

FILED

MAY 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29980-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER OWENS,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable John Hotchkiss, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Christopher Owens

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the court excluding evidence of why the defendant was afraid of the deceased and why that fear was reasonable.

2. The court denied appellant his constitutional right to counsel by prohibiting counsel from arguing inferences from the evidence.

3. Appellant assigns error to Jury Instruction No. 12, CP 67, quoted in full below.

4. Appellant assigns error to the trial court's oral instruction to the jury defining "reasonable doubt," RP(5/23/11) 8, quoted below.

5. Appellant assigns error to Instruction No. 6, CP 61, quoted in full below.

6. Appellant was denied due process when the prosecutor made improper argument to the jury in closing argument.

7. Cumulative error denied appellant due process and a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err and deny appellant due process and the right to present a defense when it excluded evidence that was relevant to why his fear of the defendant was reasonable?

2. Did the trial court deny appellant his constitutional right to counsel when it prohibited counsel from arguing inferences from the evidence it admitted?

3. Did the trial court deny appellant due process and the right to present a defense when it omitted from the self-defense instruction the right to use force to resist an intent to commit a felony?

4. Did the trial court err by instructing the jury with a different definition of "reasonable doubt" when the Washington Supreme Court has directed all trial courts to use the language of WPIC 4.01 to define "reasonable doubt"?

5. Did the trial court deny appellant due process and the right to a jury trial when it instructed the jury to return a verdict of guilty without consideration of self-defense?

6. Was appellant denied due process when the prosecutor argued in closing from an emotional personal experience outside the evidence of this case?

7. Did cumulative error deny appellant due process and a fair trial?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

a. Background

Christopher Owens grew up in the East Wenatchee home of his mother, Kellie Brown. Ex. 66 at 4.

Kellie had been in abusive relationships. From when he was as young as five, Chris vividly remembered men beating her up. The police did not get there in time to protect his mom. One man raped her, right next to him, and there was nothing he could do to protect her. RPII 424;¹ Exs. 54, 55, 155;² Ex. 65 at 16, 27-28; Ex. 66 at 26.

Chris started working with Kellie at his grandfather's Wenatchee Collision Center when he

¹ The Report of Proceedings was prepared for both trials. In general, "RPI" indicates the first trial held September, 2009, paginated sequentially; "RPII" indicates the second trial, held May, 2011. References to hearings transcribed separately are designated "RP(date)".

² Exhibits 54 & 55 are the CDs of the recorded interviews, from which portions were played at the first trial. RPI 209-61. Exhibits 65 & 66 are transcripts of those complete interviews; the transcripts were not provided to the jury. Supp. CP (Subno. 268: Exhibit list). Exhibit 155 is the edited recording of Ex. 55; it was played with Ex. 54 at the second trial. RPII 400-53, 457-63.

was 16. He advanced from sweeping floors to management. Even after Chris grew up and moved out of Kellie's home, he and Kellie worked together daily for nine or ten hours. They were very close. Chris was Kellie's confidant. RPII 517-20, 525-26, 652-54.

In 2002 Kellie began seeing Rick Tyler. Rick moved into Kellie's home. Their relationship was good for a couple of years. RPII 521. There were times that Rick moved out, then moved back in. RPII 590-92. Rick never paid rent or shared in food expenses. He had no legal interest in Kellie's home. RPII 640.

Early in Kellie's relationship with Rick, Dawn Tyler, his ex-wife, left voicemail messages for Kellie on the work phone. Dawn warned Kellie that Rick had assaulted her and threatened to kill her during their marriage. Chris overheard the messages when Kellie played them. RPII 751.

Rick had angry outbursts. He threatened Kellie. Once he threw a fruit crate at her; once he threw down the boat trailer on its hitch. RPII 606-07; Ex. 65 at 4-5.

Chris observed Rick's behavior around Kellie. Usually Chris avoided Rick. Rick was a bully. He seemed pleased to have people afraid of him. Kellie conveyed all her fears to Chris. Chris saw his mother behave very skittishly around Rick, worried about what would set him off. RPII 642-43, 664-65.

In February, 2008, Rick assaulted Kellie. He pushed her down the concrete steps in front of her house. RPII 605, 663-65. Kellie tried to get Rick to move out of her home. She ended all intimate relations with him. He refused to leave. Instead, she slept on her couch and he in her bedroom. RPII 528-32, 589-90, 640-41, 666-67.

Although Rick did not specifically "hit" Kellie, he intimidated her. His displays of anger made her afraid to step out of line. Rather than make him angry, she tiptoed around, trying to get him to leave her home on his own without a confrontation. RPII 642.

In 2008, Chris saw Rick explode in anger with no indication of what the problem was. Kellie talked about Rick's personality changes. Rick's

behavior was getting more and more unpredictable and volatile. RPII 526, 665-67.

By summer, May through August, Rick was not living at Kellie's home anymore. RPII 592. He still had some possessions there, a dresser, a few clothes, some books and records. RPII 593.

In early October, 2008, Rick got a job driving truck in the eastern part of the U.S. He left Wenatchee. RPII 530-31; Ex. 65 at 4-5. After Rick left, Kellie was relaxed and happy. RPII 667.

As the holidays approached, Rick called Kellie to say he would be back at Christmas. Kellie told him she didn't want him in her home. She said she would move all his belongings out of her house and into his box truck. Her attorney had approved this plan. After a year of trying, Kellie thought she was successfully ending this relationship -- until the week before Christmas. RPII 532-33.

b. December 19, 2008

On Friday, December 19, Rick called Kellie to say he would arrive at the airport December 23 at 2:30. He asked her to pick him up; she refused. He told her he wanted to have sex with her, which she also refused. RPII 545, 615-17. He threatened

he would have sex with her even if she didn't want to. RPII 527.

Rick's threat to rape her caused Kellie to go that same day to the Crisis Center for help to get a protection order. RPII 527-28. She obtained the court order that same day. RPII 535; Ex. 114.³

The police were to serve the protection order on Rick. Kellie hoped and believed that he would obey a court order. Officer Patterson called Kellie to say they couldn't find Rick. Kellie explained he would not be back until the 23rd at 2:30. She said she was afraid Rick would sexually assault her. Kellie changed the locks on her doors. RPII 511-15, 534-36, 541-42.

c. December 23, 2008

Over the weekend, Chris helped Kellie move all of Rick's possessions into his box truck that was still on her property. She hoped to have Rick's family remove his car and the truck. RPII 668-72.

³ The Order restrained Rick Tyler from having any contact with Kellie; from going onto the grounds of or entering her residence; it gave her exclusive right to the residence, permitting Rick to remove his personal clothing only while a law enforcement officer was present; and it prohibited him from coming within 100 feet of her residence or workplace. Ex. 114.

On Tuesday morning, December 23, Chris was at Kellie's house when Rick called. Kellie repeated that she did not want him to come to her house. She told him she had obtained a protection order. He was not to come over under any circumstances. Kellie came near Chris and put the phone on speaker so he could hear Rick's angry reaction. Rick shouted he didn't care about any protection order, no piece of paper would stop him, he was coming over to get "what's mine." RPII 552-55, 613, 673-74; Ex. 66 at 12-13. Thinking of his earlier threat of sexual assault, to Chris this meant Rick considered everything "his," even his mom. RPII 730-31.

