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STATE OF WASHINGTON
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No. 36534-1-II

DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant.

Lewis County Superior Court

Cause No. 04-1-00043-7

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Slert was denied his constitutional right to due process of law under the state and federal constitutions.
2. The trial judge violated the appearance of fairness doctrine by deciding a critical issue after acknowledging bias.
3. The court's instructions improperly focused the jury on the decedent's actual mental state rather than on Mr. Slert's reasonable belief that Benson intended to harm him or commit a felony.
4. The trial court erred by giving Instruction No. 22, which read as follows:

No act allegedly committed by Mr. Benson while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether Mr. Benson acted with intent.
Supp. CP.
5. Mr. Slert was denied the effective assistance of counsel by his attorney's failure to object to Instruction No. 22.
6. The court's instructions failed to explain that Residential Burglary is a felony.
7. Mr. Slert was denied the effective assistance of counsel by his attorney's failure to propose an instruction explaining that Residential Burglary is a felony.
8. The court's "to convict" instruction omitted an essential element of Murder in the Second Degree.
9. Mr. Slert was denied his constitutional right to a jury trial because the jury did not determine whether or not he acted without premeditation, an essential element of Intentional Second Degree Murder.
10. The trial court erred by giving Instruction No. 5, which reads as follows:

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 23rd day of October, 2000, the defendant shot John Benson;
2. That the defendant acted with intent to cause the death of John Benson;
3. That John Benson died as a result of the defendant's acts; and
4. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

Supp. CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Kenneth Slert was charged with murder for having shot and killed John Benson. He gave numerous statements to law enforcement, including one statement to Sheriff John McCroskey while being transported from the scene to the jail.

At trial, Mr. Slert moved to suppress his statement to McCroskey and all fruits of that statement. He alleged (based on testimony of the former Chief Criminal Deputy prosecuting attorney) that McCroskey had tape-recorded him without permission, in violation of the privacy act. An evidentiary hearing was held, and McCroskey testified.

After hearing the testimony, the trial judge informed the parties that he had worked with McCroskey since 1979 and had developed a favorable opinion as to his credibility. He acknowledged that recusal was appropriate, but claimed that circumstances prevented recusal. He then denied the motion to suppress, indicating that he could not "imagine the circumstances under which... Mr. McCroskey would deliberately violate the privacy rights of Mr. Slert..."

1. Did the trial judge violate the appearance of fairness doctrine by deciding a critical issue after acknowledging bias?
Assignment of Error Nos. 1, 2.

Mr. Slert told law enforcement that he sat in Benson's truck, drinking with the other man. An argument developed into a scuffle, and Mr. Slert left the truck and crossed his campsite. Benson followed and attacked him, choking him from behind. Mr. Slert said that he escaped into his tent, found his pistol, and shot Benson as the other man tried to enter the tent to attack him.

At Mr. Slert's request, the court instructed the jury that the homicide was justifiable if Mr. Slert reasonably believed Benson intended to commit a felony or to inflict death or great personal injury. The court also defined the crime of Residential Burglary, but did not instruct the jury that Residential Burglary is a felony.

In addition, the court gave an instruction permitting the jury to take into account Benson's voluntary intoxication in considering whether or not Benson had the ability to form criminal intent.

The court's "to convict" instruction did not require the jury to find that Mr. Slert acted without premeditation.

2. Did the court's instructions on justifiable homicide fail to make the relevant legal standard manifestly apparent to the average juror? Assignment of Error Nos. 1, 3, 4.
3. Did the trial court's instruction on Benson's voluntary intoxication confuse the issue of justifiable homicide?
Assignment of Error Nos. 1, 3, 4.
4. Did the trial court's instruction on Benson's voluntary intoxication erroneously shift the jury's focus away from Mr. Slert's reasonable belief? Assignment of Error Nos. 1, 3, 4.
5. Was Mr. Slert denied the effective assistance of counsel by his attorney's failure to object to the instruction on Benson's voluntary intoxication? Assignment of Error Nos. 1, 3-5.

