

No. 30255-5
Consolidated with No. 29979-1

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March 27, 2012
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MAGGIE MAE TYLER, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE KATHLEEN O'CONNOR

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Ms. Tyler's counsel was ineffective for failing to object to a special verdict unanimity instruction.
2. The trial court erred when it found the flawed special verdict instruction sufficient.
3. The trial court erred in calculating Ms. Tyler's offender score.
4. The evidence was insufficient to sustain a conviction for second- degree murder.

Issues Relating to Assignments of Error

- A. Was counsel ineffective for failure to object to the special verdict unanimity instruction?
- B. Did the trial court err when it found the flawed Special Verdict Instruction sufficient?
- C. Did the trial court err in calculating Ms. Tyler's offender score?
- D. Was the evidence sufficient to sustain a conviction for second -degree murder beyond a reasonable doubt where the defendant raised the issue of self-defense?

II. STATEMENT OF FACTS

Maggie Mae Tyler was charged with second degree murder in the death of Vitaliy Schevanko, and as an accomplice in the second degree assault of Timofei Dmitriev. (CP 473). She raised the affirmative defense of self-defense. At trial, the following evidence was presented.

On July 6, 2009, twenty-four year old Maggie Tyler was at home. (Vol.5 RP 971-2). That afternoon Matthew Nedeau and Savannah Frye, individuals she had recently become acquainted with, came over to visit and listen to music. (Vol.5 RP 973). Prior to their arrival, both Mr. Nedeau and Ms. Frye had smoked methamphetamine. (Vol.5 RP 872). The three left in Ms. Frye's car to run errands and purchase some alcohol. ((Vol.5 RP 973-74).

They drove back to Ms. Tyler's home and were joined by another acquaintance, Nathan Gilstrap¹. (Vol.5 RP 975). Ms. Tyler drank two rum and cokes, and a beer, and along with Mr. Gilstrap and Mr. Nedeau, took a tablet of ecstasy. (Vol.5 RP 977). The four of them eventually left in the car to go somewhere else. (Vol.5 RP 977). Mr. Nedeau drove, Ms. Frye and Ms. Tyler sat in the backseat, and Mr. Gilstrap was in the front passenger seat of the

¹ Mr. Gilstrap was deceased by the time of trial.

small car. (Vol.5 RP 874). Shortly before 10 p.m., they drove down Greene Street. (Vol.5 RP 978).

That evening, around 9pm, Vitaliy Shevchuk and Timofei Dmitriev went to visit a friend, Peggy Hill, at her home on Greene Street in Spokane. (Vol.2 RP 320-22). Mr. Shevchuk and Mr. Dmitriev shared two six packs of beer that day, and it was later determined that Mr. Shevchuk had a blood alcohol level of .22. (Vol.1 RP 70; Vol.2 RP 374). Around 9:45 pm, Ms. Hill and Mr. Shevchuk left the home. Mr. Shevchuk drank another beer as they walked along Greene Street toward the store to purchase some cigarettes. (Vol.1 RP 71).

As the car carrying Ms. Tyler and her friends drove by, Mr. Shevchuk yelled something at them. (Vol.2 RP 444). Mr. Nedeau brought the car to a stop in the street. Mr. Nedeau, Mr. Gilstrap and Ms. Tyler got out of the car. (Vol. 5 RP 978). Mr. Nedeau and Mr. Schevchuk yelled at each other. Neighbors who came out into the street also got involved in the yelling. (Vol.1 RP 131; Vol.2 RP 263, 286,325; Vol.5 RP 978). Before she ran back to her house, Ms. Hill also yelled, and later said she was fearful “it would be another street fight...I thought some punches would be thrown...” (Vol.1 RP 78).

Concerned for his safety Mr. Nedeau reached into his pocket and pulled out his knife. (Vol.5 RP 940). One male neighbor yelled at Mr. Nedeau to “fight fair.” (Vol.2 RP 315).

Ms. Tyler was very concerned about the number of male neighbors coming towards them. (Vol.5 934, 981). Mr. Nedeau testified that Mr. Schevchuk came at him to attack him, and to protect himself, he inflicted a superficial, nonlethal wound on Mr. Shevchuk’s chest. (Vol.5 RP 942). Mr. Nedeau told a male neighbor that he should just take Mr. Shevchuk home. (Vol.2 RP 315). Instead, Mr. Shevchuk ran to a neighbor’s yard and picked up a boulder. (Vol.1 RP 79).