Literally shaking, Kellie immediately called the police. She told them of the call, of what time he would arrive at the airport. She believed the police would serve Rick with the order at the airport. RPII 563, 675-76. They told her to keep her doors locked, keep the phone nearby, and call 911 if he came over. RPII 753. Chris went home. RPII 556-58.

At shift change that morning, the police were briefed that they needed to serve the protection

order. Rick Tyler might show up at the airport or at the house. RPII 130-31, 148. At the 4:00 shift change, officers again were briefed that they needed to serve this order. Officer Virnig said the family would call them when Rick arrived at the house. RPII 175-76.

Rick Tyler was 6'5"; he weighed 250-260 lbs. Kellie Brown was 5'2"; she weighed 130 lbs. Chris was 5'11". RPII 544.

Kellie's house has two levels. The front door enters midway between the two floors. Inside is a landing with parallel stairs going up on the left to the main living area and down to the right to the basement. There is no door at the top of the stairs. The door at the bottom was propped open. Solid walls limit the view from the upper floor and stairs to the lower stairs. The front door has a large frosted glass window. Exs. 9, 16.

Kellie locked all the doors to her house. She used a screwdriver to secure the mechanism on her garage door. She also locked the solid-core door from the garage into the basement. RPII 557-61, 603-04, 728.

By 2:00, Kellie called Chris. She was very frightened. She didn't want to be alone if Rick came over. She begged Chris to come over. Chris was afraid of what would happen if the police didn't serve Rick at the airport. He was afraid of Rick's volatile and unpredictable behavior. He said he wouldn't feel safe and wouldn't come over unless he brought his gun. Kellie reluctantly agreed. RPII 564-67.

Chris came over just before 2:30. His bird gun, a .22/.410, had two barrels. One fired birdshot, the other a .22 bullet. Ex. 65 at 7-8. When he first arrived, he stood at the front window keeping watch. When no one had arrived by 3:30, they both began to relax. They made some pizza. Chris watched television while Kellie did laundry. RPII 567-68, 655, 721-22.

As it was getting dark shortly after 4:00, Kellie and Chris suddenly heard loud banging at the front door. Kellie went to the top of the stairs. She saw Rick's figure through the glass in the door. "Oh my god, it's Rick." He was rattling and trying to force the door. She got the phone to call 911. She saw Rick turn away from the front

door and head back down to the driveway. She thought maybe he was leaving. RPII 572-73, 655-57.

Then Chris and Kellie heard someone forcefully tugging on and shaking the garage door. They heard a loud noise and felt the floor shake beneath their feet as Rick forced open the metal garage door. They heard another huge bang as the solid fire door hit the wall. Chris realized there were no more locked doors between them and Rick. He ran to the top of the stairs to put himself between Rick and his mother. Her eyes were enormous with fear. RPII 574-76, 658-60, 684-86.

Chris grabbed his gun and returned to the stairs. He bellowed down the stairs, "Rick, don't come up those stairs, I have a weapon." He moved down the upper stairs, his mother above and behind him. RPII 687-89.

Rick came through the lower door. He looked up at Kellie and kept coming up the lower stairs. He reached toward Chris. Chris was afraid Rick would get the gun. About halfway on the upper stairs, Chris retreated up as he held the gun over the railing and fired the birdshot into the lower stairway. He hoped the loud noise would frighten

and stop Rick. He hoped he would turn around and leave. Instead Rick ducked down but kept coming up the stairs. RPII 576-78, 692-94, 716, 743.

Near the top of the stairs, Chris flipped the gun to the second barrel. He turned and saw Rick was still coming up the lower stairs. He was nearly to the landing. As Rick's head came above the railing, Chris fired again. Rick went down and stopped, his head at the top of the lower stairs. RPII 694-95.

Kellie was calling 911. Ex. 62. Chris looked out the front window. He saw for the first time Rick's father and sister in the driveway. The father carried a long snow scraper that Chris initially mistook for a gun. He reloaded, then saw it was not a weapon. He put his gun down. He told them to stay where they were, the police were on their way. RPII 696-97.

While talking to 911, Kellie realized Rick had been shot. Ex. 62. The police found Rick Tyler dead at the top of the lower flight of stairs. He had been shot twice. They arrested Chris Owens. RPII 135-38.

d. Chris's Statements to the Police

Chris cooperated fully with the police. He waived his rights. The detective recorded the interview. Exs. 54, 55. Crying periodically, Chris explained what had happened that day. Det. Darnell focused on why it happened. Repeatedly, Chris explained his mother's recent discovery of oxycontin pills in Rick's possessions. He explained that Rick had a history of using pain medication with alcohol, leading to angry outbursts. Chris's cousin was addicted to oxycontin and they had experienced a complete personality change in him, it made him very violent. Ex. 65 at 16-18, 26; RPII 414-15.

Later in the interview, Chris asked if Rick was okay. Only then did he learn that Rick had died. His voice became inaudible. He immediately mentioned Rick's daughter and how sorry he was for her. Ex. 65 at 29.⁴

The detective spoke with the elected prosecutor, then returned to Chris. Det. Darnell

⁴ Cf. State v. Douglas, 128 Wn. App. 555, 559-60, 116 P.3d 1012 (2005) (defendant was shocked to learn during police interview that man had died).

and the prosecutor wanted to know **why** Chris did what he did. Chris again agreed to answer all the detective's questions. Exs. 65-66; Ex. 155.

Chris explained again about the oxycontin pills. His cousin threatened to kill his grandparents. "[I]t destroys the soul of a person you know?" Ex. 66 at 6. He again explained the history of his mother being beaten, how their fear increased after she discovered the pills. Ex. 66 at 26-27. In yet another attempt to explain why he shot:

CO: Like I said my-my main concern was to protec-protect my mom, ah, and protect myself.

DD: K. (pause) Have I missed anything?

CO: Ah, you know as far as, as far as I know, my [mom] wanted me there because she was afraid of him. Ah, (pause) you know f-from that point of view I don't think there's anything um..

DD: K.

CO: I-I just he's unpredictable.

DD: Why do you say that?

CO: Well he just is but with you know like I said ya add in the oxycontin and, ...

Ex. 66 at 29-30.

Although Chris did not use the word "rape" in his interview with Det. Darnell, Kellie told him she was afraid Rick Tyler would rape her. RPII 752.

e. Physical Evidence

Rick Tyler was hit by two gunshots. The first shot was fatal, but not necessarily immediately; the second was instantly fatal. RPII 238-60. He lay with his head at the top of the lower stairs when the police arrived. RPII 390-91.⁵

The defense offered photographs of the door from the garage into the basement to show a boot print on it. Kellie saw the print immediately after the police released the house to her; she asked them to photograph it. The defense also photographed it. Defense counsel offered the State's photograph of the door, showing the bootprint. Sent. Ex. 2.⁶ He had photographs from both January, very shortly after the shooting, and August. He noted the bootprint on the door matched the boots Mr. Tyler wore when he entered the house that night. RPII 319-23, 343-46; Exs. 134, 158.

