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NO. 36175-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

FLOYD ROCKY JENNINGS,

Appellant.

---

BRIEF OF APPELLANT

---

John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

 ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for attempted second degree murder because the state failed to present substantial evidence on this charge. RP 25-255.

2. Trial counsel's failure to propose an instruction on self-defense and failure to object when the state elicited improper opinion evidence of guilt denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. RP 62-63, 181, 192, 196, 215.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment against the defendant for an offense that is not support by substantial evidence?

2. Does a trial counsel's failure to propose an instruction on self-defense and failure to object when the state elicits improper opinion evidence of guilt deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when but for those errors the jury would have returned a verdict of acquittal?

## STATEMENT OF THE CASE

### *Factual History*

On March 17, 2006, the defendant Floyd Jennings and his “girlfriend” Gretchen Alfrey met in the City of Vancouver with an out-of-town carpenter by the name of Charles Grigsby. RP 55-57. Mr. Grigsby had come to the Portland-Vancouver area at the suggestion of his local union that there was work available in the area. RP 86. The reason the three met was that a few days previous, Ms. Alfrey had walked off with Mr. Grigsby’s cell phone after meeting him on the street and borrowing it to make a call. RP 86-87. After discovering that Ms Alfrey had walked off with his phone, Mr. Grigsby had called the number and left a message stating that he would give Ms Alfrey fifty dollars if she would meet him at a Texaco Station and return his property. RP 88. At the time Mr. Grigsby was living out of his small motor home and the defendant and Ms Alfrey were living with the defendant’s mother. RP 49-50, 90.

When the three met, Ms Alfrey first introduced the defendant and then handed over the cell phone. RP 89. In return, Mr. Grigsby gave her fifty dollars as he had promised. *Id.* He then asked the defendant and Ms Alfrey if they knew a location of a Laundromat where he could wash his clothes. RP 90. They said that they did and the three of them got into Mr. Grigsby’s vehicle and pointed out the correct location. *Id.* In fact, they stayed with him

and talked while he did his laundry. *Id.* As he finished, the three of them decided to go to drink some beer in celebration of St. Patrick's day. RP 58, 90. Once this was decided, Mr. Grigsby drove the three of them to the Heights Tavern off Mill Plain and Andresen in Vancouver, went inside, and ordered a pitcher of beer. RP 62-63, 90-92.

About four or five pitchers of beer later all three of them had become intoxicated and Ms. Alfrey became loud and obnoxious with the bartender who had refused to turn up the jukebox after Ms Alfrey had put money in it. RP 39-42, 91. In fact, Ms Alfrey became so loud and obnoxious that the bartender ordered her to leave. RP 41-42. Up to this point there had been no animosity between the defendant and Mr. Grigsby, although the defendant appeared a little upset at Ms Alfrey's rude behavior. RP 41-44. In any event, after she was ordered out Ms Alfrey walked out the front door, with the defendant a little behind her. RP 42-43, 64-66.

Once outside Ms Alfrey and the defendant got into an argument when Ms Alfrey got into the passenger side of Mr. Grigsby's vehicle. RP 69-70. According to her, the defendant ordered her to give him the \$50.00 Mr. Grigsby had given her, tried to get her purse when she refused, and hit her a couple of times. *Id.* She also claimed the defendant was mad that she was apparently going to leave with Mr. Grigsby, although at this time he had yet to leave the bar. RP 70-71. However, by the time he did, he saw the

defendant and Ms Alfrey struggling with each other by the passenger side of the vehicle. RP 95-96. When he did, he walked up and asked what was going on. RP 100, According to Mr. Grigsby, at this point the defendant turned to him, pulled out a knife, and said “this is what’s happening, mother-fucker.” *Id.* According to Ms. Alfrey, the defendant actually told Mr. Grigsby that it “wasn’t his business” and to “stay out of it.” RP 71. In response, Mr. Grigsby hit the defendant in the head at least twice. RP 102-103. According to a statement the defendant later made to the police, he did pull out the knife but only in self defense after Mr. Grigsby began hitting him in the head. RP 160-161, 177-178, 252.