6. Did the trial court err by failing to explain to the jury that Residential Burglary is a felony? Assignment of Error No. 1, 6.
7. Was Mr. Slert denied the effective assistance of counsel by his attorney's failure to propose an instruction explaining that Residential Burglary is a felony? Assignment of Error Nos. 6, 7.
8. Did the court's "to convict" instruction omit an essential element of Murder in the Second Degree? Assignment of Error Nos. 1, 8-10.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. PRIOR PROCEEDINGS

Kenneth Slert was charged by Information on January 16, 2004, with Murder in the First Degree and in the alternative with Murder in the Second Degree. CP 15-17. The matter proceeded to a jury trial, and Mr. Slert was convicted of Murder in the Second Degree, with a firearm enhancement. He was sentenced and appealed. Supp. CP, Notice of Appeal.

The Court of Appeals reversed his conviction after finding instructional error and ineffective assistance of counsel. See Cause No. 31876-8-II. Mr. Slert was retried for Murder in the Second Degree. He was convicted and sentenced, and filed this timely appeal. CP 4, 5-14.

II. STATEMENT OF FACTS

On the evening of October 23, 2000, a stranger pulled up to Kenneth Slert's rural Lewis County campsite. RP 180. Mr. Slert was at

the time a 55-year-old veteran with no criminal history, an IQ of 90, an anxiety disorder.¹ RP 691-696; CP 6.

When the truck pulled up, Mr. Slert stood by the driver's door and spoke with the man through the driver's side window. RP 341. The other man invited him to sit in the truck and talk, and Mr. Slert climbed into the passenger side. RP 301. The two of them spoke, passing a bottle of whiskey back and forth. RP 180. The driver, who was later identified as John Benson, was five feet ten inches tall, and weighed 235 pounds. Supp. CP, Exhibit 68. He was not accustomed to drinking, and soon became intoxicated. RP 125; Supp. CP, Ex. 105.

According to Mr. Slert, Benson became disagreeably belligerent, and they began to argue. Benson made numerous anti-government statements. RP 180, 342, 530. During the argument, Benson leaned across and got in Mr. Slert's face, yelling and shoving Mr. Slert. Mr. Slert punched Benson once or twice. RP 183, 342. When Benson "came after" him, Slert pushed him away with his hand on Benson's throat. RP 532. Mr. Slert then got out of the truck, and walked across his campsite to light a lantern. The other man also got out of the truck and followed Mr. Slert.

¹ Mr. Slert has been hospitalized more than once at Veteran's Administration hospitals for his mental health issues. RP 696.

A short while later, Mr. Slert and sheriff's deputies returned to the campsite. RP 172. The officers found that Benson had been shot twice. RP 376-377. His body was near the entrance to Mr. Slert's tent, covered with a tarp. RP 178. Fibers from his clothing were found on the wooden tent pole at the entrance to the tent. TP 657-660. Following an autopsy, Benson was found to have a blood alcohol content of .23. Supp. CP, Ex. 105.

Detective Wetzold interviewed Mr. Slert at the scene (while it was being processed), and Mr. Slert was then taken to the Lewis County jail by Sheriff John McCroskey. While en route, they spoke about the case. RP 211-212, 214-216, 340-346. According to McCroskey, Mr. Slert said that he'd mixed alcohol with his medications, but he did not think the combination affected him. RP 215. According to McCroskey, Mr. Slert told him that Benson fell when he was shot, but later said Benson kept coming at him so he shot him twice. RP 215.

At the jail, Mr. Slert was read his *Miranda* rights, and he gave a tape-recorded statement. RP 525, 552. Mr. Slert was subsequently released from jail without charges being filed.

More than three years after the incident, Mr. Slert was charged with murder. CP 15-17. His first conviction for Murder in the Second Degree was overturned on appeal. Prior to Mr. Slert's retrial, a CrR 3.5

hearing was held on in front of Judge Nelson Hunt. RP 18-98. The defense challenged the admission of Mr. Slert's statements to Sheriff McCroskey, alleging that they had been taped without Mr. Slert's permission. RP 55-98.