⁵ His body slipped down the stairs somewhat when the medics checked him. The photographs were not taken until after the medics were finished, so he appeared lower on the stairs. RPII 390-92; Ex. 12.

⁶ Counsel offered this photograph during trial, but the court did not mark and admit it as an exhibit until the sentencing hearing. RPII 319-25; RP(6/15/11) 12-15.

The State objected, claiming there was no evidence the door was in the same condition as the night of the shooting. The defense responded that Kellie would testify she noticed the footprint immediately after the incident, she photographed it and called the police. The print matched Mr. Tyler's boots he was wearing when shot. It supported the witnesses' statements: Kellie and Chris that they heard Rick angrily break in the door; and Heather and Bob's testimony that they heard three bangs they thought were gun shots, first one, then two more close together.⁷ RPII 319-25.

The court excluded the evidence of the footprint and ordered defense counsel could not present testimony or argue that there was a footprint on the door. It concluded the door had been in the "exclusive control of the defendant" since the incident. RPII 324-25, 343-46.

f. Facts Unknown to Chris and Kellie

Rick Tyler's plane had arrived late. His father and sister picked him up at the airport.

⁷ There was no evidence whatsoever that a third shot was fired.

They drove directly to the license branch to renew the tabs on Rick's car that was at Kellie's house. He didn't have the registration, so they drove over to Kellie's. They wanted to get back to DOL before it closed. Rick didn't appear angry to them. Heather and Bobby started to clear the snow off Rick's car in the driveway when they heard what they thought were three gunshots. Then the police arrived. RPII 287-94.

The autopsy revealed no alcohol or drugs in Rick Tyler's body. RPII 254-55; Ex. 63.

2. PROCEDURAL FACTS

a. Charges, Verdict & Sentence

The State charged Christopher Owens by amended information with Count I, first degree premeditated murder, with a firearm allegation.⁸ It charged an alternative Count II of second degree intentional murder also with the firearm allegation. CP 7-9.

The defense was self-defense and defense of another. The State argued Chris's perceptions and

⁸ RCW 9A.32.030(1)(a); former 9.94A.602, 9.94A.533(3)(a) and (d). Former RCW 9.94A.602 was recodified effective August 1, 2009, as RCW 9.94A.825.

response were not "reasonable," and so not justifiable.

The case first was tried in September, 2009. The jury was unable to reach a unanimous verdict. RPI; RP(9/8/09) 646.

The case was retried in May, 2011. The jury found Chris Owens guilty of Count I as charged. RPII; CP 76-77. The court sentenced him to 321 months in prison, a sentence within the standard range. CP 83-92.

b. Oxycontin at First Trial

The State sought to exclude all evidence regarding Rick Tyler using oxycontin. Defense counsel explained that Kellie Brown found oxycontin tablets in Rick Tyler's possessions. Rick had used oxycontin before. Kellie told Chris about finding the pills and his prior usage. Chris's cousin had been addicted to oxycontin. The drug completely changed his cousin's personality. It made him violent. He threatened to kill his grandparents. Chris repeatedly explained to Det. Darnell this was a major reason he was afraid of Rick Tyler -- the drug use increased the likelihood that he would be violent. The court excluded the evidence as too

speculative, too prejudicial, and not probative enough. RPI 165-68.

The State played the recordings of Chris's statements for the jury. Although the prosecutor stopped the recording to exclude the portions referring to the oxycontin, he played a portion that included it: When the detective asked Chris why he brought his rifle, Chris responded that Rick was a big man. "And once we found the oxycontin ..." RPI 269-70.

The defense moved for permission to admit the rest of the evidence about oxycontin. The court agreed this portion of the recorded statement opened the door to Chris's perceptions of the oxycontin. RPI 269-79. The jury then heard all the evidence about oxycontin in Chris's interviews, as well as the following evidence:

When Kellie was packing Rick's things to move them out of her house, she found oxycontin. She knew Rick had prescription pain medications and had used them with alcohol. Until then, she didn't realize it was oxycontin. Her nephew had moved here from Florida hooked on oxycontin. She and Chris had witnessed his volatile behavior. Twice

he had threatened to kill Kellie's mother to get more money to buy the drug. He broke into his parents' home. He stole family heirlooms to buy drugs. When she found the same drugs in Rick's things, she talked with Chris. They began matching some of Rick Tyler's behavioral changes with those of Kellie's nephew. RPI 357-59.

Rick would drink and use oxycontin, then call Kellie at work when Chris would answer the phone. Rick was irate, yelling. RPI 466-68.

Chris was with her when Kellie asked Rick about the oxycontin in the December 23 telephone conversation. Rick said he'd be back to get it. Kellie said no, she had a no contact order, he was not to come back to the house. Rick then said no piece of paper would stop him from coming back. He hung up. RPI 359-61.

Later that afternoon, Kellie asked Chris to come to the house in case Rick came over. Chris was very upset about Rick using oxycontin. He was afraid Rick would force his way into the house. Chris wouldn't come unless he could bring his gun. RPI 477-78. When Chris explained why he wanted the gun, Kellie agreed. RPI 479-80.

During closing argument, defense counsel reviewed for the jury why the oxycontin added to Chris's and Kellie's fear and why that fear was reasonable:

In the background of their mind, of course, they had apparently a relative that took oxycontin, became addicted to oxycontin, and threatened to kill his grandparents and threatened to kill Kellie's parents. It increased the fearfulness that they had for Rick, because they knew that he was abusing oxycontin

The fear of the oxycontin is reasonable because standing in Chris' shoes, as the jury instructions say you must, standing in Chris' shoes, this is more information for him, of course And they know that drug steals your soul! It does. Doesn't it? You know. You have family members. You do, friends. It stole their soul, didn't it? You've seen addicts. You know what they're like. It does steal their soul. It makes them somebody that they were not. It does. It made Rick Tyler something probably that he really was not. It did.

RPI 619-20.

c. Oxycontin at the Second Trial

Before the second trial, defense counsel asked the court to reconsider its ruling in limine from the first trial that excluded the evidence of

oxycontin.⁹ The parties discussed what they recalled from the first trial.¹⁰ Counsel noted Chris explained to Det. Darnell why he was afraid of Rick Tyler that night. He specifically explained the oxycontin, their family's experience with his cousin, how he and Kellie had recognized similar personality changes between Rick and the cousin, and why it added to Chris's fear. The judge responded he didn't recall how or why it came in at the first trial, but thought he granted a motion in limine to keep it out, and he would stick with that ruling because it was irrelevant. Defense counsel objected. RPII 263-65.

Once again, the State's recording of Chris's statement included reference to the oxycontin. RPII 414-15. Once again, the defense moved to admit evidence of the drug and its significance for Chris. This time, the court denied the motion and kept the evidence out. RPII 454.

⁹ Although the transcript refers to a ruling "two days ago," it is likely counsel said or meant "two years ago," since there is no record of any discussion of this issue from two days previous. RPII 263.