At about this time two things happened. First, Ms Alfrey got out of the vehicle and came around the back to find the defendant and Mr. Grigsby rolling on the ground struggling. RP 73-75. She did not see a knife in the defendant’s hand, but she did see the defendant hit at Mr. Grigsby a number of times. *Id.* Second, a person by the name of Brian Ottenback happened to drive by slowly in his car. RP 120. As he did, he saw two men in the parking lot of the Heights Tavern swinging at each other with a female standing between them. RP 122. He then saw one of the males fall to the ground with the other male hitting him in the nose. RP 122. At about this point the defendant got up and left the scene with Ms Alfrey following behind. RP 123-124. As they did, the barmaid came out, saw that Mr. Grigsby was

bleeding profusely, and helped him back into the tavern while calling “911.”  
RP 44, 106-107.

Within a few minutes the ambulance arrived and took Mr. Grigsby to Southwest Washington Medical Center where he was taken into surgery to repair a stab wound that had perforated his colon. RP 45, 228-234. The doctors also closed five other stab wounds that had not perforated Mr. Grigsby’s abdominal cavity. *Id.* In a later statement to the police, Mr. Grigsby indicated that he remembered seeing the knife in the defendant’s hand and he remembered hitting the defendant in the head when he saw it, but he did not remember the defendant stabbing him. RP 103-107.

While the ambulance was taking Mr. Grigsby to the hospital, the police were out looking for the defendant and Ms Alfrey. RP 26-27, 141-143, 162-164, 177-181. Within ten or fifteen minutes, Officer Suvada located the two of them running toward an apartment complex a few block from the Heights Tavern. RP 146-147. Ms Alfrey was in front of the defendant and ran into an apartment while Officer Suvada ordered the defendant to the ground at gunpoint. *Id.* As he did this two other officer arrived, put handcuffs on the defendant and searched him. RP 149-150, 162-167. Inside his pocket the officer found an open folding knife with a three and one-quarter inch blade. RP 165-167. They also noticed blood on the defendant’s hands. RP 177-181. When they asked him if he was injured, the

defendant responded that the blood was probably from the person he had stabbed. *id.* The defendant also stated that Ms Alfrey had not “done anything” and that he had only pulled the knife after the other person had started hitting him. RP 151.

### ***Procedural History***

By amended information filed June 7, 2006, the Clark County Prosecutor charged the defendant with one count of attempted murder in the second degree, and one count of first degree assault in the alternative. CP 4-5. Following a change of attorneys and a CrR 3.5 hearing that was held on May 2, 2006, and March 6, 2007, the case was called for trial. RP 5/2/06 & RP 3/6/07.

During trial the state called thirteen witnesses, who testified to the facts contained in the preceding factual history. RP 25-255. In spite of the fact that the defendant had claimed to the police that he had acted in self-defense only after Mr. Grigsby had begun hitting him, four of the state’s witnesses on five occasions referred to Mr. Grigsby as the “victim” in the case crime. RP 27-28, 62, 181, 191, 196. The first witness to do so was Officer Hemstock, who stated the following during direct examination.

Q. Detective Hemstock, can you describe for the jury what you did once you arrived at this particular scene?

A. Well, once I arrived at the scene, I made contact with the officers that were on the scene already and saw briefly that *the victim*

of that incident was being taken away from the scene for medical help. I looked at the scene and who was there and who was involved as witnesses and then I began to evaluate where the crime scene was located and to take some photographs of what was believed to be the crime scene and items of evidence that were left at the scene.

RP 27-28 (emphasis added).

The second witness to use this term was Gretchen Alfrey, during the following portion of her direct examination:

Q. All right. Can you describe what happened once you arrived at this bar?

A. We went inside and ordered some drinks, I believe a couple pitchers of beer, started drinking a little bit and I decided to play some music. I'm not sure where the fact of why Charles was suddenly *a victim*. I was not under the impression that anything bad was going on at the time –

RP 62-63 (emphasis added).

The state then elicited this term again from Officer Braaksma on direct examination wherein the officer gave the following characterization to one of the defendant's statements to him.

Q. And how did he reply?

A. He said it was not his blood and he believed it belonged to the other gentleman, *the victim*.

RP 181 (emphasis added).

