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Court of Appeals
Division III
State of Washington

No. 29980-5-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER OWENS,

Appellant.

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF THE CASE

A. Rick Tyler Came Home for the Holidays

It was two days before Christmas 2008 when Rick Tyler was shot twice in the head and killed in the East Wenatchee home where he lived. Rick¹ was a long-haul truck driver and had been on the road for over two months. He had just flown home to the Wenatchee area to spend the holidays with his 11 year old daughter, Selena Tyler, and the rest of his family. RP II 195, 200-201, 202, 242, 248, 279-280, 285-287, 634.

Rick and Kellie Brown had been romantically involved and living together in Ms. Brown's East Wenatchee home for several years. Rick's clothing, personal effects, tools, furniture, vehicles and his dog were at the home. He received his mail there. When Rick had visitation with his daughter, she stayed at the home with Rick and Ms. Brown. Some of Selena's belongings were kept at the home in the bedroom she used. RP II 184, 187-188, 271, 273-274, 521, 524, 584, 589-595, 762.

A few days before his holiday return, Ms. Brown informed Rick she was ending their relationship and no longer wanted him in

¹ Mr. Rick Tyler's first name is used throughout the Counter-Statement of the Case to avoid confusion with his father, Mr. Bob Tyler.

the home. On December 22, Ms. Brown arranged a meeting with Rick's father, Bob Tyler, and his sister, Heather McCourt. Ms. Brown delivered Rick's dog to them and spoke about her relationship with Rick ending. They discussed arrangements to retrieve Rick's property from the home. At that meeting Ms. Brown gave them the arrival information for Rick's December 23 flight and asked that they pick up Rick at the airport. RP II 198, 200-201, 283, 285-286, 289, 300-302. That same day Rick and his father spoke over the telephone and Rick told his father about the relationship with Ms. Brown ending and Rick needing to remove his property from the home. RP II 196-197.

Rick was greeted at Pangborn Airport by his father and sister shortly before 4:00 pm. He was in good spirits, glad to see his family and looked forward to spending time with Selena. Rick asked Ms. McCourt to drive him to the vehicle licensing agency in East Wenatchee. The vehicle license for Rick's car was expired and he needed his car to pick up Selena for holiday visitation. At the vehicle licensing agency Rick was informed he needed his car's registration to renew the license. The family then drove to the home Rick shared with Kellie Brown in order to retrieve the car's registration. RP II 202-204, 287, 288, 289.

Upon arriving at the East Wenatchee home, Ms. McCourt parked in the driveway. Rick's car and other vehicles were also parked in the driveway, as was Ms. Brown's car. Ms. McCourt and Mr. Tyler began clearing snow from Rick's car. Based on their discussions with Ms. Brown the previous day, neither Mr. Tyler nor Ms. McCourt had concerns about being at the home. They believed they could be there with Rick. RP II 200-201, 205, 207, 219, 285-286, 289, 291-292, 316-317.

Rick went to the front door. The door was locked. No one came to the door or spoke to Rick. Rick then walked over to the garage door, opened it and walked into the garage. Rick opened the entry door leading to the lower living area, entered, turned to his right and began walking up the stairs. Rick was not yelling, screaming or expressing anger. He said nothing during this time. The lights were off in the stairwell and it was dark. As Rick reached the stairwell's third step he was shot in the forehead with a blast from a .410 shotgun and went down. While lying face down in the stairwell, Rick was shot a second time in the back of the head with a .22. Rick died within moments, if not immediately. RP I 203-204, 242, 248, 250, 260-261, 294, 378-379, 390, 391-392, 406, 409-411, 416, 428-431, 447, 449, 450, 452, 453, 724, 725-726.

B. The Police Arrived

East Wenatchee police arrived at 122 Eastridge Drive within three or four minutes after Ms. Brown called 911. The officers initially contacted Bobby Tyler and Ms. McCourt, who were standing outside the home. Mr. Tyler told the officers that a man inside the home had just shot his son. RP II 113-114, 132, 153. The officers were aware that Ms. Brown had obtained a temporary no contact order that was to have been served on Rick when he returned to the Wenatchee area. RP II 120-121, 148-149, 177. Police knocked on the front door and were let inside the home by Ms. Brown's son, Christopher Owens. RP II 115, 132, 164-165.