Ms. Tyler, Mr. Nedeau, and Mr. Gilstrap immediately got back in the car and drove away. (Vol.5 RP 982). Mr. Shevchuk threw the 14-15 pound rock at their car, smashing the rear window of the hatchback. (Vol.1 RP 80,133). Mr. Nedeau drove down the street, made a U-turn in the road, and came back. (Vol.2 RP 451).

Mr. Nedeau, Mr. Gilstrap, and Ms. Tyler got out of the car. By that time, Mr. Shevchuk had armed himself with a metal pole, preparing to strike Mr. Nedeau. Mr. Dmitriev had a chair as a weapon, and another neighbor, armed with a broom handle, later told police he intended to hit Mr. Nedeau with it. (Vol.1 RP 79, 87,

Vol.2 RP 288, 335, 338; Vol.4 RP 779-780). Because Mr. Nedeau had dropped his knife in the earlier encounter, he threw a bottle at Mr. Shevchuk when he saw him approach yet again. (Vol.4 RP 740-41).

Ms. Tyler was very frightened that Mr. Nedeau was going to be beaten by the three men. (Vol.4 RP 764, 797). She saw a knife on the ground and picked it up. She testified she was terrified and swung the knife at Mr. Shevchuk to get him to back away. She stated she was not trying to kill him. (Vol. 5 985-86). She struck Mr. Shevchuk in the neck, let go of the knife, and got back in the car with the others. (Vol.1 RP 165; Vol.4 RP 767, 770). Mr. Nedeau reportedly asked Ms. Tyler, "Oh my god, you know, did that really just happen, did you do that?" Ms. Tyler said yes. (Vo.3 RP 474-475). Officers from the Spokane Police Department were dispatched to the scene. (Vol.1 RP2). Mr. Shevchuk was transported to the hospital. (Vol.4 RP 642).

The friends drove in silence back to Ms. Frye's home, saw police cars at the residence, and parked the car a block away. They walked to a store and got a ride with other friends to another house. (Vol.3 RP 473).

Ms. Frye contacted Crime Check a day or so later, after she learned from news reports that the police were looking for her. (Vol.1 RP 169). Ms. Tyler was not aware Mr. Shevchuk died until she saw a report on the news the next day. (Vol.4 769). She was arrested seventeen days later. (Vol.1 RP 16).

In the interview with Spokane police, Ms. Tyler said “[s]he guessed she stabbed him” and that Mr. Shevchuk was acting like he was about to hit Mr. Nedeau with a metal pipe. (Vol.4 RP 791). She stated she did not remember injuring Mr. Shevchuk, but remembered she “backed up afterwards” and “was shocked.” (Vol.4 RP 813).

Spokane police officers found two knives in the street. (State’s Exhibits P9, P10; Vol. 3 RP 549, 595). At trial, the Washington State Patrol crime lab technician testified both knives contained Mr. Shevchuk’s DNA. (Vol.4 RP 666,669). Ms. Tyler was excluded as a DNA contributor. (Vol.4 RP 667). The technician testified one knife measured “approximately 3.25 inches,” but did not state how she measured it. The second knife was measured at “approximately 3-1/8” but did not state with any exactitude how she measured the knife. (Vol.4 RP 670).

The Chief Medical Examiner testified that Mr. Shevchuk died as a result of the neck wound. (Vol.2 RP 375). She also noted that Mr. Shevchuk had numerous bruises over his body, arms, and legs, caused blunt force injuries sustained days before the encounter with Mr. Nedeau and Ms. Tyler. (Vol.2 RP 364).

At trial the following jury instructions were given.

Instruction No. 13

A person commits the crime of Second Degree Murder when with intent to cause the death of another person but without premeditation, he or she causes the death of such person unless the killing is justifiable.

or

A person commits the crime of Second Degree Murder when he or she commits Second Degree Assault and in the course of and in furtherance of such crime he or she or an accomplice causes the death of a person other than one of the participants unless the killing is justifiable.
(CP 668).

Instruction No. 15

To convict the defendant, Maggie Tyler, of the crime of Second Degree Murder as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) that on or about the 6th day of July 2009, a defendant, or one with whom he/she was an accomplice,
 - a. acted with intent to cause the death of Vitaliy Shevchuk, and Vitaliy Shevchuk died as a result of a defendant's, or one with whom he or she was an accomplice, acts.
- or
- b. a defendant, or one with whom he/she was an accomplice, committed the crime of second degree

assault, and in the course of and in furtherance of such crime caused the death of Vitaliy Shevchuk; and that Vitaliy Shevchuk was not a participant in the crime of second degree assault; and

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

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

(CP 671).