¹⁰ Trial counsel had transcripts of the witnesses' testimony, but not of the various colloquys. RPII 263.

d. State's Theory

On cross-examination, the prosecutor emphasized that Chris did not personally witness Rick Tyler's previous actions against Kellie Brown. He had not seen any assaults. He then asked about his interview:

Q: Okay. Do you believe that Detective Darnell gave you an opportunity to fully explain yourself?

A: I believe he gave me an opportunity. Yes.

RPII 705. Referring to the second recording after a break, the prosecutor again asked:

Q: Okay. And again would you agree that he gave you all the opportunity in the world to fully explain yourself in that second interview?

A: He did give me another opportunity. Yes.

Q: And he asked you questions about what had occurred. Is that correct?

A: That is correct.

Q: And at the conclusion of both the first and the second statement, he asked you if there was anything else that you wanted to say. Is that correct?

A: That is correct.

Q: And he asked if there was anything else you wanted, or anything that you wanted to change. Is that correct?

A: That's correct.

RPII 706-07.

Although Det. Darnell had permitted Chris to say everything, the jury was not permitted to hear

everything he said. Thus the prosecutor conveyed that Chris's statements were complete when they were not. They excluded all references to oxycontin.

The prosecutor argued Chris's perceptions of danger were not "reasonable" as required by the law. He then decided to tell the jury a "short story" about himself and his wife sleeping in their home "just about two weeks ago." He heard their dogs barking, he woke up enough to look down the hallway, and he saw a figure standing here. "Scared the hell out of my wife." The figure faced away, had a hood, the prosecutor couldn't see his face.

I bolted up. Now, I have a firearm as well. But I bolted up and I responded and I aggressively went in the direction of the guy. And for that split second I didn't know who he was. But just a moment later, I realized who it was. It was my son. He had an emergency at his house. He didn't want to wake us, but he walked in without telling us he was coming over.

Ladies and gentlemen, my son had lived at that house. He didn't need to call. He didn't need to tell me. Probably would have been smart under the circumstances, but you have to know who you're dealing with in this case. Mr. Tyler wasn't a stranger to either of them.

RPII 782-83.

He argued there was no reasonable belief of great injury, or that it was imminent. He argued Rick Tyler never said he was going to rape Kellie Brown. RPII 793-98. And he argued Rick's family said he was not angry when they arrived at the house. "No evidence that there was a prior sexual assault. She never said he raped her before" RPII 784. He argued Rick might have used some force on the door from the garage to the basement.

Not necessarily angry force. Force doesn't mean anger. Force means you're doing something until you can get through it. And so he opened the door.

RPII 786-87. He argued Rick Tyler "made no threats or acted aggressively towards [Chris] after he entered the house." RPII 788. "He just walked silently to his death is what happened. He was ambushed." RPII 789.

The prosecutor argued the defense exaggerated domestic violence. He argued that domestic violence was just a "buzz word" in this case; there was no history here of domestic violence or a break-in. RPII 788-89.

Defense counsel argued in closing that Kellie told the police Rick Tyler said he was going to

come "get some," meaning sex, from her, against her will. RPII 814.

In rebuttal, the State argued that the protection order was only a temporary one, that "[A]ny one of you could go to court tonight, tomorrow, and get a no-contact order against another person." RPII 838-39.

Nowhere did the State argue its burden to prove the absence of self-defense.

e. Jury Instructions

At the beginning of voir dire, the court instructed the jury venire:

A reasonable doubt is one for which a reason can be given and may arise from the evidence or lack of evidence. ... If, after your deliberations, you do not have **a doubt for which a reason can be given** as to the defendant's guilt, you are satisfied beyond a reasonable doubt. If, after your deliberations, you do have **a doubt for which a reason can be given** as to the defendant's guilt, you are not satisfied beyond a reasonable doubt.

RP(5/23/11) at 8. The court did not review these instructions with counsel before giving them.

Following trial, the court instructed the jury as follows:

No. 6

To convict the defendant of the crime of Murder in the First Degree, each

of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 23, 2008, the defendant acted with intent to cause the death of Richard Lynn Tyler;

(2) That the intent to cause the death was premeditated;

(3) That Richard Lynn Tyler died as a result of the defendant's acts; and

(4) That any of these 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.

CP 61 (emphasis added).

No. 12

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer, the slayer's parent, or any other person in the slayer's presence or company when:

(1) **the slayer reasonably believed that the person slain intended 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 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 67 (emphasis added). The State excepted to instructions 12 and 14, arguing there was insufficient evidence of self-defense. The defense did not except to the court's instructions. RPII 765.

C. ARGUMENT

1. THE COURT ERRED BY EXCLUDING EVIDENCE CRUCIAL TO ESTABLISHING THE DEFENDANT'S PERCEPTIONS AND FEAR WERE REASONABLE, AN ESSENTIAL ASPECT OF SELF-DEFENSE.

In Washington, self-defense is defined by statute. Homicide is justifiable when committed either:

(1) In the lawful defense of the slayer, or his ... parent ... or any other person in his presence or company, 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 or to any such person, and there is imminent danger of such design being accomplished;

RCW 9A.16.050 (emphasis added).

A defendant bears the initial burden of producing some evidence which tends to prove that

the killing occurred in circumstances amounting to self-defense.¹¹ State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993).

But self-defense negates the mens rea of homicide. Therefore, due process requires the State bear the ultimate burden to prove the lack of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, **knowing all the defendant knows and seeing all the defendant sees. . . .**

[Jurors are to] put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent [person] similarly situated would have done.

. . . The trial court must evaluate the evidence from this same point of view if it is to properly determine whether the defendant has produced some evidence of self-defense.

¹¹ Appellant uses the term "self-defense" to encompass all aspects of the crime being "justifiable" under RCW 9A.16.050, including defense of another.

State v. Janes, supra, 121 Wn.2d at 238 (citations omitted) (emphases added), quoting State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977).

By evaluating the evidence from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees, our approach to reasonableness incorporates both subjective and objective characteristics. It is subjective in that the jury is "entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view to determine the character of the act." ... Also, the jury is to consider the defendant's actions in light of **all** the facts and circumstances known to the defendant, even those substantially predating the killing. ... The self-defense evaluation is objective in that the jury is to use this information in determining "what a reasonably prudent [person] similarly situated would have done."

Janes, 121 Wn.2d at 238 (Court's emphasis).

A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. ... A finding of actual imminent harm is unnecessary. ... Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from **all the surrounding facts and circumstances as they appeared to the defendant.**

State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996) (emphasis added). It is for the jury, not the court, to determine whether the defendant's perceptions and actions were "reasonable." U.S.

Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.¹²

In Wanrow, the Supreme Court considered **all** that Ms. Wanrow knew and believed about the deceased to assess the adequacy of the self-defense instructions. It considered what she knew personally, and what she had heard from others. All of it was relevant to why she was afraid. It was for the jury to determine whether her perceptions and actions were reasonable. But they could only assess reasonableness by considering everything she knew and perceived about the deceased. Wanrow, supra.

Of course, the jury cannot consider "all the surrounding facts and circumstances as they appeared to the defendant" if the court does not permit the defense to present all of them.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are

¹² Constitutional provisions, relevant statutes and rules are quoted in the appendix.