The home at 122 Eastridge Drive is a split-level floor plan. There is a front door entry landing, with two sets of stairs. One set of six stair treads descends from the entry landing to the lower living area and garage. The other set of stairs ascends to the living room and kitchen. RP II 115, 132-133, 155, 371. Police found Rick's body lying in the stairwell descending from the entry landing to the lower living area and garage. Rick's head was resting on the top step next to the entry landing in a pool of blood and bone

fragments. RP II 115, 133, 143, 166-167, 336, 379, 390, 391-392.

While police were securing the scene, Owens told the officers he had come to the home to protect Ms. Brown and that Rick broke into the home by coming through the garage. When Rick entered the garage Owens told police he yelled out that he had a weapon. Owens shot Rick with a .410 when Rick starting walking up the stairs from the lower level. When Rick started to get up after being shot, Owens shot him again with a .22. RP II 118, 127, 134, 150-151.

Blood spatter was located in the lower stairwell and was subsequently identified as being Rick's blood. Analysis of the blood spatter indicated Rick was at the third step from the lower living area when he was shot. RP II 378, 478; Exs 39-52, Ex 53.

The firearm used by Owens was located on the living room couch. The firearm was a double-barrel over-under .410 shotgun and .22 caliber rifle combination. The firearm was loaded with an expended shotgun shell in the .410 chamber and a live .22 shell in the .22 chamber. Police also located an expended .22 shell casing underneath the coffee table in the living room, and ten live .22 shells on the window sill in the living room. RP II 116, 118, 169-

171, 341-342; Ex 56, Ex 57, Ex 58, Ex 60. Owens had three .22 hollow point rounds in his shirt pocket. RP II 137.

C. The Christopher Owens Interview

Less than two hours after the 911 call and response by the East Wenatchee Police, Owens was interviewed at the East Wenatchee Police Department by Detective Darin Darnell. The interview took place in Detective Darnell's office. RP II 396-400. A recording of the interview was admitted as evidence and played during the trial. RP II 400-464; Ex 155. During the interview, Owens provided the following information:²

Owens and Ms. Brown knew that Rick was coming over that afternoon to remove his vehicles and other property. RP II 405, 419, 420, 442-443.

During a telephone conversation between Ms. Brown and Rick earlier that day, Owens overheard Ms. Brown tell Rick to not come into the house. Owens heard Rick say "No piece of paper's going to keep me [out]. I'm coming in the house and getting what's mine." Rick never threatened any violence against Ms. Brown during the telephone call. RP II 405, 419, 420-421, 446.

Ms. Brown asked Owens to be at the house that afternoon because Rick would be coming over. RP II 405, 443.

Owens brought the firearm to the house to protect Ms. Brown. RP II 416, 433, 463.

² Excerpts of the Owens interview, with citations to the trial transcript, are appended to this Brief of Respondent at Appendix A.

Owens feared for his safety and the safety of Ms. Brown, because he had seen Ms. Brown physically abused by other boyfriends when he was a child. RP II 414, 461, 463.

There had never been any violence between Owens and Rick. Not even yelling. RP II 418, 462.

Owens had never seen Rick hurt Ms. Brown and did not know if there had been past physical abuse. RP II 424, 441, 462.

Owens did not want to get into a physical fight with Rick because Rick was "a big man." RP II 418, 443.

Owens heard the front door "shaking." Rick "wasn't kicking the door. He wasn't throwing his weight in to try to get in that way." Rick did not say anything while he was at the front door. RP II 406, 447.

Owens heard the garage door "fling up," knew Rick was in the garage and yelled "Rick, don't come up the stairs. I have a weapon." RP II 406, 450.

Owens stood on the ascending stairs, leaning over the railing and pointing the gun down the descending stairs. The stairs were dark. Rick started walking up the stairs and Owens shot Rick using the .410. RP II 409, 416, 449.

Owens gave Rick one warning. Rick never acknowledged hearing the warning or said anything while inside the home. Rick did not look up and see Owens pointing the gun towards him. RP II 417, 423, 450.