Instruction No. 45

It is a defense to a charge of that the Second Degree Murder, First Degree Manslaughter, or Second Degree Manslaughter, was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

(1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to commit a felony or to inflict death or great personal injury;

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

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

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

(CP 702).

Instruction No. 53 (in pertinent part):

You will also be given special verdict forms for each crime. If you find the defendant not guilty of a crime do not use the special verdict form for that crime. If you find the defendant guilty of any of the crimes, you will then use the special verdict form for those crimes and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

(CP 714).

Counsel did not object to Instruction no. 53.

Ms Tyler was found guilty of second -degree murder, with a special deadly weapon verdict. (CP 715, 716). After the verdict, but prior to sentencing, defense counsel moved for a new trial on the following bases: First, during an early CrR 3.5 hearing, the State only moved to admit recorded statements that Mr. Nedeau had made to a Spokane police detective, but during trial included statements he allegedly made prior to the video recording. (CP 830-831). Specifically, counsel objected to the State's continued emphasis of Ms. Tyler's alleged flight and failure to contact law

enforcement. Second, during closing argument, State's counsel argued that the "magical term" reasonable doubt was equivalent to a jigsaw puzzle. Third, defense counsel was precluded from showing the difference in the two deadly weapon instructions given by the court, and lastly, no evidence was presented at trial that definitively established the length of the knife. (CP 830-836). The court denied the motion for a new trial. (CP 1005-1007).

At sentencing, the court denied Ms. Tyler's request to not impose the weapon enhancement on the basis the jury instruction was constitutionally defective. (Vol.8 RP 1346). The parties disputed Ms. Tyler's offender score. The defense asserted it was a "2", while the State argued it was a "4". The court found Ms. Tyler to have an offender score of "3". (Vol.8 RP 1358; CP 1013). Ms. Tyler was sentenced to 178 months, including the 24 months weapon enhancement. (CP 1015). This appeal follows.

III. ARGUMENT

A. Ms. Tyler's Counsel Was Ineffective For Failing To Object To The Defective Special Verdict Unanimity Instruction.

A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To

establish ineffective assistance of counsel, Ms. Tyler must demonstrate (1) counsel's performance was deficient, and (2) the deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To meet the first part of the test the representation must have fallen below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, the trial court gave, without objection, instruction No. 53, the special verdict jury instruction. In pertinent part, the instruction informed the jury:

"Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you *unanimously have a reasonable doubt as to this question, you must answer "no."* (CP 714). (Emphasis added).

Under *State v. Bashaw*, it is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove the facts supporting a sentence enhancement. *State v. Bashaw*, 169 Wn.2d 133, 145-48, 234 P.3d 195 (2010). Though

unanimity is required to find the presence of a special finding that increases the maximum penalty, it is not required to find the absence of such a special finding. If a single juror votes “no” on the special verdict, then the State has failed to establish its case on that issue. *State v. Goldberg*, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). The *Goldberg* ruling applies to both sentencing enhancements and aggravating factors. *Bashaw*, 169 Wn.2d at 146.

On August 9, 2011, after this case was decided, the Washington Supreme Court accepted *State v. Ryan* 160 Wn. App. 944, 949, 252 P.3d 895 (2011) and *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), for review. The issue for review is whether after *Bashaw* a defendant may raise on appeal, for the first time, the instructional error, or whether a failure to object at the trial court constitutes a waiver of the claim on appeal. Irrespective of how the Court decides that particular issue, the parties in this matter were already on notice the unanimity instruction was defective based on *Goldberg* and *Bashaw*. Failure to object to the instruction was deficient performance.

The second prong of the test for ineffective assistance of counsel is whether the defendant was prejudiced by the deficient

performance. The *Bashaw* court identified the instructional error as a “procedure by which unanimity would be inappropriately achieved,” and called it a “flawed deliberative process”. *Bashaw*, 169 Wn.2d at 147. As the *Ryan* court noted, “The [*Bashaw*] court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The [C]ourt refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.” *Ryan*, 160 Wn. App. at 949. (Emphasis added).

The *Bashaw* court held the instructional error resulted in a flawed deliberative process, holding it is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove the facts supporting a sentence enhancement. *Bashaw*, 169 Wn.2d at 145-148. Because the instructional error has already been held as manifest constitutional error, Ms. Tyler was per se prejudiced by counsel’s failure to object to the incorrect jury instruction. The remedy for an improper special verdict is, as trial counsel requested, to strike the enhancement.