"'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

a. Oxycontin Was Relevant to Why Chris Was Afraid and the Reasonableness of His Fear.

The court here ruled at the second trial that Chris's knowledge of the oxycontin was not relevant, and so not admissible. ER 401, 402.

The ultimate issue of fact was whether Chris's perceptions and actions were reasonable, given all that he knew and perceived. This is an essential "element" of self-defense of which he must produce evidence. Janes, supra. As his defense to the

charge, he was entitled to present **all** he knew that was relevant to his perceptions and actions.

Chris repeatedly explained to Det. Darnell the night of the shooting that the oxycontin was a significant factor in his fear. He knew from past experience Rick Tyler had used the pain pills with alcohol and it caused irrational anger. RPI 466-68.¹³ He knew oxycontin made his cousin threaten to kill his grandparents. He and Kellie compared Rick's recent behavior changes to his cousin's. He believed it "stole your soul," that it made a person unpredictable and likely to do things a person without the drugs would not do. Knowing of these drugs was why he brought the gun along.

In Wanrow, the court considered many things the defendant had heard about the deceased: he had molested her friend's daughter, had tried to abduct her son, had earlier tried to molest a boy who once lived in the same house, and was previously committed to the state hospital for the mentally ill. As here, Ms. Wanrow and her friends had

¹³ Cf. State v. Eakins, 127 Wn.2d 490, 492-94, 902 P.2d 1236 (1995) (defendant's use of alcohol and tranquilizers caused uncharacteristic aggressive and threatening behavior).

sought police assistance, but been put off until a later time. Friends gathered in one house all night long, afraid the deceased would try to break in and harm their children. They then invited the deceased into the home to discuss matters. Ms. Wanrow shot him when she found him suddenly standing directly behind her, as a reflex to being startled.

Courts frequently have noted the defendant's perception that the other person was intoxicated in self-defense cases. State v. George, 161 Wn. App. 86, 97, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011) (defendant felt intimidated by deceased's larger size [and] bloodshot eyes from which he concluded deceased was under the influence of drugs); LeFaber, 128 Wn.2d at 898 ("drunken belligerence"); State v. Douglas, 128 Wn. App. 555, 558, 116 P.3d 1012 (2005) ("rather drunk"). People understand that intoxication or the influence of drugs makes people less predictable. Obviously even on appeal the courts find such evidence is "relevant" to analyzing the evidence in support of self-defense.

The oxycontin evidence was crucial to Chris's perceptions and reasons for his actions. Excluding it denied his right to present a "complete defense." U.S. Const., amends. 6, 14; Const. art. I, §§ 3, 22.

The State's theory was that Chris's perceptions and actions were not reasonable. Reasonableness was the only issue at stake. The evidence was not merely relevant; it was essential. The court's conclusion that it was irrelevant was an abuse of discretion.

Without this evidence, the jury could not properly assess the reasonableness of Chris's actions. The trial court usurped his right to have the jury hear and consider all the evidence of why he acted as he did and whether his actions were reasonable, and so his right to a jury trial. U.S. Const., amends. 6, 14; Const. art. I, §§ 3, 21, 22.

b. Exclusion of the Oxycontin Was Not Harmless.

Exclusion of the oxycontin evidence was not harmless. Chris mentioned it many times in his interviews with Det. Darnell. Ex. 65 at 16-18, 26; RPII 414-15. He especially explained it when Det. Darnell returned for a second interview to find out

"why" Chris did what he did. The oxycontin was a major factor for "why" Chris was afraid and brought the gun. Ex. 66 at 6, 26-27, 29-30.

On this record, we have the rare opportunity to see the prejudice clearly: At the first trial, when this evidence was admitted, the jury was unable to convict. RPI. At the second trial, without the evidence, the jury found him guilty as charged. RPII.

Furthermore, excluding this evidence prejudiced the defense in the State's presentation of the evidence. The prosecutor appeared to establish that the detective gave Chris every opportunity to explain everything about what had occurred and why. RPII 705-07. Yet he succeeded in keeping the jury from hearing large portions of Chris's explanation.

c. The Court Erroneously Excluded Evidence and Argument that Rick Tyler's Bootprint Was On the Door From the Garage to the Basement.

Although the court admitted a section of the door from the garage to the basement for one

purpose,¹⁴ it excluded all testimony about a footprint and prohibited counsel from arguing that any evidence showed a footprint on the door. RPII 319-26.

The State argued there was insufficient foundation to show the door was in the same condition as the night of the shooting. The law, however, does not require absolute certainty that the item has not changed. The court acknowledged there were photographs from both January, very shortly after the shooting, and August. The court ultimately ruled "after this incident it was in the exclusive control of the defendant and I don't think it's been properly preserved." RPII 343-46.¹⁵

"[G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility." Melendez-Diaz v. Massachusetts,

¹⁴ To prove it was a solid-core door, contrary to Bob Tyler's testimony. RPII 190-94, 319-21.

¹⁵ In fact, the defendant had been in custody since the shooting. He had no control over the door. Furthermore, the boots were removed with Rick Tyler's body. They remained in evidence since then. RPII 362-66. Thus no one had access to the boots to make a matching print on the door.

557 U.S. 305, 129 S. Ct. 2527, 2532 n.1, 174 L. Ed. 2d 314 (2009).

Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. ... Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." ... The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. ... Identity and condition of an exhibit are always subject to rebuttal. ... The jury is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. ... However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) (citations omitted); cited with approval in State v. Roy, 126 Wn. App. 124, 107 P.3d 750 (2005). Usually, a trial court's ruling is reviewable for an abuse of discretion. Campbell.

The majority of cases challenging chain of custody involve the State's evidence admitted against a defense objection. Here, in contrast, the defense sought to admit the evidence. The

court's discretion must be weighed against the defendant's constitutional right to present a defense. Holmes, supra.

Chris explained to the detective and to the jury his fear of Rick grew as Rick violently broke through two locked doors to enter the house. Chris and Kellie heard an enormous "bang" when Rick came through the door from the garage into the basement. The sound was consistent with kicking the door open so it forcefully struck the wall. Kicking the door open was consistent with breaking into the house and displaying anger and aggression -- which is what Chris and Kellie perceived. The State argued these perceptions were unreasonable, that Rick Tyler did not break into the house.

This evidence was admissible to support what Chris perceived and why his perception was reasonable for self-defense.

Furthermore, the court violated his right to counsel by prohibiting him from arguing about the footprint even from the evidence that was admitted.

The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This right to counsel encompasses the delivery of

closing argument. Although trial courts possess discretion over the scope of closing argument, a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel. When a court's limitation of argument relates to a fact necessary to support a conviction, the defendant's due process rights may also be implicated.

State v. Frost, 160 Wn.2d 765, 768, 161 P.3d 361 (2007); Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). See also State v. Mayo, 42 Wash. 540, 548-49, 85 P. 251 (1906) (reversing murder case where court limited closing argument to 1-1/2 hours per side as abuse of discretion, after trial of more than four days; Const., art. I, § 22).