The state then elicited the use of this term again by recalling Officer Hemstock and asking the following:

Q. Can you describe how you came in contact with that shirt?

A. I went -- well, on the day that the incident happened, I was directed inside and I looked inside and saw where *the victim* was treated by EMS, the ambulance personnel, and there, at that location, was a shirt that I was told was cut off of *the victim*. It was -- it appeared to be blood-soaked and that's how I came in contact with that shirt.

RP 192 (emphasis added).

Finally, the forensic scientist the state called to testify in this case also gave her opinion that Mr. Grigsby was the "victim" in the case. The following is taken from her direct testimony.

Q. Can you describe the items that you received?

A. Our laboratory received a knife, a jacket, oral swabs from *the victim*, and oral swabs from Jennings.

RP 196 (emphasis added).

On the second day of trial, the defense filed proposed jury instructions that included WPIC 17.02, WPIC 17.05, and WPIC 16.05, which set out and defined "self-defense" under Washington law. CP 19-21. However, on the last day of trial, the defendant's attorney withdrew his request for instruction on self-defense, apparently under the belief that the defendant did not have the legal right to claim self defense if he did not testify. RP 215. The defense attorney's specific statement on this issue was as follows:

THE COURT: Thank you, Mr. Fairgrieve. Anything you wish to add, Mr. Lowe?

MR. LOWE: The only thing I have to add, Your Honor, is I think we'll probably not proceed with the self-defense. We'll probably

withdraw those instructions.

THE COURT: Oh, okay.

MR. LOWE: And of course the -- I've explained to my client that the decision to testify or not to testify is his to make and not mine or the state's or the Court's and that's based on his constitutional rights and he obviously can still make that decision to testify. If he does testify, then we would proceed on a self-defense basis. So I don't want to be premature, I'm just saying --

THE COURT: Certainly.

MR. LOWE: -- the direction that it looks like we're going to go, we'll probably withdraw that. If we do go self-defense, as I explained to the State, I would take exception. I know that case kind of outlines the instruction. I would take exception to it because I don't think Division II has ruled on it.

RP 215.

At the end of the trial, defense counsel confirmed that he was withdrawing the request for instructions on self-defense. RP 263. After the state closed its case, the defense rested without calling any witnesses. RP 258. The court then instructed the jury without including any requirement that the state disprove self-defense, and without the defense making any objections to the court's instructions. RP 264-280. Following argument by counsel, the jury retired for deliberations, and eventually returned a verdict of guilty to attempted second degree murder. CP 1. The jury also returned a verdict that the defendant had committed the offense while armed with a deadly weapon. CP 66. The court later sentenced the defendant within the

standard range, after which the defendant filed timely notice of appeal. CP  
82-98, 99-116.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR ATTEMPTED SECOND DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that

the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with attempted first degree murder under RCW 9A.32.050(1)(a), which states:

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

RCW 9A.32.050(1)(a).

Under this statute, the crime of murder or attempted murder requires specific intent to cause the death of another person. *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991). Absent a specific verbalization or prior act demonstrating the intent to kill, this mens rea element must be proven as a logical inference from all of the circumstances surrounding the event. *State v. Gallo*, 20 Wn.App. 717, 729, 582 P.2d 558 (1978).

In the case at bar, the “circumstances surrounding the event” do not lead to a reasonable inference that the defendant ever formed the intent to kill. First, there had been no prior contact between the defendant and Mr. Grigsby, much less any type of acrimonious exchange between the two. Second, on the day in question, there had been no animosity at all between them. Third, at the time of the stabbing, the defendant had his attention and ire focused towards Ms. Alfrey, not towards the defendant. Fourth, the defendant had not procured the weapon for the purpose of assaulting Mr. Grigsby. Rather, by his own admission, he always carried it for self protection. Finally, the interaction between the defendant and Mr. Grigsby apparently was very brief and unaccompanied by any statements of an intent to kill. Under these circumstances there is no substantial evidence from which a reasonable jury could infer an intent to kill. Absent such evidence on this intent, the trial court erred when it entered judgment of conviction for attempted second degree murder.

**II. TRIAL COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION ON SELF-DEFENSE AND FAILURE TO OBJECT WHEN THE STATE ELICITED IMPROPER OPINION EVIDENCE OF GUILT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v.*

*Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to propose an instruction on self-defense, and based upon counsel's failure to object when police officers testified to their opinion that the defendant was guilty. The following presents these arguments.