The accusation was supported by the testimony of former Chief Criminal Deputy Prosecuting Attorney David Arcuri. RP 65-82. Mr. Arcuri testified that he was supervisor of the Lewis County Prosecuting Attorney's criminal division from 1996-2002. He testified that he met with Sheriff McCroskey and Prosecutor Jeremy Randolph in October 2000 after Mr. Slert's arrest. RP 65-67. He explained that he was reviewing his office's charging decision with the other two men when McCroskey said he had Slert's statements (from the car ride) on tape. He said that McCroskey did not understand why he would need Mr. Slert's permission to tape record him. RP 68-71. Mr. Arcuri testified that after he spoke with Mr. Randolph about it, he had concerns that something might happen to the tape. RP 72.

McCroskey testified at the CrR 3.5 hearing and denied the claim. RP 57-63, 82-86. Former Prosecuting Attorney Jeremy Randolph provided an affidavit asserting he had no recollection of the relevant events. Supp. CP.

The trial judge, the Honorable Nelson Hunt, denied the motion to suppress. Prior to ruling, he made the following comments:

This is one of those things where I think judges usually recuse themselves, and I would have done it if there had been any way that I could have.

The reason for that - and it's something that everyone should know here - is that I have known all three of the players for a long time. Sheriff, then Deputy McCroskey - it was even before he was a sergeant - was the investigating officer on I think the second or third case that I worked on after I got here in 1979, and I worked with him extensively in many trials. It was impossible then for me not to form an opinion as to whether I thought he was a credible person.

The same, however, is true of the other two people. Mr. Randolph was obviously a defense attorney from the day I got here until the day that he took over for me in 1995, and I have known of him as well.

What people may not know though is I knew Mr. Arcuri well before Mr. Randolph hired him as his chief criminal deputy. I interviewed him extensively - I think three times - to fill a spot that was eventually taken by someone else, and it was I who let Mr. Randolph know that Mr. Arcuri was available for a chief criminal deputy position when that became available early on in Mr. Randolph's career.

So I have had extensive dealings with all three of them, both professionally and to a certain extent away from the office, so this makes it a very difficult thing to sit and judge credibility on.

Having said all of that - and more in the interest of full disclosure here - if I had known in time where there would have been another person available or another judge available to deal with this issue I would have handed it off to them because this is one of those things that makes me very uncomfortable and is very difficult to do.

All right. Now, having said all that, the reason I am denying the motion to suppress is that I cannot imagine the circumstances under which Mr. Randolph and now Mr.

McCroskey would deliberately violate the privacy rights of Mr. Slert, particularly in the way that it's being alleged here.²
RP 108, 109.

At trial, Mr. Slert presented a justifiable homicide defense, based on Benson's violent attacks and Mr. Slert's reasonable belief that Benson was attempting to commit a felony (residential burglary). RP (5/9/07) 393, 464; RP (5/10/07) 621-679, 708; RP (5/11/07) 757-782. The defense proposed an instruction on justifiable homicide, as well as instructions defining residential burglary, and the court gave these instructions to the jury. Supp. CP.

The court's "to convict" instruction, given without objection, read as follows:

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 23rd day of October, 2000, the defendant shot John Benson;
2. That the defendant acted with intent to cause the death of John Benson;
3. That John Benson died as a result of the defendant's acts; and
4. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

² Mr. Hunt was the elected prosecutor in Lewis County until 1995; he was succeeded by Mr. Randolph. RP 108-109.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Instruction No. 5, Supp. CP.

The court also gave an instruction relating to Benson's voluntary intoxication. Instruction No. 22 read as follows:

No act allegedly committed by Mr. Benson while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether Mr. Benson acted with intent.
Instruction No. 22, Supp. CP.