Ex. 20, one of the State's photographs, shows the door with an apparent bootprint on it. The court also admitted the section of the door with the print on it. Ex. 158. Yet it prohibited counsel from arguing to the jury that this evidence supported Chris's perceptions that Rick kicked in that door. Since this was a crucial fact supporting self-defense, which the State vehemently argued against, it was an abuse of discretion to limit the evidence and argument in this way.

2. MANIFEST CONSTITUTIONAL ERROR CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

(a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... manifest error affecting a constitutional right. ...

RAP 2.5(a). Defense counsel did not except to the court's jury instructions.

Erroneous jury instructions that constitute manifest constitutional error include directing a verdict, shifting the burden of proof to the defendant, failing to define the "beyond a reasonable doubt" standard, and omitting an element of the crime charged. State v. O'Hara, 167 Wn.2d 91, 100-01, 104, 217 P.3d 756 (2009).

In this case, the court omitted an essential element of self-defense; it improperly defined "reasonable doubt" so as to shift the burden of proof; and it directed a verdict while omitting an essential element of the charge from the "to convict" instruction. See arguments below. All of these instructional errors thus may be reviewed for

the first time on appeal. O'Hara, supra.¹⁶

3. THE COURT ERRONEOUSLY INSTRUCTED THE JURY ON SELF-DEFENSE, OMITTING AN ESSENTIAL ELEMENT OF THE DEFENSE.

One cannot adequately present a defense if the court does not properly instruct the jury on the law applicable to that defense. Due process and the right to a jury trial require as much. U.S. Const., amends. 6, 14; Const., art. 1, §§ 3, 21, 22.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful

¹⁶ The trial record does not include the parties' proposed instructions. Appellant's counsel contacted trial counsel and the trial court. Defense counsel and the court administrator replied the proposed instructions were not in their files. The prosecutor said he would review his files. Counsel has not heard back.

Should respondent plead and prove that defense counsel proposed the instructions challenged in this appeal, and argue they are therefore invited error, appellant reserves the right to raise the additional issue that proposing these instructions was ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). A claim of ineffective assistance of counsel can be raised for the first time on appeal. State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). There can be no legitimate strategic or tactical reason for proposing instructions that decrease the State's burden to prove the absence of self-defense. Id. at 868-69.

opportunity to present a complete defense."

Holmes v. South Carolina, supra, 547 U.S. at 324.

- a. The Trial Court Failed To Instruct On All Applicable Grounds for Self-Defense, Thus Denying Appellant His Right to Present a Defense.

The jury instructions in a case of self-defense are particularly crucial in allocating the burden of proof and accurately conveying the law to the jury.

Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard "manifestly apparent to the average juror."

State v. LeFaber, supra, 128 Wn.2d at 899-900; State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); State v. Wanrow, supra, 88 Wn.2d at 237.

Additionally, because the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude.

State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

RCW 9A.16.050, quoted above, makes homicide justifiable if the slayer reasonably believes the person slain intends "to commit a felony or to do some great personal injury" to the slayer, his parent, or a person with him. Yet the court's instructions omitted the possibility of intending to commit a felony.

The defense evidence very clearly articulated that Rick Tyler threatened to rape or sexually assault Kellie Brown; i.e., to commit a felony against her.¹⁷ This threat caused her to get the protection order. It apparently caused the court to grant the protection order.

Chris Owens was aware of this threat. He intended to protect his mother against rape and sexual assault as well as against death or any severe pain or injury. The law gave him that right. Defense counsel argued that right in closing argument. RPII 814.

If an erroneous instruction goes to the essence of an accused's defense, the error may so deprive a criminal defendant of due process of law that manifest

¹⁷ See RCW 9A.44.050 (Rape 2°, Class A felony); RCW 9A.44.060 (Rape 3°, Class C felony); RCW 9A.44.100 (Indecent Liberties, Class A or B felony).

justice requires the matter to be remanded for a new trial, even if counsel did not except below.

State v. Painter, 27 Wn. App. 708, 715, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981).

Chris answered the detective's and prosecutor's questions honestly: Rick Tyler had not specifically threatened to kill or beat him or his mother. A beating might well "produce severe pain or suffering" within the instruction's definition. The instruction, however, does not encompass a sexual assault, which might not produce the "severe pain or suffering" a beating would.

The Court reversed a murder conviction in Painter, supra, because the trial court instructed the jury:

"Great bodily harm" means an injury of a more serious nature than an ordinary striking with the hands or fists.

In that case the evidence was limited to the deceased using his hands against the defendant, a woman walking with a crutch who, after the deceased pushed her down, felt one leg paralyzed. She pulled her gun and warned him to stay back or she'd shoot, but he started toward her again. She fired.

When he reached for her throat after the first shot, she fired again.

The Court of Appeals reversed the conviction. By limiting "great bodily harm" to something more than striking with hands or fists, the trial court effectively removed the only evidence by which a jury could find the homicide was justifiable. Painter, 27 Wn. App. at 714.

The Supreme Court adopted the rationale of Painter:

By defining [great personal injury] to exclude ordinary batteries, a reasonable juror could read instruction 18 to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury.

State v. Walden, supra, 131 Wn.2d at 477. Similarly here, the jury could read the instructions to prohibit consideration of Chris's subjective impressions of all the facts and circumstances, specifically whether he reasonably believed Rick Tyler had threatened to rape or sexually assault his mother.

b. The Erroneous Instruction Was Prejudicial.

In Walden, the Court held the definition of great personal injury was a misstatement of the law and therefore "is presumed prejudicial to the defendant."

An instructional error is harmless only if it is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*. ... Because the definition of [great personal injury] may have affected the final outcome of this case, the error cannot be declared harmless.

Walden, 131 Wn.2d at 478 (Court's emphases), citing Wanrow, supra, and State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970).

For the same reasons here, the failure to include the threatened felony prohibited the jury from considering a portion of the defense in this case. It requires reversal and a new trial.

4. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY THAT A REASONABLE DOUBT IS ONE FOR WHICH A REASON CAN BE GIVEN INSTEAD OF ONE FOR WHICH A REASON EXISTS.

Due process requires that a jury may not convict a person of a crime unless and until the State has proven every element of the charge beyond

a reasonable doubt. U.S. Const., amends. 5, 14; Const., art. I, § 3; Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof. State v. Coe, 101 Wn.2d 772, 787-88, 684 P.2d 668 (1984).

The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.

State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

The Washington Pattern Jury Instructions--Criminal provide language in both WPIC 1.01 and in 4.01 defining reasonable doubt:

A reasonable doubt is one for which a reason **exists**. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would **exist** in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

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1.01 (3d Ed. 2008) (emphases added).

A reasonable doubt is one for which a reason **exists** and may arise from the evidence or lack of evidence. It is such a doubt as would **exist** in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

WPIC 4.01 (emphases added).

- a. Washington Trial Courts Are Required to Define Reasonable Doubt With the Language of WPIC 4.01.

The Supreme Court explicitly disapproves of experimenting with this fundamental principle in jury instructions.

We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms, and shifts, perhaps ever so slightly, the emphasis of the instruction. . . . Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. **We therefore exercise our inherent supervisory power to instruct Washington trial courts We have approved WPIC 4.01 and conclude that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of**

the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 317-18 (emphases added).