After firing the .410. Owens walked up to the top of stairs, switched the gun to the .22 barrel, saw Rick move his head, then aimed down and fired at the back of Rick's head. RP II 410, 411, 428-429, 430-431, 452, 453.

Owens shot Rick a second time because he saw him move, but did not know if Rick was walking or on his feet. Owens

was “worried about missing him” because the gun only chambered one round at a time, RP II 411, 452.

Owens did not know if Rick would have assaulted Ms. Brown. RP II 424, 427.

Owens explained, “You don’t pull a gun on someone unless you’re going to use it.” RP II 432.

Owens “didn’t know what he [Rick] was going to do” or “what his [Rick’s] intentions were.” RP II 433

Owens felt threatened because Rick had been told there was a restraining order, came into the house and did not stop. RP II 462.

D. Additional Trial Evidence

An autopsy examination of Rick Tyler was conducted by Dr. Gina Fino, a board certified forensic pathologist, who opined that the manner of Rick Tyler’s death was homicide. Dr. Fino described the shotgun injury as a penetrating shotgun wound to the right lower forehead consisting of an oval 3/4” by 1-1/4” hole to the forehead. RP II 238, 242. The shotgun pellets showed little dispersal and resulted in fractures to the skull radiating from the point of impact to the base of the skull, hemorrhaging and laceration of the brain, pellets embedded in bone, and a collapsed right eye. RP II 243, 246.

The .22 injury was described by Dr. Fino as a penetrating rifle wound. The bullet entered the lower right of the back of the

head, and traveled upward through the brain, from back to front and right to left. RP II 248, 250, 254. Dr. Fino used a model of a human head and a pointer to demonstrate the trajectory of the bullet that struck the back of the head. RP II 249-250. Based upon the injuries to the skull and brain, Dr. Fino opined that the shotgun injuries occurred first, followed by the rifle injuries. RP II 251.

Dr. Fino described the shotgun wound to Rick Tyler's forehead as fatal, but could not give an opinion as to survivability from those injuries because the brainstem was not injured. Dr. Fino opined that Mr. Tyler would have been impaired by brain injury, but could not express an opinion as to the degree of impairment. Dr. Fino opined that the rifle wound to the back of Rick Tyler's head was not survivable because of extent of injury to the brain and brainstem. RP II 259-261. Toxicology conducted on Rick Tyler's blood and urine was negative for alcohol, illegal drugs and prescription drugs of abuse. RP II 255; Ex 63.

Ms. Brown testified for the defense and described how her relationship with Rick Tyler had begun to deteriorate in February 2008, after being pushed by Rick Tyler.³ She was trying to end the

³ Ms. Brown's testimony regarding an incident during which she was pushed by Rick Tyler is contradicted by Selena Tyler, who was present at the incident. RP II 762-763.

relationship. During the morning of December 23, Ms. Brown spoke with Rick Tyler over the telephone for 20 minutes. RP II 522. Ms. Brown asked Owens to be at the house on the afternoon of December 23 because she expected Rick Tyler to be coming to the house. RP II 564, 650. Owens told Ms. Brown he was bringing a gun to the house. Ms. Brown told Owens she did not want a gun in the house, but Owens told her, "If I can't bring my weapon I'm not coming." RP II 565, 618.

Ms. Brown described the one incident in February 2008 when she was pushed by Rick Tyler. RP II 532. Rick had never hit Ms. Brown, kicked her, or thrown her to the ground. RP II 607. Ms. Brown never told Owens she was scared for her life. RP II 618. Rick never threatened any harm to Ms. Brown. RP II 614, 631, 650. Ms. Brown confirmed she told Detective Darnell she had screamed, "Oh my God, don't shoot him," after Owens fired the first shot. RP II 630.

Owens also testified at the trial and described his mother's relationship with Rick Tyler, based on what Ms. Brown had told him. Owens had "very little" firsthand information. Owens had never been assaulted by Rick Tyler and had never seen Rick assault his mother. RP II 661, 703.

When Owens arrived at his mother's home he did not park in the driveway or in front of the house. Owens parked his car down the block and across the street. Someone driving to the house would not have passed Owens' car. RP II 680-681.