The jury found returned a verdict of guilty, along with a special verdict relating to the firearm. CP 5. This timely appeal followed. CP 4.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY HEARING AND DECIDING A CRITICAL ISSUE DESPITE ACKNOWLEDGING BIAS.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Similarly, Article I, Section 3 of the Washington Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Article I, Section 3. Under both constitutions, due process secures for an accused the right to a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899 at 904, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997). Furthermore, "to perform its high function in the best

He pushed, shoved, and grabbed at Mr. Slert, mauling him like a bear and putting his hands to Mr. Slert's throat. RP 343-345.

The two ended up at the entrance to Mr. Slert's tent, where Benson choked Mr. Slert. RP 346. Mr. Slert broke free, crawled inside his tent, found his pistol, and shot Benson, who was coming after him through the tent entrance. Benson was knocked backwards by the force of the shot. RP 346, 390, 402-403, 408. Mr. Slert got out of the tent, stepping over Benson's body in the dark. RP 348. As he stepped over the body, Benson grabbed at his leg, and he shot him a second time. RP 387, 398, 409. He kneeled down next to Benson and then he walked around, "dazed and confused," and then returned to his tent and sat down on his sleeping bag. Eventually, he fell asleep. RP 349, 357, 388, 390.

In the morning, after waking up and seeing the body, he took his antidepressant medication and drank more whiskey. RP 351. He covered the body with a blue tarp from his vehicle, and tried to call for help using Benson's cell phone and CB radio, then got in his car and drove towards town. RP 350, 351, 353. On the way, he stopped a park ranger, and explained the situation. RP 152-155. He told the ranger that he'd shot Benson because he was afraid of being choked to death, and that he'd been afraid for his life. RP 155, 166-167.

way “justice must satisfy the appearance of justice.” *In re Murchison*, 349 U.S. 133 at 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955), quoting *Offutt v. United States*, 348 U.S. 11 at 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *Madry*, at 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474 at 486, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for prejudgment of “issues of fact about parties in a particular case” or “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party...” *Buell v. City of Bremerton*, 80 Wn.2d 518 at 524, 495 P.2d 1358 (1972), quoted with approval in *OPAL v. Adams County*, 128 Wn.2d 869 at 890, 913 P.2d. 793 (1996).

To prevail under the appearance of fairness doctrine, a claimant must only provide *some* evidence of the judge’s actual or potential bias. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to

the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

Mr. Slert brought a motion alleging that former Sheriff McCroskey had illegally tape-recorded a conversation with him in violation of the privacy act. RP 55-98. Because the state's case depended heavily on Mr. Slert's statements, any violation of his privacy rights could have undermined the prosecution by requiring suppression of Mr. Slert's statements to Sheriff McCroskey. RP 719-755. *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789 (2004); RCW 9.73.050.

The accusation was supported by the testimony of former Chief Criminal Deputy Prosecuting Attorney David Arcuri. RP 64-82. McCroskey testified and denied the claim, and former Prosecuting Attorney Jeremy Randolph provided an affidavit asserting he had no recollection of the relevant events. RP 57-63, 82-86; Supp. CP.

The trial judge admitted that "judges usually recuse themselves" under the circumstances, and stated that he would have recused himself "if there had been any way that I could have." RP 108. In particular, the trial judge acknowledged that he'd known and worked extensively with McCroskey since 1979 and that "[i]t was impossible then for me not to form an opinion as to whether I thought he was a credible person." RP 108. The judge announced his ruling as follows: "[T]he reason I am

denying the motion to suppress is that I cannot imagine the circumstances under which Mr. Randolph and now Mr. McCroskey would deliberately violate the privacy rights of Mr. Slert...” RP 109.

These comments (as well as the judge’s statements acknowledging that he was “uncomfortable” at having to do something “very difficult”) evidenced actual bias. The trial judge’s willingness to preside over the hearing and to rule against Mr. Slert despite acknowledging bias further compounds the problem. Because the trial judge violated the appearance of fairness, Mr. Slert’s conviction must be reversed and the case remanded for a new trial before a different judge. *Dugan, supra*.