Bennett's directive is mandatory. In State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009), the trial court gave a different instruction on reasonable doubt eight months after Bennett. The Castillo court reversed the child rape conviction. It explicitly rejected the State's argument that the error was harmless. It held eight months was sufficient time for the lower courts and counsel to learn of the directive to use the pattern instruction.¹⁸

[T]here is nothing ambiguous about the supreme court's directive: trial courts are to use **only** WPIC 4.01 as the reasonable doubt instruction "until a better instruction is approved." The court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt.

Castillo, 150 Wn. App. at 472 (court's emphasis).

¹⁸ Once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. Id. at 467 n.2, citing State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In State v. Lundy, 162 Wn. App. 865, 256 P.3d 466 (2011), Division Two held a variation on WPIC 4.01 was harmless beyond a reasonable doubt. In that case, however, the court did not change the language defining reasonable doubt. It slightly modified language discussing that each charge had elements, and it reversed the sequence of the first two paragraphs -- but it used the same language as WPIC 4.01 to define reasonable doubt. Lundy, 162 Wn. App. at 871.

The court here instructed the jury a reasonable doubt is one "for which a reason can be given." This language suggests that a juror or the defendant is required to give a reason for any doubt. It thus improperly shifts the burden of proof, violating due process. U.S. Const., amend. 14; Const., art. I, § 3.

b. The Law Does Not Require That Anyone Give a Reason for Doubt.

The prejudicial effect of requiring a "reason be given" for a doubt to be reasonable is evident from cases of prosecutorial misconduct. Even without objection, the courts have reversed convictions for flagrant prosecutorial misconduct where the prosecutor argued this definition of

reasonable doubt, although the jury instructions were correct.

In State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011), the prosecutor used equivalent language in closing argument:

[W]hat you should be able to say, "I have a doubt about, okay, element X, **and it's because of this reason**," fill in the blank, okay? And it should be a reason that comes from the evidence or lack of evidence.

Evans, 163 Wn. App. at 641-42 (emphasis added). The Court held this argument was flagrant and ill-intentioned. It reversed, explaining the argument violates due process and

subverts the presumption of innocence by implying that the jury has an initial affirmative duty to convict and that the defendant bears the burden of providing a reason for the jury not to convict.

Evans, 163 Wn. App. at 645.

The Court explained how this concept diminishes the presumption of innocence in State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009):

By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this

implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Even without an objection, this remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." State v. Venegas, 155 Wn. App. 507, 524 n.16, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). Accord: State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011); State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011).

If the prosecutor's argument is so prejudicial it cannot be cured by an instruction, the court's instruction is far more prejudicial. The court instructs the jury to disregard counsel's argument if it is not supported by the law in the court's instructions. But the jury is required to follow the court's instructions, regardless of what it believes the law is or ought to be. WPIC 1.01, Part 2, 1.02;¹⁹ CP 55-57.

¹⁹ The relevant text of WPIC 1.02, given in every case, is contained in the appendix.

In this case, the trial court modified the definition of reasonable doubt for the entire venire. RP(5/23/11) at 8. It stated the incorrect definition three times. Immediately before this instruction, a venire member expressed her concern that English was not her first language; she was not comfortable that she would understand everything. Although capable of working for an export company, the words used in court were very different. The entire venire heard this exchange. RP(5/23/11) at 4-7.

A juror's language ability further demonstrates the difference between the instruction used here and WPIC 4.01. A juror may conclude she or he has a reasonable doubt, that such a doubt exists; yet that juror in deliberations may not be able to articulate or "give a reason" for that doubt. Giving a reason requires more facility with language than merely having a reason for the doubt.

This difference mattered here. The State did not argue its burden to disprove self-defense. It argued the facts not from Chris's point of view, but from Rick Tyler's point of view, from Bobby Tyler's and Heather McCourt's point of view, and

asked the jury to determine from that angle whether Christopher Owens's fear was reasonable. RPII 783-86. And it shifted the burden of proof:

Reasonable, under self-defense appears in that definition four times. Each time you have to find that reasonable occurred or he was reasonable or the circumstances were reasonable in order for that defense to apply.

RPII 795. "The State not only neglected to make the law clear, it further confused the law [in its argument]." State v. Bland, 128 Wn. App. 511, 516, 116 P.3d 428 (2005).

c. Instructions That Subvert The Presumption of Innocence and Burden of Proof Violate the Right to a Jury Trial and Require Reversal.

In Sullivan v. Louisiana, 508 U.S. 275, 277-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), the Court reversed a state court murder conviction because the jury instructions misdefined reasonable doubt. The Court, by Justice Scalia, held the error could not be harmless. Since the instruction incorrectly defined reasonable doubt for the jury, the "verdict" was not rendered beyond a reasonable doubt as required by due process. U.S. Const., Amends. 5, 14. As a consequence, "there has been no jury verdict within the meaning of the Sixth

Amendment." The instructional error vitiated all the jury's findings. It could not be harmless.

For the same reasons, this Court should reverse this conviction and remand for a new trial.

d. This Court Should Exercise Its Supervisory Power To Correct This Practice.

State v. Bennett was unambiguous. All trial courts were ordered to define reasonable doubt with the language of WPIC 4.01.

In Castillo, the Court rejected the State's argument that no published opinion had ever reversed a conviction because of an improper reasonable doubt instruction. Castillo, 150 Wn. App. at 475. Here, this Court should consider that the trial court gave its modified definition of "reasonable doubt" at a time in the proceedings when counsel did not have advance notice or an opportunity to object to the instruction, as is required later. CrR 6.15.

Furthermore, the court gave this instruction in a portion of the record that routinely is not prepared for indigent appeals. RAP 9.2(b).²⁰ Thus the trial court's violation of Bennett's

²⁰ The rule's text is in the appendix.

directive could continue without any appellate review for the vast majority of cases. It is within this Court's supervisory duty to take this opportunity to correct this practice. Obviously the Supreme Court's directive for future cases was not sufficient to get this trial court's attention. Bennett, supra.

In a case where the instructions were less than obvious about the burden of proving lack of self defense, this instruction violated appellant's right to due process. This Court should reverse the conviction and remand for a new trial.

5. THE INSTRUCTIONS FAILED TO REQUIRE THE JURY TO FIND EVERY ESSENTIAL ELEMENT IN ORDER TO RETURN A VERDICT OF GUILTY.

Due process requires the court's instructions to fully instruct the jury on every essential element of the charged crime.

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. ... It is reversible error to instruct the jury in a manner that would relieve the State of this burden.

State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997); In re Winship, 397 U.S. 358, 364,

25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); U.S. Const., amend. 14; Const., art. 1, § 3.

When there is evidence that the use of force was justified, the court must instruct the jury unequivocally that the state bears the burden of proving the use of force was not lawful or justified. State v. Acosta, supra, 101 Wn.2d at 616; State v. McCullum, supra.

In this respect, once evidence of self-defense is presented, the lack of self-defense becomes an "element" of the charge that the State must prove beyond a reasonable doubt before the jury may convict.

The "to convict" instruction listing elements did not include the state's burden to prove the absence of that defense.

