arguments made squarely

based on fact and law – the trial Court *doctored* the WPIC and removed a whole paragraph providing for the argument to be made to the jury that Mr. Decker was confronted by two malicious trespassers (CP 170-93)

The facts, *according to the State*, were that Mr. Decker was on the property where he resides when he was confronted by two individuals who (a) did not live there, (RP 848, lines 11-13/21-23) and (b) were smoking, went there to “play basketball” and got out of their car(s) and confronted and threatened Mr. Decker. The WPIC jury instruction part omitted by the trial Court reads as follows:

It is a defense to a charge of (fill in crime) that the force [used][attempted][offered to be used] was lawful as defined in this instruction. . . .

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

WPIC 17.02

The trial Court removed this section from WPIC 17.02 and ruled that Mr. Decker could not argue that he was confronted by malicious trespassers/a threat to Mr. Decker's property (*e.g.*, his car in the parking lot/his residence.) Viewed in the light favorable to Mr. Decker, the trial Court necessarily erred in doing so for the facts asserted by the State in their own PC statement and the law set forth by the Supreme Court, and Mr. Decker's testimony entitle Mr. Decker to make this argument:

First of all, the PC statement (CP 3-5) and other State's evidence admits what was acknowledged at trial by the two complaining witnesses, namely, that they did not live at the premises that Mr. Decker did and where Mr. Decker was confronted, *i.e.*, they were trespassing.

Secondly, the Revised Code of Washington (RCW) 9A.16.020 defines "Use of Force – When lawful," as, "(3) Whenever used by a party . . . in preventing or attempting to prevent . . . a malicious trespass, or other malicious interference

with real or personal property lawfully in his or her possession,.” And, “(4) Whenever reasonably used by a person to *detain* someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person.”

RCW 9A.04.110, furthermore, provides us with the definition of malice/maliciously trespassing, stating:

Definitions. In this title unless a different meaning plainly is required: (12) “Malice” and Maliciously” shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty;

RCW 9A.04.110(12)

It was admitted by the State’s evidence that (a) the two individuals whom confronted Mr. Decker did not live at the real property comprised of the Shorewood Apartments, and (b) Mr. Decker did, and that, (c) those two individuals “confronted” Mr. Decker twice and yelled and screamed at him, and did so, (c) in an area of Mr. Decker’s residence where he had his

personal property (automobile,) and after he summonsed the police.

That Mr. Decker was a tenant in an apartment complex (multi-family dwelling) versus a single family dwelling (a house) is irrelevant under the law as made clear by the Supreme Court in *Action Council v. Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2008), which states:

The general rule is that the tenant receives the right to possess and use the house, the yard, and everything else necessary to the use of the leased premises. An apartment lease operates on the same principle as does a lease of a single family residence.

Action Council v. Hous. Auth., 162 Wn.2d at 780

The trial court, with this law before it, nevertheless erred and ruled that *Action Council* did not apply to Mr. Decker, and then proceeded to omit the corresponding paragraph in WPIC 17.02, whereas, per the Comment to WPIC 17.02 states:

The instruction has been amended for the 2008 edition to clarify for the jury that the defendant need not believe that the defendant or another is about to be injured in order to lawfully use force against a malicious interference with property. *See State v. Bland*, 128 Wn.App. 511, 116 P.3d 428, 430 (2005).

WPIC 17.02 – Comment

This was error because Mr. Decker, while on the real property of his residence, and at the location (parking lot) of his personal property (his car, yard, “and everything else necessary to the use of the leased premises” *etc.* (*See Action Council (supra)*),) he was confronted at least twice by individuals who were yelling and screaming and threatening Mr. Decker (*i.e.*, vexing and annoying) as malicious trespassers, whom, by law, Mr. Decker, then, is acting lawfully in using force to (a) defend himself on his personal real property from physical threats, (b) use force in the defense of his personal property, and (c) detain the malicious trespassers until help arrived (which was done.)