***(1) The Failure to Propose an Instruction on Self-defense Fell below the Standard of a Reasonably Prudent Attorney.***

Under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment a defendant is entitled to raise any defense supported by the law and facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). In order to properly raise the issue of self-defense in the State of Washington, a defendant need only produce "any evidence" supporting the claim that the defendant's conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). This evidence need

not even raise to the level of sufficient evidence “necessary to create a reasonable doubt in the jurors’ minds as to the existence of self-defense.” *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* The defendant’s claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not “any” evidence exists to justify instructing on self-defense, the court must apply a “subjective” standard. *State v. Adams*, 31 Wn.App. at 396. In other words, “the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and ‘not by the condition as it might appear to the jury in the light of testimony before it.’” *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified

in defending themselves.

*State v. Tyree*, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

*State v. Tyree*, 143 Wash. at 316.

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *State v. Adams, supra*, also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense beyond a reasonable doubt as part of the elements of the offense. The following examines these cases.

In *State v. Wanrow, supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and got the decedent, whom the other woman believed had molested one of her children. The Supreme Court gave the following outline for the facts as they followed this point.

It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5'4" woman who at the time

had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

*State v. Wanrow*, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She then appealed, arguing, among other things, that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, *and has reasonable grounds* to believe, that *he* is in imminent danger of death or great bodily harm.

*State v. Wanrow*, 88 Wn.2d at 239 (italics in original).

In *Wanrow*, the court reversed, based in part upon this erroneous instruction. The court's comments were as follows.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

*State v. Wanrow*, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *State v. Adams, supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbors unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my life..." Adams knew there were other guns in the trailer. He didn't know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn't intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox's death.

Considering these circumstances and Adams' testimony-he thought Chard and Cox had come to do him harm because Goard fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby

telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a loaded gun-a jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing “any evidence.” Accordingly, the trial judge should have given a self-defense jury instruction.

*State v. Adams*, at 397-98.

In *Wanrow*, the Supreme Court reversed on the basis that the jury instruction erroneously failed to allow the jury to consider the defendant’s particular vulnerability under all the facts as they existed, even though the defendant had only been threatened with a simple assault if even that. Similarly, in *Adams*, the court reversed upon the trial court’s failure to give a self-defense instruction in a situation in which the defendant had not even been threatened directly. Both of these cases stand for the proposition that under circumstances of particular vulnerability, a defendant using deadly force may be entitled to a self-defense instruction even if only faced with a simple assault, or no assault at all.

In *Wanrow*, the defendant was particularly vulnerable because of her small stature relative to the decedent, the decedent’s intoxication, and the fact that she had a cast on her foot. In *Adams*, the defendant was particularly vulnerable because of his isolation, the potential that the burglars knew he was present, and the fact that they might have been armed with deadly weapons. In the case at bar, the evidence seen in the light most favorable to

the defendant shows that defendant and his friends, including Mr. Childreth, were crossing the road when an adult drove by, yelled at them, and then specifically pulled over in order to confront them. This person then twice started a physical confrontation with Mr. Childreth. As the prior cases clarify, this evidence is sufficient to trigger the defendant's right to force the state to prove the absence of self-defense beyond a reasonable doubt.

As is apparent from the cases previously cited, claims of self-defense require the court as trier of fact to make two separate determinations, each with a different standard of proof. The first question is: "Does the evidence presented at trial constitute some evidence of self defense when seen in the light most favorable to the defendant?" If this question is answered in the affirmative, then the second questions is: "Has the evidence presented at trial proven the absence of self-defense beyond a reasonable doubt."

In this case, the state may argue that the defendant's attorney was not deficient in failing to request a self-defense instruction because the defendant's failure to testify precludes a claim of self-defense. However, any such argument would be incorrect for two reasons. First, there is no requirement that a defendant testify in order to establish the right to an instruction on self-defense. Second, in the case at bar there was direct evidence presented at trial supporting a claim of self-defense. The following sets out these arguments.