Owens warned Rick Tyler once while Rick was still in the garage. Owens did not know if Rick Tyler heard the warning. As Owens pointed the gun down the stairwell he never made eye contact with Rick. Owens never heard Rick Tyler say a word from the time Rick arrived at the front door until the time Owens shot him in the stairwell. Owens did not fire a warning shot because his gun only held two shots. RP II 715, 718, 726, 729, 752.

Owens never saw Rick reach up or grab for Owens or Owens' gun. RP II 734-735, 736. At the time Owens shot Rick Tyler in the back of the head, Owens believed that Rick was "using the stairs for cover." RP II 742.

Owens brought his gun to the house to avoid a physical fight between he and Rick, "which I would not have won." Rick Tyler was 6'4" and weighed 250 lbs. Owens is 5'11" and weighed 270 lbs. at the time of the shooting. Asked if Rick Tyler would have killed his mother if Owens had not been at the house, Owens

answered, "I don't know what he would have done." RP II 619, 743, 747

E. Relevant Pre-Trial and Trial Procedure

Christopher Owens was charged by Amended Information with Murder in the First Degree, while armed with a firearm, or in the alternative, Murder in the Second Degree, while armed with a firearm. CP 7-9. A five-day jury trial was held in September 2009 and ended in a mistrial after the jury declared it was hopelessly deadlocked in its deliberations. RP I 646-650.

A second five-day jury trial was held in May 2011. Prior to beginning testimony, the parties stipulated that all exhibits admitted during the September 2009 trial were admitted in the May 2011 trial and would use the same exhibit numbers. RP II, 91, 129.

The parties also stipulated that the trial court's prior rulings on the State's motions in limine made for the September 2009 trial would be in effect during the May 2011 trial. RP II 91.

The trial court denied Owens' request to reconsider its ruling on a prior motion in limine to exclude evidence of Rick Tyler's use of the prescription drug oxycontin. The trial court's prior ruling was part of the September 2009 trial. Based on ER 403, the trial court previously ruled the mere use of oxycontin was too speculative on

the issue of violence and the unfair prejudice of the evidence was outweighed by any probative value. Unless Rick Tyler's use of oxycontin could be tied to his violent behavior, the trial court ruled such use of oxycontin was not admissible.⁴ RP I 165-168, 463; RP II 263-265, 454.

The trial gave the same jury instructions used in the September 2009 trial that concluded with a deadlocked jury and a mistrial.⁵ RP Hearings, 38; RP II 262. The State took exceptions and objected to the trial court's self-defense instructions, 12 and 14, on the basis of insufficient evidence of self-defense. Owens did not take exception to or object to any of the trial court's instructions. RP II 765.

Neither the State nor Owens proposed jury instructions on manslaughter as a lesser included offense. Owens objected to instructing the jury on lesser included offenses. The trial court took under advisement the court's ability to instruct on lesser included offenses over the objection of the defendant. Based on its review

⁴ Owens was asked on direct examination at the first trial if he had observed Rick Tyler become "explosive" when Rick Tyler used oxycontin or if his mother told him Rick Tyler became explosive. Owens replied, "I can't say." RP I 467.

⁵ Although it is not clear from the transcript, the May 2011 jury instructions relating to the commission of the crime while armed with a firearm and the Special Verdict Form were revised to comply with *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). RP II 757-758, CP 74.

of case law, the trial court declined to overrule Owens' objection and advised Owens the strategy was a "big gamble." RP II 263, 757-759, 765-766.

The jury returned a verdict of guilty on the charge of Murder in the First Degree and a special verdict finding Owens was armed with a firearm at the time of the commission of the crime. RP II 843-846; CP 76-77. Owens was sentenced to a standard range sentence of 261 months on his conviction for Murder in the First Degree, plus 60 months on the firearm enhancement, for a total sentence of 321 months. RP Sentencing Hearing, 18; CP 83-92.

II. ARGUMENT

It is undisputed that Owens intentionally killed Rick Tyler. Self-defense had nothing to do with Owens' second shot that killed Rick Tyler. That second shot could easily be characterized as an execution. The State took exception to the trial court instructing the jury on self-defense. RP II 765.