The facts supporting this argument are those provided by the State, and the law providing for this argument is set forth by the Supreme Court – the trial Court, therefore, was in error in omitting and depriving Mr. Decker of his instruction. This was highly prejudicial inasmuch as the self disclosure of the facts necessary to support this action provided an “easier,” *per se*

defense for Mr. Decker to make. That is to say, arguing to the jury that Mr. Decker himself faced physical threats alone justifying the lawful use of force, is a more difficult case to make than the factually fully provided for and mechanical operation of law for using force against malicious trespassers.

Because the facts supporting the malicious trespasser jury instruction arise from the State's PC statement, PC could not have been lawfully found because the PC statement/State's evidence establishes the defense identified in the RCW and the WPIC. Accordingly, Mr. Decker asks on appeal that his conviction be reversed and the matter remanded to the trial Court with instructions to strike this matter from the record and awarding Mr. Decker all of his claimed attorney's fees and those on appeal.

D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN MAKING ITS JUDICIAL DETERMINATION OF PROBABLE CAUSE

Not only was it error to find probable cause when the malicious trespass defense is established by the State's PC

statement (*supra*,); The State's PC statement also establishes the defense of lawful use of force when the threat is to a person when it states that Mr. Decker was "confronted" twice by his assailants. (CP 3-5) In *State v. Walker*, 40 Wn.App. 658 (1985), the Court of Appeals, citing the Supreme Court in *Andrews v. McCutcheon*, 17 Wn.2d 340, 135 P.2d 459 (1942) states that it is substantive evidence of self defense and that the defendant is entitled to a self defense jury instruction when:

The evidence must establish a confrontation or conflict, not instigated or provoked by the defendant, which would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe that there was imminent danger of great bodily harm to be inflicted. See *State v. Griffith*, 91 Wn.2d 572, 589 P.2d 799 (1979); *State v. Currie*, 74 Wn.2d 197, 443 P.2d 808 (1968); *State v. Wilson*, *supra*; *State v. Churchill*, 52 Wash. 210, 100 P. 309 (1909).

State v. Walker, 40 Wn.App at 662

Here, the State's PC statement, *i.e.*, the State's own evidence - having been certified and submitted as a testimonial statement as being true and correct under the penalty of perjury - states that Mr. Decker was confronted twice by his assailants.

Because the State's burden in charging assault includes proving beyond a reasonable doubt that Mr. Decker's actions were not self defense, (*See State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984) *et al.*) and because the State provides the evidence in the form of a PC/certified under the penalty of perjury sworn statement of a law enforcement officer (CP 3-5). As a matter of law and fact, here, the State's burden, therefore, includes proving that their own PC statement should not be believed, *i.e.*, they must prove beyond a reasonable doubt that the PC statement's allegation that the two individuals *confronted* Mr. Decker is not true; In the alternative, the State can allege that the maker of the PC statement – their own witness - has committed perjury. In any event, the State submitted a PC statement that establishes self defense, and, therefore, it would necessarily be error to find probable cause. Accordingly, and without a judicial determination of probable cause, this matter should never have come to trial. It did, however, and for this error, it is respectfully requested that Mr. Decker's conviction

be reversed and any/all sanctions, attorney's fees, *etc.*, allowable under the law be awarded to him.

E. REASONABLE ATTORNEY'S FEES

“When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second whether the award of fees is reasonable.” *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 951 P.2d 798 (1998) (citing, *Public Util. dist. No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994); *Gossett v. Farmers Ins. Co.*, 82 Wn. App. 375, 387, 917 P.2d 1124 (1996))

It is not in dispute, and the trial Courts award of attorney's fees acknowledges that Mr. Decker is entitled to his reasonable attorney fees (CP 279-81). On appeal, Mr. Decker disputes whether the amount awarded was reasonable, because:

The trial Court erred as a matter of law and abused its discretion in - without explanation, and in contradiction to its own order - awarding only 15% of those reasonable attorney's

fees timely, properly, and in accordance with the law (*Lodestar*) submitted by counsel for Mr. Decker. Accordingly, Mr. Decker asks the Court to correct this error and award Mr. Decker all those fees claimed in his counsel's affidavit, and those on this appeal-specifically:

Summarized, the trial Court's Order on Award of Attorney's Fees:

1. Does not dispute – as pled by Mr. Decker – that the method to determine the fees here is the Lodestar method, and;
2. Acknowledges that Mr. Decker's claim for fees is valid pursuant to *State v. Jones*, 92 Wn. App. 555 (1998), and;
3. Asserts that Mr. Decker is only entitled to fees incurred in defending the count he was acquitted and declared innocent (Count 1,) and;
4. That Mr. Decker's counsel's affidavit *failed* to segregate hours/rate spent on Count 1 versus Count 2, and;

5. That without counsel for Mr. Decker's segregation, the trial Court was left without adequate information to determine fees, and;

6. That, therefore, no reasoning and/or explanation of how the fees were *segregated* and calculated need be provided, and that the then arbitrary 85% downward adjustment of the affidavit's amount is tenable and the award of 15% reasonable (CP 279-81).

The trial Court's Order on Award of Attorney's Fees is manifestly untenable and internally contradictory, and at odds with the law because:

Under *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 951 P.2d 798 (1998), the Court states:

1. Lodestar hours and fees. In order to determine if the number of hours expended is reasonable, 'the attorneys must provide reasonable documentation of the work performed.' *Bowers*, 100 Wn.2d at 597. That documentation must include, at a minimum, (1) the number of hours worked; (2) the type of work performed; and (3) the category of attorney who performed the work. *Bowers*, 100 Wn.2d at 597. 'An explicit hour-by-hour analysis of each lawyer's time sheets is unnecessary as long as the award is made with a consideration of the relevant facts and

reasons sufficient for review are given for the amount awarded.’ *Absher*, 79 Wn. App. at 848. The awarding court should take into account the hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time, *Bowers*, 100 Wn.2d at 597. For example, in this case the trial court must segregate between the hours spent on the coverage issues as compared to the damage issues.

McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. at 292

1. Mr. Decker’s counsel’s Affidavit and Demand for Attorney’s Fees (Affidavit) pleads that the *Lodestar* method for determining reasonable attorney’s fees applies here, and the trial Court’s order does not dispute this, (CP 217-19) and;
2. The trial Court does not dispute that the claim for reasonable attorney’s fees is valid.
3. While the trial Court states that it agrees with the State and that reasonable attorney’s fees should be awarded for those only incurred in defending Count 1, as applied here, the Court’s reasoning is contradicted by the law set forth in *State v. Jones*, 92 Wn. App. 555, 964 P.2d 398(1998)¹ which states:

¹ *Note:* This case is the same case the trial Courts Order cites (p. 2, lines 6-7) as authority affirming that Mr. Decker’s claim for fees is valid.

When the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to ‘reimburse the defendant for all reasonable costs . . . involved in his or her *defense*.’ The italicized word connotes the defendant’s participation in a specific part of the process, such as one of the two or more trials [*e.g.*, as here, being on trial for two-counts at the same time]. Accordingly, RCW 9A.16.119 entitles a defendant to reasonable fees and costs related to the entire prosecution process, including all trials, if, after the last trial, the trier of fact acquitted and entered the required finding of self-defense.

State v. Jones, 92 Wn. App. at 562

The entire prosecution process for which Mr. Decker was involved at the behest of the State was to defend himself against the two-counts, *i.e.*, all trials. The State cannot escape the fact that it sought to subject Mr. Decker to the entire process he had to go through to achieve acquittal, vindication, and award of reasonable fees incurred even only on one (of two) counts. According to the law, therefore, Mr. Decker (a) need not segregate his hours, and, (b) is entitled to reasonable attorney’s fees incurred for the entire prosecution process and awarded all fees claimed in his Affidavit.