In *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977), the Washington Supreme Court addressed a number of issues regarding self-defense, including who had the burden of proof, what evidence needed to be presented, and what the source of that evidence could be. In that case, the defendant was convicted of Second Degree Murder following a trial in which he claimed self-defense. On appeal, the defendant argued, among other things, that the trial court erred when it instructed the jury that the defendant had the burden of proving self-defense. In addressing this issue, the court held as follows:

This instruction was taken verbatim from a portion of that approved by this court in **State v. Turpin**, 158 Wash. 103, 290 P. 824 (1930). The formulation of our rule of self-defense set forth in *Turpin* has remained essentially unchanged since that time. Lack of justification is an element of the crime of second-degree murder. The challenged instruction places the ultimate burden of persuasion as to that element upon the defendant. He has the burden of creating a reasonable doubt in the mind of the jurors as to the issue if he wishes to avail himself of this defense. The continued use of this instruction is directly in conflict with *State v. Kroll*, [87 Wash.2d 829, 558 P.2d 173 (1976)]. There we held an instruction requiring the defendant to create reasonable doubt as to the existence of the elements of second-degree murder in order to reduce the crime to manslaughter, resulted in a shift of the burden of proof which violated the concept of due process enunciated by the Supreme Court in *Mullaney v. Wilbur*, [421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)]. The self-defense instruction presently before us places precisely the same burden upon the defendant as to the element of absence of justification. In view of the decisions in *Mullaney* and *Kroll*, it is now only permissible to place upon the defendant the obligation to produce evidence, *from whatever source*, tending to establish self-defense. The obligation to prove the absence of self-defense must remain at all times with the prosecution.

*State v. Roberts*, 88 Wn.2d 345 (emphasis added).

As the court clarifies in this case, the defendant only has the burden of “producing” some evidence to support a claim of self-defense. However, as the dependant clause “from whatever source” clarifies, the use of the term “producing” is somewhat deceptive. The defendant need not offer the evidence. Rather, the evidence can come “from whatever source.” Thus, the defendant need not testify in order to obtain a self-defense instruction, provided some competent evidence (testimonial or otherwise; direct or indirect) supports an inference that the defendant acted in self-defense. *See also, State v. L.J.M.*, 129 Wn.2d 386, 918 P.2d 898 (1996) (“[T]he amount of evidence necessary to create a reasonable doubt in the minds of the jurors on [self-defense] ... need only be some evidence, admitted in the case from whatever source to raise the issue of self-defense.”)

This rule illustrates a more general principle in American jurisprudence that when any party in a trial endeavors to present competent evidence to the trier of fact, be that party plaintiff or defendant in a civil action, and prosecutor or defendant in a criminal case, he or she does so at the risk that the opposing side may well find a better use for the evidence presented. This principle is embodied in Evidence Rules 401 and 402 which state that (1) “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more or less probable” (ER 401); and (2) “[a]ll relevant evidence is admissible . . .” It matters not the proponent nor source of the evidence. In fact, this principle is so well established in the law that an evidence rule has been adopted for those situations in which evidence has limited admissibility, under which circumstances the court, if requested, must instruct the jury of the limitation. This rule states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ER 105.

This principle is also embodied in the rule on appellate review that the Court of Appeals must consider all of the evidence presented at trial, both by the state as well as the defense, when evaluating a defendant’s claim that the state failed to present substantial evidence to support a conviction. *See e.g. State v. Leach*, 113 Wn.2d 735, 752, 782 P.2d 1035 (1989) (“Defendant’s own testimony is enough to sustain his conviction on count”). Thus, in the case at bar, the defendant was entitled to a self-defense instruction if there was any evidence in the record to support it.

In this case, there was substantial evidence in the record to support a claim of self-defense. This evidence included (1) the defendant’s own statements to the police that Mr. Grigsby started hitting him in the face before

he pulled the knife, (2) the defendant's statement to the police that he was not a "tough guy" and so carried the knife to protect himself from attacks such as the one from Mr. Grigsby, (3) Mr. Grigsby's own testimony that he struck the first and second blow to the defendant's head in the confrontation, and (4) the fact that the forensic scientist found the defendant's own blood on his jacket, blood attributable to Mr. Grigsby's attacks on him. In examining this evidence it should be remembered that when analyzing a claim of self-defense, the court on appeal should presume all of the evidence in the light most favorable to the defendant. *Jackson v. Virginia, supra*. When seen in the light most favorable to the defense, this evidence tends to prove that the defendant was not the first aggressor, that he subjectively feared serious injury from Mr. Grigsby, and that his fear might well have been reasonable under the circumstances as he saw them. Under these facts, it would have been error for the court to refuse a self-defense instruction.