Owens brought his gun and was prepared to use it. RP II 416, 432-433, 565, 618. Owens parked his car away from the home when he arrived and Rick Tyler would not have passed by Owens' car when he came home. RP II 680-681. Owens yelled one warning when Rick Tyler entered the garage, but did not know

if Rick Tyler heard the warning, as Rick Tyler never acknowledged that Owens was in the home, through either words or actions.

While Rick Tyler began to silently walk up the stairs, looking down and never making eye contact with Owens, Owens was standing on the upper stairs waiting, with his gun pointed at Rick Tyler. RP II 409, 416, 417, 423, 449, 450, 715, 718, 729, 752.

Owens fired the .410 shotgun while Rick Tyler was on the third stair step, striking him in the forehead. RP II 378, 478.

Owens mother yelled, "Oh my God, don't shoot him." RP II 630.

The shotgun wound to the forehead caused a great deal of bleeding. RP II 257-258, 378, 391. Rick Tyler collapsed immediately, falling face down on the stairs with his head coming to rest on the top step below the stairs landing. RP II 259-261, 378-379, 391-392. Owens switched the gun mechanism from the .410 shotgun to the .22 rifle while walking up the stairs towards the living room, then aimed the gun down at the back of Rick Tyler's head and shot him a second time. RP II 410, 411, 428-429, 430-431, 452, 453. As Rick Tyler's head lay on the stairs, the .22 entered the lower right back of his head and travelled in an upward direction through the brain, killing him within moments if not instantly. RP II 248-250, 259-261, 378-379, 391-392.

Owens claimed the second shot was fired when Rick Tyler went down after the first shot, Rick Tyler was moving and using the stairwell for cover, and Owens saw his head lift up. RP 734-736, 742. The testimony and exhibits regarding the stairwell walls and blood spatter do not support Owens' claim that Rick Tyler was moving and using the stairwell for cover. There was no testimony or evidence regarding blood from the shot gun wound to the forehead, other than the initial blood spatter from the shotgun blast and the pool of blood beneath Rick Tyler's head. Ex 39-53; RP 378-379, 390-392, 478. Also, the trajectory of the second shot to the back of Rick Tyler's head, being in an upward direction, does not support Owen's claim that Rick Tyler lifted his head. RP II 248-250, 254.

Based on the evidence relied upon and argued by the State, Rick Tyler was killed by Owens while he lay on the stairs, helpless and unconscious. Based on Owens' testimony, Owens killed Rick Tyler with a second shot to the back of the head while Rick Tyler was unarmed and in the lower stairwell trying to hide from Owens. Under either set of facts, there is no factual basis for a reasonable belief that Rick Tyler was intending to commit any acts posing an imminent danger to Owens or Ms. Brown, or that the second shot to

the back of Rick Tyler's head was force and means that a reasonably prudent person would use.

The jury, who were the sole judges of the credibility of the witnesses, believed the evidence relied upon by the State and disbelieved the defense evidence.

A. Evidentiary Rulings

A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. Such rulings will not be overturned unless the exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011) (Exclusion of evidence that arson committed by victim as motive to falsify accusation of rape was not abuse of discretion); *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) (Where measuring device was not authenticated through testimony, it was abuse of discretion to admit evidence of measurement) ; *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

1. Evidence of Oxycontin Use Was Properly Excluded

Owens assigns error to the trial court's exclusion of Rick Tyler's prior use of the prescription drug oxycontin.⁶

The parties stipulated the trial court's prior rulings on the State's motions in limine made for the September 2009 trial would be in effect during the May 2011 trial. RP II 91. Owens subsequently asked the trial court to reconsider admission of Rick Tyler's oxycontin use.

Owens' offer of proof was based on Owens' statement to Detective Darnell that "one of Chris' cousins had threatened to kill his, Chris' grandparents and that he was strung out on oxycontin. Chris was aware that this had been an issue with Rick . . . noticed similar behavioral changes in Rick that he had noticed in his cousin and it generally made him fearful." Owens did not offer any testimony or other evidence that Rick Tyler was violent because of oxycontin use or Rick Tyler's alleged "behavior changes" were caused by oxycontin use. RP II 264. The court declined to admit evidence of Rick Tyler's oxycontin use saying, "I haven't seen anything that makes it relevant." RP II 265.