4. The Court's Order, furthermore, is in error and untenable when it complains that (a) the Affidavit/Mr. Decker does not segregate time spent on either/each count, (CP 280, lines 13, 14) and, (b) does not state what Mr. Decker actually paid (CP 280, lines 16-20) because, as *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283 (1998) states (as cited, *supra*:), "For example, in this case the trial court must segregate between the hours spent on the coverage issues as compared to the damage issues." *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. at 292

It is the duty of the trial Court, not Mr. Decker, to *segregate* the hours, if they are to be segregated at all. The trial Court evades their duty to do so, and discredits the reasoning of the Order to the extent of legal error, abuse of discretion, and a manifestly untenable and unreasoned determination of the fees awarded calling for reversal, remand, and instructions to award all reasonable fees claimed per the Affidavit.

The trial Court's Order, additionally, refers to *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993) for the

proposition that for Mr. Decker's Affidavit to be legally complete, that he must declare what he actually paid counsel, (CP 279-81) This is wrong for at least two-reasons: (1) *Anderson* only applies when as a matter of fact, the defendant who is acquitted and prevails on their claim of self defense is represented by a appointed counsel that is paid for by the State, and (2) the Court of Appeals (while citing *Anderson* in its opinion) in *State v. Jones*, 92 Wn. App. 555 (1998)², affirms that this is the case, holding:

When an accused is indigent, he or she is entitled to counsel at public expense. Once he or she has such counsel, he or she cannot reasonably incur fees for attorney services, at least in most instances, because he or she already has such services. . . . We hold that the State is not required to compensate for attorney fees incurred by Jones while he had court appointed counsel.

State v. Jones, 92 Wn. App. at 565

Mr. Decker was represented by private counsel throughout this whole matter. *Anderson* only applies to a claim for attorney's fees when represented by appointed counsel; this

² See *State v. Jones*, 92 Wn. App. at 561, footnote 9.

is clarified and affirmed in the subsequent *Jones* opinion produced by the same Division as produced *Anderson*. There is no requirement and the trial Court's reasoning is, therefore, manifestly untenable, and an abuse of discretion in asserting that Mr. Decker's Affidavit fails in any way, much less provides a basis for the (lack of) reasoning in *determining* that only 15% of the reasonable fees claimed should be awarded. Accordingly, Mr. Decker's should be awarded all of his fees, and post acquittal (appeal, *et al.*,) fees.

5. The Order's manifestly untenable reasoning (wrongly) concludes that Mr. Decker's Affidavit fails to supply sufficient information, (*e.g.*, segregation of time/actual fees paid,) and proceeds to explain that it will exercise (*i.e.*, abuse) its discretion and ignore the Affidavit in determining the fee. (CP 280). This is error and an abuse of discretion because under *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283 (1998); the Court of Appeals states that a complete and proper (attorney's fees) affidavit, at a minimum, is submitted when:

That documentation [affidavit] must include, at a minimum, (1) the number of hours worked; (2) the type of work performed; and (3) the category of attorney who performed the work. *Bowers*, 100 Wn.2d at 597. ‘An explicit hour-by-hour analysis of each lawyer’s time sheets is unnecessary as long as the award is made with consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.’

McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. at 292

The record will establish that Mr. Decker’s Affidavit, states as a category: (1) the hours worked, (2) the type of work (Activity) performed, and in a preceding paragraph, the category, (Mr. Decker’s only attorney (and private counsel),) and experience and brief legal/professional *curriculum vitae*, thereby meeting every prescribed legal requirement for a valid Affidavit to serve as a basis for determining a reasonable attorney fee, as opposed to the trial Court’s erroneous and manifestly untenable position that the Affidavit is anything but complete and legally competent (CP 217-19). Accordingly, on appeal, or upon remand with instructions to do so, Mr. Decker respectfully requests that he be awarded all attorney fees claimed per his Affidavit, and for those to conduct this appeal.

F. NON-SANCTION ERROR FOR ONGOING AND REPEATED DISCOVERY VIOLATIONS

1. SPEEDY TRIAL V. RIGHT TO DISCOVERY

Mr. Decker was made to forego his speedy trial right to preserve his right to discovery on more than one occasion when the State failed to act with due diligence in production of discovery *requiring* Mr. Decker to waive his speedy trial right to preserve his right to discovery.