II. THE TRIAL COURT’S INSTRUCTIONS IMPROPERLY STRIPPED MR. SLERT OF HIS JUSTIFIABLE HOMICIDE DEFENSE.

A trial court must instruct on the defendant’s theory of the case if the law and the evidence support it; failure to do so is reversible error. *State v. May*, 100 Wn.App. 478 at 482, 997 P.2d 956 (2000). The standard for clarity in jury instructions is high, since jurors are not provided rules to help them interpret instructions. *State v. Irons*, 101 Wn. App. 544 at 550, 4 P.3d 174 (2000).

Where the issue of self-defense is raised, the absence of self-defense becomes an element of the offense that the state must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191 at ___, 156

P.3d 309 (2007). Accordingly, instructions on self-defense (and justifiable homicide) are subject to heightened appellate scrutiny. *See Woods*, 138 Wn. App. at _____. Such instructions must make the relevant legal standard manifestly apparent to the average juror. *Woods*, at ____; *Irons, supra*; see also *State v. Lefaber*, 128 Wn.2d 896 at 900, 913 P.2d 369 (1996); *State v. Bland*, 128 Wn. App. 511 at 515, 913 P.2d 369 (2005). Instructions misstating the law of justifiable homicide create constitutional error and are presumed to be prejudicial. *Lefaber*, at 900.

Under Washington law, homicide is justified when committed “[i]n the lawful defense of the slayer...when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer...and there is imminent danger of such design being accomplished...” RCW 9A.16.050(1). Homicide is also justified “[i]n the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.” RCW 9A.16.050(2).

Residential Burglary is a felony, and occurs when a person enters or remains unlawfully in a dwelling with intent to commit a crime against persons or property therein. RCW 9A.52.025. Under appropriate circumstances, deadly force may be used to resist a burglary. *State v. Brightman*, 155 Wn.2d 506 at 522, 122 P.3d 150 (2005).

In this case, Mr. Slert sought and received instructions on justifiable homicide based on the use of force in self-defense or in resisting a felony. Instructions Nos. 11-14, Supp. CP. Under Instruction No. 11, the jury could find the killing justified if Mr. Slert “reasonably believed that [Benson] intended to commit a felony... or to inflict death or great personal injury...” Instruction No. 11, Supp. CP. The trial court also defined Residential Burglary, which requires (*inter alia*) proof of intent to commit a crime within a dwelling. Instructions Nos. 17-21, Supp. CP.

- A. The trial court’s instruction on Benson’s voluntary intoxication may have prevented the jury from properly considering Mr. Slert’s justifiable homicide defense.

The trial court erroneously instructed the jury that it could consider Benson’s voluntary intoxication as it impacted Benson’s ability to form intent. Instruction No. 22, Supp. CP. The instruction read as follows:

No act allegedly committed by Mr. Benson while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether Mr. Benson acted with intent.³ Instruction No. 22, Supp. CP.

³ In the last sentence of this instruction, the words “the defendant” are crossed out and “Mr. Benson” is substituted. Instruction No. 22, Supp. CP.

The sole purpose of this instruction was to deprive Mr. Slert of his justifiable homicide defense, based on Benson's intoxication. Under the instructions on justifiable homicide, the jury had to decide if a reasonable person would believe Benson "intended to commit a felony... or to inflict death or great personal injury..." To evaluate whether or not Benson intended to commit a felony, the jury was charged with deciding whether or not he had the "intent to commit a crime against a person or property" within Mr. Slert's dwelling. Instructions Nos. 11, 17, Supp. CP. If the jury decided that Benson was too intoxicated to form criminal intent, they could reasonably have interpreted the instructions as permitting them to disregard Mr. Slert's justifiable homicide claim, based on Benson's voluntary intoxication.

But a self-defense claim should not be extinguished simply because the slain person might have raised lack of intent if she or he had been charged with a crime.⁴ Instead, self-defense is premised solely on the slayer's *reasonable belief* that the slain person intended to commit a felony or to inflict death or great personal injury. *See* Instruction No. 11; RCW 9A.16.050. The slain person's actual mental state is irrelevant.