In this case, there was no conceivable tactical reason to fail to request such an instruction. The defendant admitted through his own statements to the police that he was involved in the physical confrontation out of which the state claimed he had attempted to murder Mr. Grigsby. Thus, proposing an instruction on defense of self or property would not have involved any admission by the defendant that he had not already made. In fact, far from involving any tactical disadvantage, the proposal of an instruction on defense

of self would have been a huge tactical advantage for the defense because the instruction places a burden on the state to prove lack of reasonable defense beyond a reasonable doubt.

In addition, the record in this case strongly indicates that defense counsel withdrew the self-defense instructions based upon his erroneous belief that the defendant was not entitled to such an instruction unless his testified. Counsel stated the following concerning this erroneous belief:

THE COURT: Thank you, Mr. Fairgrieve. Anything you wish to add, Mr. Lowe?

MR. LOWE: The only thing I have to add, Your Honor, is I think we'll probably not proceed with the self-defense. We'll probably withdraw those instructions.

THE COURT: Oh, okay.

MR. LOWE: And of course the -- I've explained to my client that the decision to testify or not to testify is his to make and not mine or the state's or the Court's and that's based on his constitutional rights and he obviously can still make that decision to testify. If he does testify, then we would proceed on a self-defense basis. So I don't want to be premature, I'm just saying --

THE COURT: Certainly.

MR. LOWE: -- the direction that it looks like we're going to go, we'll probably withdraw that. If do go self-defense, as I explained to the State, I would take exception. I know that case kind of outlines the instruction. I would take exception to it because I don't think Division II has ruled on it.

RP 215.

The failure to propose such an instruction in this case in analogous to

trial counsel's failure to propose a "Sherman" instruction in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). In *Thomas*, the defendant was arrested for felony eluding after a chase in which she almost ran a police car off the road and ran through a cyclone fence. During the trial, the state presented substantial evidence that the defendant was highly intoxicated while she was driving. In fact, the defendant took the stand and claimed that she was so intoxicated that she could not form the intent to drive in wanton and willful disregard of the safety of others. In spite of this claim, defendant's attorney failed to propose a "Sherman" instruction. This particular instruction, derived from the decision in *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982), tells the jury that the defendant's objective acts (how she drove) are merely circumstantial evidence of subjective intent, not conclusive evidence. In *Thomas*, the court described the holding from this case as follows:

In *Sherman*, we held that RCW 46.61.024 requires that the defendant both subjectively and objectively act with wanton and willful disregard of others. We concluded that juries should be instructed that the circumstantial evidence of defendant's manner of driving only creates a rebuttable inference of "wanton and wilful disregard for the lives or property of others ..." *Sherman*, at 59, 653 P.2d 612. Therefore, *Sherman* indicates that objective conduct by the defendant indicating disregard is only circumstantial evidence and may be rebutted by subjective evidence pertaining to defendant's mental state.

*State v. Thomas*, 109 Wn.2d at 227.

In *Thomas*, the defendant was convicted, and then appealed, arguing

that trial counsel's failure to propose a *Thomas* instruction denied her effective assistance of counsel. The Court of Appeals disagreed and affirmed. The Supreme Court then accepted review and reversed, stating as follows:

Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. *State v. Acosta*, 101 Wash.2d 612, 621-22, 683 P.2d 1069 (1984). Here, defendant's proposed "to convict" instruction did not indicate that there is a subjective component to RCW 46.61.024, nor did any other instruction offered by the defense. Furthermore, the record does not contain a proposed defense instruction on the relevance of intoxication as to the mental element of the crime charged. The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas' drunkenness caused her mental state. In contrast, defense counsel argued that Thomas' drunkenness negated any guilty mental state. Therefore, in closing argument, opposing counsel argued conflicting rules of law to the jury. *See Acosta*, at 621-22, 683 P.2d 1069. Accordingly, we conclude that in failing to offer a *Sherman* instruction, defense counsel's performance was deficient.

*State v. Thomas*, 109 Wn.2d at 228.