If the evidence supports the giving of an instruction defining excusable or justifiable [use of force], we believe the better position is to revert to the standard elements instruction ... and include those issues there.

State v. Fondren, 41 Wn. App. 17, 23, 701 P.2d 810 (1985); see also State v. Redwine, 72 Wn. App. 625, 628, 865 P.2d 552 (1994).²¹

The "to convict" instruction carries with it a special weight because the jury treats the instruction as a "yardstick" by which to measure a defendant's guilt or innocence. ...

We review the adequacy of a challenged "to convict" jury instruction de novo. ... Though, as a general matter, "[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law," ... and we review jury instructions "in the context of the instructions as a whole," ... **the reviewing court generally "may not rely on other instructions to supply the element missing from the 'to convict' instruction."**

State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005) (emphases added).

It is not a sufficient answer to this assignment of error to say that the jury could have supplied the omission of this element ... by reference to the other instructions. Concededly, as a general legal principle all the pertinent law need not be incorporated in one instruction. However, the trial court undertook to specifically tell the jury in instruction No. 5 that they could convict appellant if they found that four

²¹ "Instructions 4 and 5 explained the elements of second and fourth degree assault, but did not include as an element the absence of lawful force."

certain elements of the crime had been proven beyond a reasonable doubt. In effect, the judge furnished a yardstick by which the jury were to measure the evidence in determining the appellant's guilt or innocence of the crime charged. The jury had the right to regard instruction No. 5 as being **a complete statement of the elements** of the crime charged. This instruction purported to contain **all essential elements**, and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in instruction No. 5.

State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953) (emphases added). Here, Instruction No. 6 went beyond telling the jury it "could" convict appellant if it found all the listed elements; it told the jury it had a "duty to return a verdict of guilty." It thus relieved the State of the burden of proving the actions were not justifiable.

The other instructions actually compound this error. Instruction No. 4 refers to the state's burden to prove every "element." CP 59. Yet the only other instruction discussing "elements" is No. 6. It tells the jury it has a "duty to return a verdict of guilty" based solely on the elements in that instruction -- again, with no reference to self-defense or justification. The court did not

instruct the jury anywhere that the absence of self-defense was an "element" of the charge.²²

This error was not cured by Instruction No. 12. Instruction No. 12 properly places the burden of proof on the State to prove the lack of self-defense. McCullum, supra. But it offers no way to reconcile it with Instruction No. 6 -- that the jury has a "duty to return a verdict of guilty" if it finds all of the listed elements are proved beyond a reasonable doubt.

When instructions are inconsistent, it is the duty of the reviewing court to determine whether "the jury was misled as to its function and responsibilities under the law" by that inconsistency. ... [W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.

²² The State's argument further diminished its burden of proving lack of self-defense. It argued the elements of murder separately from self-defense, concluding it had proven murder. RPII 776-93. Under these instructions, once the jury found those elements proven, it had a "duty" to convict. CP 61.

Wanrow, 88 Wn.2d at 239; State v. Walden, 131 Wn.2d at 478.²³ This erroneous instruction requires the conviction be reversed and remanded for a new trial.

6. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. State v. Huson, 73 Wn. 2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or

²³ The Court approved similar instructions in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). However, it did not address the conflicts of the instructions or the "duty" to convict. The Supreme Court's subsequent decisions in Mills and Walden suggest Hoffman is appropriate for reconsideration.

considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process. U.S. Const., amend. 14; Const., art. 1, § 3.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

a. Arguing outside evidence for emotion and passion

The facts here are similar to those in State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984). At the end of a rape trial, the prosecutor read a poem by a rape victim to show how one of the defendant's victims "probably felt." The poem included reference to a "razor just grazing" the victim's throat, when there was no evidence of a razor or knife in the case. Id. at 851 n.4.

The court held the use of the highly emotional poem

was nothing but an appeal to the jury's passion and prejudice. ... In addition, the poem contained many prejudicial allusions to matters outside the actual evidence against Claflin. ... In short, the reading of the poem was so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.

Id., 38 Wn. App. at 850-51.

The Supreme Court reversed a case in which the prosecutor made a similarly impassioned argument based on irrelevant factors not admitted in evidence:

These inflammatory comments were a deliberate appeal to the jury's passion and prejudice and encouraged it to render a verdict based on Belgarde's associations with AIM rather than properly admitted evidence. The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.

State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Even without objection, the improper argument required reversal. Id.

In this case, the prosecutor used a very emotional and personal story about a frightening experience in his own home where he might have mistakenly shot his own son as an intruder.

But this powerful story was no analogy to this case. The prosecutor said his son was welcome in

his home; Rick Tyler was not welcome in Kellie Brown's home. The prosecutor did not have a court order prohibiting his son from entering his home; Kellie Brown had a court order to keep Rick Tyler away, and she had told him about it. The prosecutor's son had not threatened to sexually assault his parents; Rick Tyler had threatened to rape Kellie Brown when he returned.

Chris Owens did not mistakenly shoot Rick Tyler thinking he was a burglar. Rick Tyler was a burglar. He announced his intent to disregard Kellie's orders and a court's order. He demonstrated his refusal to obey orders by breaking through at least two doors to enter the house.

b. Prejudice

[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

This case involved enormous emotions. But those emotions were defined within the evidence: fear, threats, violating people's wishes and court

orders. The prosecutor went outside the evidence and injected his own concerns, his own family, into closing argument. This was improper and prejudicial. It requires reversal.

7. CUMULATIVE ERROR DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL.

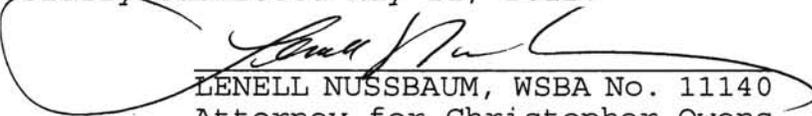
Under the cumulative error doctrine, this Court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); State v. Venegas, supra.

Appellant believes any one of the errors discussed above warrants a new trial. But certainly their cumulative effect requires a new trial.

D. CONCLUSION

For the reasons above, appellant respectfully asks that this Court reverse his conviction for first degree premeditated murder and grant him a new trial.

Respectfully submitted May 21, 2012.


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APPENDIX

Constitution, art. 1, § 3

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

Constitution, art. I, § 9

"No person shall be ... twice put in jeopardy for the same offense."

Constitution, art. I, § 21

"The right of trial by jury shall remain inviolate"

Constitution, art. I, § 22

"In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel, ... [and] to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed"

Constitution, art. 4, § 16

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

U.S. Const., Art. 3, § 2, ¶ 3.

"The Trial of all Crimes ... shall be by Jury;"

United States Constitution amend. 5

"... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law;"

United States Constitution, amend. 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence."

United States Constitution, amend. 7

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, amend. 14, § 1

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

ER 401

"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 probable or less probable than it would be without the evidence.

ER 402

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

WPIC 1.02 provides in part:

... It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. ...

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements

are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

RAP 9.2(b) provides:

A verbatim report of proceedings provided at public expense will not include the voir dire examination or opening statement unless so ordered by the trial court.