Under *State v. Price*, 94 Wn.2d 810, 620 P.2d 994

(1980), the Court states:

We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to the defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

State v. Price, 94 Wn.2d 810 at 814

Mr. Decker filed his Demand for Discovery *before* arraignment putting the State on notice that any tape recordings

or photographs were to be produced (CP 11-14). Subsequently, at arraignment, the State produced documentation represented as discovery which, therein, identified the existence of tape recordings and photographs produced and under the possession and control of the State since *before* filing charges and arraignment. At two more hearings at which the discovery remained unproduced, counsel for Mr. Decker, in effect, represented to the trial Court that he did not “have sufficient opportunity to adequately prepare a material part of his defense” due to the non-disclosure of the photographs and recordings. The trial Court’s response was to impose the impermissible *Hobson’s* choice described in *Price*, forcing Mr. Decker to choose to forego his speedy trial right, or his right to counsel who has had adequate time to prepare a defense.

Accordingly, Mr. Decker requests the relief on appeal of reversing his conviction, remanding this matter to the trial court with instructions to strike this matter from the record and award

Mr. Decker his attorney's fees claimed in full plus those incurred on appeal.

2. NON-DISCLOSURE BY STATE OF WITNESS CONTACTS

It was acknowledged to Mr. Decker and the trial Court for the first time during trial that each of the State's witnesses had multiple contacts with counsel for the State to prepare their testimony (RP: p.566, lines 8-16; p.567-68; p.319 lines 9-19; p.567, line 25; p.568, lines 1-2; p.678, lines 10-15; p.655, lines 6-11; p. 772, lines 11-20):

CrR 4.7 states:

(a) Prosecutors Obligations. (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

CrR 4.7(a)(1)

The State did not disclose any written or recorded statements and the substance of any oral statements of the witnesses it called at trial depriving Mr. Decker the opportunity to prepare effective cross-examination thereby prejudicing his ability to have a counsel who is sufficiently informed to prepare an adequate defense, and the trial Court committed an abuse of discretion in taking no action for these violations.

Under *State v. Heath*, 35 Wn. App. 269 (1983), the Court of Appeals states:

There are two aspects to this issue. The first involves the defendant's constitutional right to a fair trial. To ensure this right, prosecutors are required to divulge certain information prior to trial. *See Brady v. Maryland*, 373 U.S. 83, 10 L. Ed 2d 215, 83 S. Ct. 1194 (1963). However, the prosecutor's failure to disclose information amounts to constitutional error only when the information is material. *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). Here, there is no showing any of the undisclosed information was material. . . . Therefore, the prosecutor's failure to disclose was not constitutional error. . . . the undisclosed information was of minimal value to the defendant, so the failure to disclose did not cause substantial injury to the defendant. We find the court did not abuse its discretion in denying Heath's motions.

State v. Heath, 35 Wn. App. at 272

What *Heath* tells us is that it is constitutional error and that it does cause substantial injury to the defendant if the undisclosed information required to be disclosed is material. Here it is material because the information withheld would provide for the constitutionally entitled proper preparation of, at the very least, cross examination by counsel for Mr. Decker; The State repeatedly “denied his [Mr. Decker’s] right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *State v. Price*, 94 Wn. 2d at 814 (*supra*)

3. WITNESS “COACHING”

The degree to which the non-disclosures by the State of their contacts with witnesses discussed *supra* are material and needed to be disclosed was brought to light when Mr. Decker cross-examined one of the State’s complaining witnesses, Mr. O’Brien, who, when asked by counsel for Mr. Decker, “She [counsel for the State] helped you prepare your testimony; is

that right?” (RP 874, line 4); And Mr. O’Brien answered,
“Yes.” (RP 874, line 5).

Upon moving for a violation and sanction(s) to be found
against the State, counsel for the State explained to the trial
Court on the record:

Thank you, Your Honor. As I’ve stated multiple times now on
the record, I have contacted the witnesses to schedule their
testimony and that is essentially it. I did not follow up on
redirect because I did not want to open the door to recross, but
I’m, happy Mr. O’Brien is still out in the hallway and can be
voir dired by the Court.