The court then went on to find that trial counsel's deficient performance had prejudiced the defendant's case, although the court did find it a close question. The court stated:

In the present case, whether trial counsel's deficient performance prejudiced Thomas is a close issue. On the one hand, her driving objectively indicated the required wanton or willful disregard. On the other hand, the record indicates that Thomas was extremely intoxicated. Given a *Sherman* instruction, the jury may have determined that her extreme intoxication negated the required wantonness or willfulness. Without the *Sherman* instruction the jury may well have thought that the objective indication of wanton or willful disregard created by her driving established Thomas' guilt

and, therefore, the jury may never have considered the subjective component of RCW 46.61.024. Thus, we believe a proper instruction on the subjective component of RCW 46.61.024 was crucial. Accordingly, our confidence in the outcome is undermined such that we cannot say Thomas received effective assistance of counsel. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases. *See generally Kemp v. Leggett*, 635 F.2d 453, 454 (5th Cir.1981). We hold that counsel's deficient performance deprived Thomas of a fair trial.

*State v. Thomas*, 109 Wn.2d at 229.

In the case at bar, the evidence was overwhelming that the defendant had stabbed Mr. Grigsby. However, there was some evidence that he was acting in self-defense, given both his claims to the police and Mr. Grigsby's admission that he had struck the first two blows. Thus, there was no tactical advantage to gain by the self-defense instruction and great advantage to gain by proposing it. Consequently, trial counsel's decision to pull the self-defense instructions fell below the standard of a reasonably prudent attorney.

***(2) The Failure to Objection to Opinion of Guilt Evidence Fell below the Standard of a Reasonable Prudent Attorney.***

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial, no witness whether a lay

person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

*State v. Carlin*, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

In *State v. Carlin*, *supra*, the defendant was charged with second

degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. The court agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very

matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

*Warren v. Hart*, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In this case the prosecutor violated the defendant's right to a fair trial when on five separate occasions from four witnesses he elicited characterizations that Mr. Grigsby was the "victim" in this case, thereby making the defendant the guilty perpetrator. The first witness was Officer Hemstock, who stated the following during direct examination.

Q. Detective Hemstock, can you describe for the jury what you did once you arrived at this particular scene?

A. Well, once I arrived at the scene, I made contact with the officers that were on the scene already and saw briefly that *the victim* of that incident was being taken away from the scene for medical help. I looked at the scene and who was there and who was involved as witnesses and then I began to evaluate where the crime scene was located and to take some photographs of what was believed to be the crime scene and items of evidence that were left at the scene.

RP 27-28 (emphasis added).

This second witness to use this term was Gretchen Alfrey, during the following portion of her direct examination:

Q. All right. Can you describe what happened once you arrived at this bar?

A. We went inside and ordered some drinks, I believe a couple pitchers of beer, started drinking a little bit and I decided to play some music. I'm not sure where the fact of why Charles was suddenly *a victim*. I was not under the impression that anything bad was going on at the time –

RP 62-63 (emphasis added).

The state then elicited this term again from Officer Braaksma on direct examination wherein the officer gave the following characterization to one of the defendant's statements to him.

Q. And how did he reply?

A. He said it was not his blood and he believed it belonged to the other gentleman, *the victim*.

RP 181 (emphasis added).

The state then elicited the use of this term again by recalling Officer Hemstock and asking the following:

Q. Can you describe how you came in contact with that shirt?

A. I went -- well, on the day that the incident happened, I was directed inside and I looked inside and saw where *the victim* was treated by EMS, the ambulance personnel, and there, at that location, was a shirt that I was told was cut off of *the victim*. It was -- it appeared to be blood-soaked and that's how I came in contact with that shirt.

RP 192 (emphasis added).

Finally, the forensic scientist the state called to testify in this case also gave her opinion that Mr. Grigsby was the “victim” in the case. The following is taken from her direct testimony.

Q. Can you describe the items that you received?

A. Our laboratory received a knife, a jacket, oral swabs from *the victim*, and oral swabs from Jennings.

RP 196 (emphasis added).