⁴ In fact, absent some additional testimony, it is unlikely that Benson would have been entitled to the instruction if he had been charged with a crime. *See, e.g., State v. Kruger*, 116 Wn. App. 685 at 691, 67 P.3d 1147 (2003).

Unfortunately, Instruction No. 22 shifted the jury's attention away from Mr. Slert's reasonable belief, and directed the jury to consider Benson's actual mental state. Instruction No. 22, Supp. CP.

Instead of making the relevant legal standard "manifestly apparent," Instruction No. 22 confused the issue and may have prevented the jury from properly considering Mr. Slert's justifiable homicide defense. The erroneous inclusion of this instruction is constitutional error, and is presumed prejudicial. *LeFaber*, at 900. Because Mr. Slert was denied his constitutional right to a fair trial, the conviction must be reversed and the case remanded for a new trial. *LeFaber, supra*.

B. The trial court failed to instruct the jury that Residential Burglary is a felony, improperly denying Mr. Slert his justifiable homicide defense.

Mr. Slert's justifiable homicide defense was based (in part) on his reasonable belief that Benson "intended to commit a felony upon [him], in his presence, or upon or in a dwelling, or other place of abode in which he is..." Instruction No. 11, Supp. CP. To find Mr. Slert justified in using force to resist a felony, the jury was required to determine whether or not Benson's actions amounted to a felony. But the jury was never instructed that Residential Burglary is a felony. Supp. CP. Because of this, nothing in the instructions permitted the jury to acquit Mr. Slert even if he reasonably believed Benson intended to commit Residential Burglary.

Because the instructions on justifiable homicide omitted this critical piece, they did not make the relevant legal standard “manifestly apparent to the average juror.” *LeFaber* at 900; *Woods, supra*. This constitutional error is presumed to have prejudiced Mr. Slert. *LeFaber* at 900. Accordingly, his conviction must be reversed and the case remanded for a new trial *LeFaber, supra*.

- C. If these errors are not preserved for review, then Mr. Slert was denied the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865,

16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

1. Mr. Slert was denied the effective assistance of counsel by his attorney's failure to object to Instruction No. 22 on Benson's voluntary intoxication.

As noted above, Instruction No. 22 served no legitimate purpose at trial. There was no strategic reason for defense counsel's failure to object to the instruction, as it provided no benefit to Mr. Slert. Furthermore, the instruction harmed Mr. Slert's justifiable homicide defense by confusing the issues and by erroneously suggesting to the jury that it could reject the defense if it believed Benson too intoxicated to form criminal intent.

If the problem with Instruction No. 22 is not preserved for review, then it should be analyzed as an ineffective assistance claim. Because defense counsel's deficient performance prejudiced Mr. Slert, his

conviction must be reversed and the case remanded for a new trial.

Reichenbach, supra.

2. Mr. Slert was denied the effective assistance of counsel by his attorney's failure to propose an instruction informing the jury that Residential Burglary is a felony.

Failure to propose proper instructions on the justifiable use of force constitutes ineffective assistance of counsel. *Wood, supra; see also State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004). In this case, defense counsel proposed instructions outlining (*inter alia*) the justified use of deadly force in resisting a felony. Defense counsel also proposed instructions defining Residential Burglary. However, defense counsel did not propose an instruction linking the two; thus the jury was not informed that Residential Burglary is a felony. Supp. CP.

There was no strategic reason for the omission. Indeed, it prejudiced Mr. Slert: without such an instruction, the jury was unable to even consider Mr. Slert's argument that he legitimately used deadly force to resist Benson's attempt to commit Residential Burglary.

If the issue of this missing instruction is not preserved for review on its own merits, then it should be reviewed as an ineffective assistance claim. Because Mr. Slert was prejudiced by his attorney's failure to propose an instruction explaining Residential Burglary is a felony, the

conviction must be reversed and the case remanded for a new trial. *Wood, supra; Rodriguez, supra.*

III. THE ABSENCE OF PREMEDITATION IS AN ELEMENT OF MURDER IN THE SECOND DEGREE THAT MUST BE INCLUDED IN THE “TO CONVICT” INSTRUCTION (INCLUDED FOR PRESERVATION OF ERROR).⁵

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415

⁵ This Court has decided that the absence of premeditation is not an element of Murder in the Second Degree. *State v. Feeser*, 138 Wn. App. 737, 158 P.3d 616 (2007). A petition for review is pending in *Feeser*.