**I did tell him [Mr. O’Brien] not to bring up his prior
criminal history no matter what.**

(RP 878, lines 1-8) (emphasis added)

Here, counsel for the State contradicts herself by saying
first that she only had contact with any of these witnesses only
to schedule their testimony, then, counsel confirms that she
“coached” them regarding their testimony. Mr. Decker is
entitled to have those coaching session(s) summarized and
disclosed; *what did counsel for the State keep from the
Defense?*

As regards to Mr. O'Brien, furthermore, not only did the State fail to disclose witness coaching to the Defense, counsel for the State acknowledges on the record that Mr. O'Brien was told to withhold testimony, "no matter what." (RP 878, lines 7-8)

RCW 9A.72.120 – Tampering with a Witness; states:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to **withhold any testimony, . . .** [and]

(2) Tampering with a witness is a class C felony.

RCW 9A.72.120(1)(2) (emphasis added)

The State's counsel's acknowledges to the trial Court that: (a) she told Mr. O'Brien to withhold testimony, "no matter what," and; (b) a person is guilty of tampering with a witness if (as here) they acknowledge that they induced a witness (Mr. O'Brien) to withhold testimony. This is suggestive, if not

indicative, of not only the coaching of Mr. O'Brien (or worse) but of all of the State's witnesses.

Accordingly, it is requested on appeal Mr. Decker's conviction be reversed, this matter remanded to the trial Court with instructions to strike this matter from the record and award Mr. Decker his attorney's fees as claimed, and awarded those for this appeal, and any/all sanctions/terms, *et al.* available under the law be imposed.

G. CUMULATIVE ERROR DOCTRINE:

Concurring with the majority in *State v. Fisher*, 165 Wn.2d 727 (2009), (Chief) Justice Madsen states:

The cumulative error doctrine applies to cases in which 'there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.' *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identify from the victim's mother, and (3) the prosecutor repeatedly attempted to

introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

While I do not believe any of the errors in Fisher's trial standing alone would merit reversal of his conviction,, taking the errors into consideration as a whole, I am left with the abiding belief that he did not receive a fair trial. I concur in the judgment of the majority that Fisher's conviction should be overturned.

State v. Fisher, 165 Wn.2d 727 at 772

Mr. Decker has endured a trial in which he was denied his right to confront his accuser, the Complaint was *amended* the day of trial, and after he asked for a continuance and was denied, was wrongfully denied the opportunity to argue his theory of the case before a jury and deprived a proper instruction, had judicial finding of probable cause made despite the fact that the probable cause statement if taken as true establishes a complete defense, been denied his reasonable attorney's fees without explanation, and had the rules of

discovery preserving his right to prepare for trial and have a fundamentally fair trial violated repeatedly and to his injury.

It is Mr. Decker's position that each and every one of his arguments, *supra*, both stand-alone individually as a basis to reverse his conviction and award him his attorney's fees as claimed and those on appeal, and that together, most certainly qualify under the Cumulative Error Doctrine. Accordingly, Mr. Decker on appeal asks that his conviction be reversed, the matter remanded to the trial court to strike this matter from the record, and that Mr. Decker be awarded his attorney's fees as claimed, and for those on this appeal.

VI CONCLUSION

For having had his constitutional rights, the law, and the court rules, *et al.*, violated - individually, and cumulatively - as took place here, Mr. Decker respectfully requests the following relief:

(a) That his conviction in the trial Court be reversed, and;

- (b) That the trial Court's award of attorney's fees be revised and that Mr. Decker be awarded all those fee's claimed, and those on this appeal, and;
- (c) That he be granted the honor and privilege of oral argument.

June 6, 2016

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I, Andrew L. Magee, attorney of record for the Defendant/Appellant, Brian T. Decker, and pursuant to the laws and penalties of perjury in the State of Washington do hereby certify that this document was electronically served/delivered to Ian Ith, Esq., attorney for the Plaintiff/Respondent, *et al.*, King County/State of Washington on June 6, 2016 at the following address:

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