As was mentioned previously, in this case the only viable defense under the facts was self-defense. The defense initially offered such an instruction, and the evidence supported giving it. Given this defense and the defendant’s claims to the arresting officers, Mr. Grigsby was not the “victim” in the case at all, even though he received the stab wounds. Rather, he was the aggressor who provoked the defendant to act in self-defense. Under these types of fact, the characterization of Mr. Grigsby as the “victim” in the case gave the jury the clear message that all four witnesses were of the opinion that the defendant did not act in self-defense and that the defendant was guilty. This evidence was particularly damaging when coming out of the mouths of two police officers. Since no tactical reason exists for the defense to fail to object to this type of improper opinion evidence of guilt, trial counsel’s failure to object at each upon hearing each of the four improper

characterization fell below the standard of a reasonably prudent attorney.

***(3) The Failure to Propose an Instruction on Self-defense and the Failure to Object to Opinion of Guilt Evidence Caused Prejudice.***

In the case at bar the state presented substantial evidence to support a conclusion that the defendant had stabbed Mr. Grigsby with a knife in an altercation in which Mr. Grigsby had first struck two substantial blows to the defendant's head. However, the evidence as presented by the state, particularly the defendant's claim of self defense to the police and the lack of apparent motive indicate that had the defendant's attorney not withdraw the request for a self-defense instruction, the court would have given the jury the instruction and more likely than not the jury would have returned a verdict of not guilty based upon the inability of the state to prove the absence of self-defense beyond a reasonable doubt. Thus, counsel's deficient conduct in withdrawing this requested instruction caused prejudice. Indeed, this prejudice was exacerbated by the improper opinions of four witnesses that Mr. Grigsby was the "victim," implying that the defendant did not act in self defense. Thus, the defendant has proven prejudice in that there is a substantial likelihood that the defendant would have been acquitted had trial counsel objected to the improper opinion evidence and had counsel not withdrawn the proposed self-defense instructions. As a result, the defendant was denied effective assistance of counsel under Washington Constitution,

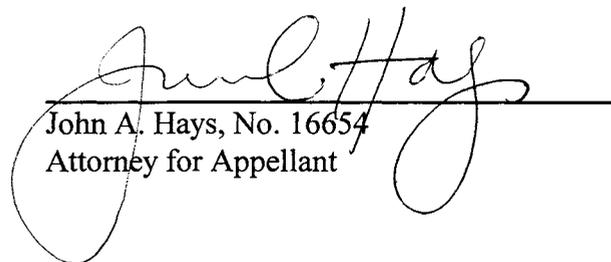
Article 1, § 22 and United States Constitution, Sixth Amendment, and he is entitled to a new trial.

**CONCLUSION**

Substantial evidence does not support the charge of attempted first degree murder. As a result, the defendant's conviction should be vacated with instructions to enter verdict on the lesser included offense of second degree assault. In the alternative, the defendant is entitled to a new trial based upon ineffective assistance of counsel.

DATED this 11<sup>th</sup> day of October, 2007.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9A.32.050**  
**Murder in the Second Degree**

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 FLOYD R. JENNINGS, )  
 )  
 Appellant, )

CLARK CO. NO: 06-1-00561-9  
APPEAL NO: 36175-2-II

**AFFIDAVIT OF MAILING**

STATE OF WASHINGTON )  
 ) vs.  
 COUNTY OF CLARK )

DONNA BAKER, being duly sworn on oath, states that on the **11th day of OCTOBER, 2007**,  
affiant deposited into the mails of the United States of America, a properly stamped envelope  
directed to:

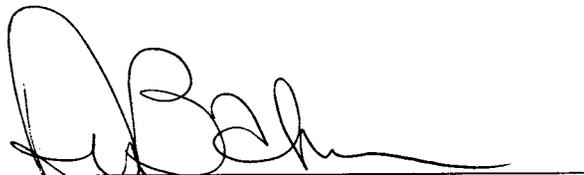
ARTHUR CURTIS  
PROSECUTING ATTORNEY  
1200 FRANKLIN ST.  
VANCOUVER, WA 98668

FLOYD R. JENNINGS-DOC# 960276  
WASH STATE PENITENTIARY  
1313 n. 13<sup>TH</sup> AVE.  
WALLA WALLA, WA 99362-1065

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 11<sup>TH</sup> day of October, 2007.

  
DONNA BAKER

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of OCTOBER, 2007.



Heather Chittock  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 11-04-09

**John A. Hays**  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084