(2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997) (“*Smith I*”). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

The elements of an offense are determined with reference to the language of the statute. See *State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn. App. 400 at 409, 101 P.3d 880 (2004). The court’s inquiry “always begins with the plain

language of the statute.” *State v. Christensen, supra* at 194. If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra, at 409; see also State v. Punsalan, 156 Wn.2d 875, 133 P.3d 934 (2006) (“Plain language does not require construction;” Punsalan, at 879, citations omitted)*. The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland, at 410.*

In *State v. Azpitarte, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000)*, the Supreme Court examined *former* RCW 10.99.040(4)(b), which punished as a class C felony any assault in violation of a no contact order “that [did] not amount to assault in the first or second degree.” *Former* RCW 10.99.040(4)(b). The Supreme Court gave effect to the plain language of the statute, and held that the prosecution was required to allege and prove an assault not amounting to assault in the first or second degree to obtain a conviction for Assault in Violation of a Protection Order:

[W]ithout a showing of ambiguity, we derive the statute's meaning from its language alone.... By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault “not amount to assault in the first or second degree.” We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately.

Azpitarte, at 142.

Second Degree Murder is defined by RCW 9A.32.050. Under that statute, “A person is guilty of murder in the second degree when: [w]ith 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.” RCW 9A.32.050(1)(a).

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the second-degree murder statute any intentional killings done with premeditation. RCW 9A.32.050(1)(a). Accordingly, the absence of premeditation is an essential element of the crime, which must be alleged in the Information, included in the “to convict” instructions, and proved to a jury beyond a reasonable doubt. *Azpitarte, supra*.

In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court reinterpreted *Azpitarte*, restricting its application in certain limited circumstances. Applying convoluted logic, the Court in *Ward* held that the language at issue in *Azpitarte* (“does not amount to assault in the first or second degree”) was only an essential element of Assault in Violation of a No Contact Order if the defendant was also charged with Assault in the First or Second Degree.

Under *Ward*, if the defendant was not also charged with Assault in the First or Second Degree, the state was not required to allege or prove

that the assault in violation of the no contact order did “not amount to assault in the first or second degree.” The legislature’s goal, according to the Supreme Court, was to punish assault in violation of a no contact order as a felony, but not if the defendant was already charged with another felony assault:

Since the State did not charge Ward or Baker with first or second degree assault, the State was not required to allege that petitioners’ conduct did not amount to assault in the first or second degree... The omitted language is not necessary to find felony violation of a no-contact order because the State did not additionally charge first or second degree assault. Accordingly, all elements of the crime were submitted to the jury for a finding beyond a reasonable doubt. *Ward, supra, at 813-814.*

It is difficult to imagine how *Ward’s* reinterpretation of *Azpitarte* would apply to this case. As the Supreme Court made clear in *Ward*, its holding was based on the assumption that a defendant could be convicted of Assault in the First (or Second) Degree, or of Assault in Violation of a No-Contact Order, but not of both.

RCW 9A.32.050 cannot be read in the same fashion. Nothing in the statute permits the state to charge a defendant with both Murder in the First Degree and Murder in the Second Degree for the same conduct.⁶

⁶ The only possible exception would be for charges brought in the alternative. Mr. Slert was originally charged in the alternative; however, Mr. Slert’s second trial was limited to Murder in the Second Degree. RP (10/27/05) 4.

Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.32.050, and has no bearing on Mr. Slert's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.32.050. The substantive crime addressed in *Ward* was the “[w]illful violation of a court order issued under [certain provisions authorizing such orders].” *Former* RCW 10.99.040(4) (1997) and *former* RCW 10.99.050(2) (1997). Other provisions of each statute varied the penalty depending on the circumstances; these provisions did not create separate crimes, but instead enhanced the sentence for the base crime. *Ward, supra*, at 812-813. By contrast, there is no single statute defining a base crime of murder and setting varying penalties based on the circumstances of the crime.⁷ *See* RCW 9A.32 *generally*. Instead, the phrase “but without premeditation” is contained in the very provision defining the substantive crime itself. RCW 9A.32.050. It is not set forth in a separate provision establishing penalties for a base crime.

This structure is identical to the structure used in RCW 9A.32.030, which requires that Murder in the First Degree be committed with premeditated intent:

⁷ Interestingly, the definition of “homicide” includes both criminal and noncriminal killings. RCW 9A.32.010.

A person is guilty of murder in the first degree when:
(a) With a premeditated intent to cause the death of another person,
he or she causes the death of such person or of a third person...
RCW 9A.32.030

Just as premeditated intent is an element of Murder in the First Degree, the absence of premeditation is an element of Murder in the Second Degree. This court is not free to disregard the legislature's choice of language and read this element out of the statute. *Sutherland, supra*.

The "to convict" instruction in this case did not require the jury to find that that murder was committed "without premeditation," as required by RCW 9A.32.050. Instruction No. 4, Supp. CP. Because the instruction omitted an essential element, the assault conviction must be reversed and the case remanded for a new trial with proper instructions. *Jones, supra*; *Brown, supra*.

CONCLUSION

Mr. Slert's case presented the jury with very difficult issues. There were no eyewitnesses, the physical evidence was inconclusive, and Mr. Slert's statements varied over time as he struggled to remember exactly what happened. In addition, the jury was required to carefully weigh what was reasonable under the facts as they were presented, taking into account Mr. Slert's anxiety disorder. Under these circumstances, even the slightest error threatened the reliability of the proceedings.

Mr. Slert's conviction must be reversed for three reasons. First, the trial court judge violated the appearance of fairness doctrine by deciding a critical issue after acknowledging bias. This not only undermines confidence in the court's decision on that issue, but also infects the entire proceeding with the taint of potential bias.

Second, the trial court's instructions on justifiable homicide were incomplete and were improperly undercut by an extraneous instruction on the decedent's voluntary consumption of alcohol. Rather than making the relevant legal standard manifestly apparent to the average juror, the incomplete instructions and the unnecessary shift of focus (from Mr. Slert's reasonable belief to Benson's mental state) confused the issues, violated the constitution, and prejudiced Mr. Slert.

Finally, the “to convict” instruction omitted an essential element of Murder in the Second Degree. By failing to require the jury to find that Mr. Slert lacked premeditation, the instructions relieved the state of its burden and violated Mr. Slert’s constitutional right to due process.

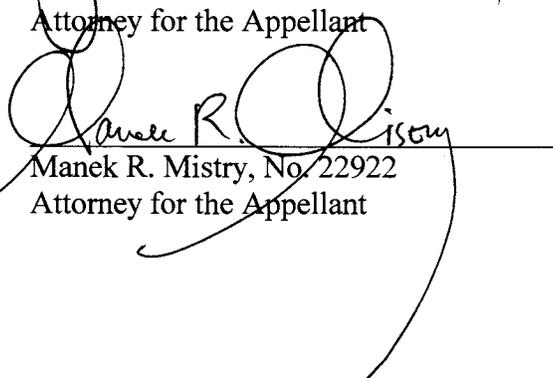
For all these reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on January 9, 2008.

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Ken Slert, DOC 872135
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191 Constantine Way
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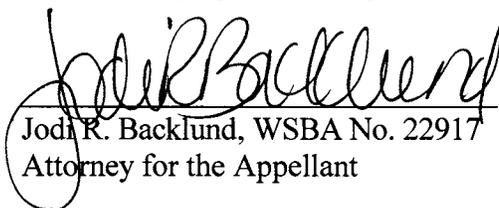
And to the office of the Lewis County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 9, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on January 9, 2008.



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