B. The Trial Court Erred When It Found The Flawed Special Verdict Instruction Was Sufficient.

Jury instructions are reviewed *de novo*, to determine whether they are supported by substantial evidence, allow the parties to argue theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. *See State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). As stated above, the Washington Supreme Court has ruled that instructing jurors they must be unanimous in order to answer the special verdict either “yes” or “no” is a misstatement of the law. *Bashaw*, 169 Wn.2d at 146.

Further, the *Bashaw* court held that when a jury is improperly instructed, as here, the deliberative process is so fundamentally flawed that it is not possible to say with any confidence what might have occurred had they been properly instructed. *Bashaw*, 169 Wn.2d at 148. In *Bashaw*, even though the Court was convinced that for at least two of the enhancements the jury would have come to the same conclusion, the unanimity instruction rendered the deliberative process itself flawed. *Id.* at 147-48. The Court concluded that a reviewing court “cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” *Id.*

In *State v. Ryan*, Division One revisited the faulty instruction and pointed out that the *Bashaw* court “refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.” *Ryan*, 160 Wn. App. at 949. The *Ryan* court felt constrained to conclude under *Bashaw* the instructional error must be treated as one of constitutional magnitude and “is not harmless.” *Id.*

Here, the trial court was informed of the applicable law regarding the special verdict instruction at the sentencing hearing for Ms. Tyler. In direct contrast to the holdings in *Goldberg*, *Bashaw*, and *Ryan*, the trial court stated:

“I know there is a significant issue about an instruction....But the bottom line of this case, there is absolutely no question that a deadly weapon was used and a deadly weapon was the cause of death. No question whatsoever. The law is clear that deadly weapon enhancement is appropriate when in fact, a deadly weapon was used in the commission of the crime. That’s the position I took in Mr. Nedeau’s case and that is the legal position I am going to take today.” (Vol.8 RP 1354).

Under current Washington law the error was not harmless.

The enhancement should be vacated.

C. The Trial Court Erred In Calculating Ms. Tyler's Offender Score.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. McCraw*, 127 Wn.2d 281,289, 898 P.2d 838 (1995). A correct offender score must be calculated before a standard range sentence is imposed. *State v. Tili*, 148 Wn.2d 350,358, 60 P.3d 1192 (2003). Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Ms. Tyler argues the trial court misapplied the law in calculating her offender score: Ms. Tyler argues the facts show her score should be a "2", while the trial court found it to be "3".

In 2002, Ms. Tyler had juvenile adjudications for attempted first degree theft and third degree assault, which involved the same victim, the crimes occurred at the same time and place, and the same general intent standard applied to both offenses. (CP 952). The trial court here rightly counted that adjudication at ½ of a point. (Vol.8 RP 1357; CP 1013).

In May 2005, Ms. Tyler had a conviction for possession of a controlled substance. (CP 956). That sentencing court counted the juvenile adjudications as ½ point, thus at the sentencing, her offender score was zero. (CP 958).

In November 2005, Ms. Tyler was charged with two counts of forgery. (CP 978). The Summary of Facts showed the counts occurred on the same day, against the same financial institution, and the same victim. (CP 981-982). The Judgment and Sentence listed the offender score as “3”, but set the sentences to be served concurrently. (CP 791;795).

Prior adult convictions should be counted as criminal history unless they were not previously deemed “same criminal conduct” but their sentences were served concurrently and the court now determines that they were committed at the same time, in the same place, and involved the same victim.² At sentencing, the trial court here compounded the earlier sentencing court error by finding that the forgery counts were not the same course of criminal conduct. (Vol.8 RP 1358).

² 2011 Washington State Adult Sentencing Guidelines Manual, p.22.

“Same criminal conduct” is defined by statute and case law as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A. 589 (1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). This court examined “same criminal conduct” with respect to forgery in *State v. Calvert*, 79 Wn. App. 569, 903 P.2d 1003). There, Calvert pleaded guilty to five counts of forgery. *Id.* at 572. At the sentencing hearing, the trial court found that because two of the checks were presented to the same bank, drawn on the same account, on the same day, they counted as one forgery. *Id.* at 574.

Here, the court acknowledged that the earlier court had neglected to check the same course of criminal conduct box. However, the court then went on to take inconsistent positions: first stating it appeared the felony forgery cases were considered the same course of conduct for purposes of the forgery sentence, but then stating that reviewing courts generally find they are not the same course of criminal conduct, even when they have the same victim, if they are different events. (Vol.8 RP 1357-58). The court was incorrect. In *State v. Price*, the court found multiple crimes were not part of the same criminal conduct because the physical

location of the crimes were different. *State v. Price*, 103 Wn. App. 845, 856, 14 P.3d 841 (2000); but in *State v. Porter and Calvert*, the court found that crimes that met the same time, same place, same intent, and same victim, are regarded as the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); *Calvert* 79 Wn. App. at 578.

An offender score is the sum of points rounded down to the nearest whole number. RCW 9.94A.525. The correct offender score should have been a “2”: ½ point for the juvenile adjudications, one point for the drug possession conviction, and one point for the forgery conviction. Ms. Tyler was sentenced to 154 months, at the low end of the presumptive sentence, with an offender score of “3”. The standard range should have been 144 months to 244 months.

D. The Evidence Was Insufficient To Sustain A Conviction For Second- Degree Murder: The State Did Not Disprove That Ms. Tyler Did Not Lawfully Act In Defense Of Herself Or Mr. Nedeau.

Due process rights, guaranteed under both the Washington Constitution and the United States Constitution, require the State to prove every element of a crime charged beyond a reasonable

doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 618 P.2d 628 (1980). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

To convict Ms. Tyler of murder in the second degree, the State was required to prove the elements of second degree murder (either an intentional unpremeditated homicide or second degree assault resulting in a homicide) beyond a reasonable doubt and that the homicide was not justifiable. RCW 9A.32.050. Because Ms. Tyler raised the issue of self-defense/defense of others, its absence became another element of the offense, which the State was required to prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-6, 683 P.2d 1069 (1984).

A self-defense claim is "predicated upon the right of every citizen to reasonably defend himself against unwarranted attack." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (quoting

Whipple v. State, 523 N.E.2nd 13363, 1366 (Ind. 1988). Homicide is also justifiable when committed in the defense of another when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do great personal injury to another, and there is imminent danger of it being accomplished. RCW 9A.16.050(1), (2). Evidence of self-defense is to be assessed from the viewpoint of a reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees.*” *Id.* at 238. See *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). (Emphasis added).

Here, every eyewitness testified that Mr. Shevchuk threw the boulder through the back window of the car Ms. Tyler rode in. When Ms. Tyler got out of the car during the second encounter, she saw Mr. Shevchuk with a metal pole preparing to hit Mr. Nedeau. She also saw Mr. Dimitriev with a chair, and a neighbor with a wooden broom handle, who admittedly intended to hit Mr. Nedeau. The men were yelling and arguing, at least two of them were very intoxicated, and each of them were coming toward Mr. Nedeau. Street fights were apparently not unusual on this area of Greene Street, as one female eyewitness stated she was afraid “it would be *another* street fight.”

It was evident that the circumstances, as they appeared to Ms. Tyler, were that Mr. Nedeau was going to be beaten by the three men. Subjectively, there can be no question that Ms. Tyler's fear of death or great bodily injury was reasonable.

The degree of force used in self-defense or defense of others is limited to what a reasonably prudent person, in the same or similar circumstances as they appeared to the defendant, would find necessary. See *State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979). Thus, a jury is to use the subjective information to determine what a reasonably prudent person would do under those conditions. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993); See also *State v. LeFaber*, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

Here, the question is whether a reasonably prudent person, viewing the circumstances as Ms. Tyler did, would have used the available weapon to hold off a potential attacker. Ms. Tyler had every reason to subjectively and objectively fear for her safety and the safety of Mr. Nedeau. Ms. Tyler did not chase Mr. Shevchuk with the knife, rather, he approached her. She swung the knife to get him to move away, and in so doing, inflicted the fatal wound to

his neck. Deadly force can be used in self defense and defense of others, if the defendant reasonably believed she was threatened with death or great personal injury. *State v. Walden*, 131 Wn.2d 469, 474-75, 932 P.2d 1237 (1997). Ms. Tyler reasonably believed either or both she and Mr. Nedeau were going to be attacked. She used a minimal amount of force, which unfortunately proved lethal. The evidence was insufficient to sustain the conviction for second-degree murder. Ms. Tyler's conviction and related deadly weapon enhancement should be reversed and dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Tyler respectfully requests this Court to reverse her conviction and dismiss with prejudice for insufficiency of the evidence. Alternatively, Ms. Tyler requests this Court to vacate the enhancement and remand to the trial court for correction of the offender score.

Dated this 27th day of March 2012.

Respectfully submitted,

s/Marie Trombley

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington and of the United States, that on March 27, 2012, I mailed, first class, postage prepaid a copy of appellant's opening brief to Maggie Mae Tyler, 882994, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300; and by email per agreement between the parties to: Mark E. Lindsey, Spokane County Prosecutor, at: kowens@spokanecounty.org.

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