⁶ The toxicology report conducted on Rick Tyler's blood and urine was negative for alcohol, illegal drugs and prescription drugs of abuse. RP II 55; Ex 63.

Although Rick Tyler's use of oxycontin was excluded, evidence of Rick Tyler's "behavioral changes" and "personality changes" was allowed. RP II 526-527, 665-666, 678. Ms. Brown and Owens described Rick Tyler's behavior as becoming intimidating, threatening, frightening, bizarre, shouting, yelling, volatile, escalating, bullying, aggressive, and unpredictable. RP II 526-527, 547, 552, 554-555, 565, 598, 608, 615, 642, 664, 665, 749-750. Owens testified he was made fearful by "a pattern of increasing intimidation, increasing bullying, increasing volatility." RP II 755.

The trial court carefully considered admission of the oxycontin evidence as part of the State's motion in limine and then again during the trial. The trial court did not abuse its discretion in excluding the evidence. *State v. Perez-Valdez, supra*; *State v. Bashaw, supra*. Owens was able to admit evidence of all Rick Tyler's alleged "behavior changes" and "personality changes" without connecting them to oxycontin use. Owens offered no evidence that oxycontin caused such changes. Owens experience of his cousin's behavior, which he believed to be caused by oxycontin, was too remote and, if admitted, would have been unduly prejudicial. *State v. Perez-Valdez*, 172 Wn.2d at 816-817.

Owens was able to argue his theory of the case and the outcome of the trial was not materially affected by the trial court's evidentiary ruling. *State v. Bashaw*, 169 Wn.2d at 143; *State v. Powell*, 126 Wn.2d at 267.

Owens' Assignment of Error No. 1 should be rejected by this Court.

2. Alleged Evidence of a Boot Print
on a Door Was Properly Excluded

Owens assigns error to the trial court's evidentiary ruling to not allow testimony regarding an alleged "boot print" on a section of the fire door between the garage and lower living area. RP II 324.

Owens sought to admit the door section to show it was a solid core door, and to also show the existence of a boot print on the door. The offer of proof was that Ms. Brown noticed white markings she would describe as a "boot print" and she photographed those markings on January 22, 2009. Ms. Brown could not testify whether the boot print was created before or during the incident on December 23, 2008. Defense counsel indicated the boot print "looks like" it came from a shoe worn by Rick Tyler. Defense counsel also confirmed the defense expert who had examined the door and was on the defense witness list would not

be called to testify. The offer of proof did not include any evidence as to how, or if, the white markings were determined to be a “boot print” and how, or if, the markings were determined to be made by a shoe worn by Rick Tyler. RP II 319, 320, 324. The State objected to admission of the door based on chain of custody and its changed condition since December 23, 2008, while in the exclusive control of the defense. RP II 319.

The trial court ruled it would admit the door section, but limited testimony to the purpose of showing it was a solid door, rather than a hollow core door. The trial court did not allow testimony regarding the alleged boot print. RP II 324-325. After voir dire of the authenticating police officer witness to the effect the “white markings” were not on the door on December 23, 2008, the door was admitted as Exhibit 158. RP II 352.

The trial court carefully considered Owens offer of proof on admission of the alleged boot print evidence and did not abuse its discretion in excluding Ms. Brown’s testimony. *State v. Perez-Valdez, supra*; *State v. Bashaw, supra*. The relevance of physical evidence may depend upon chain of custody and evidence its condition is unchanged as part of authentication. Teglund, 5 *Washington Practice*, §402.31 (5th Ed. 2011). Owens did not offer

any evidence the “white markings” were, indeed, a boot print. Owens did not offer any evidence the boot print was caused during the event on December 23, 2008. Owens did not offer any evidence the boot print matched the shoes worn by Rick Tyler on December 23. Other defense evidence was admitted that Rick Tyler forced open the door, a section of which being admitted as Exhibit 158. RP II 574-575, 658-659, 684. Due process does not extend so far that a defendant is entitled to admit evidence that is irrelevant and inadmissible. If excluding evidence of the alleged boot print was error, it was harmless error. Owens was able to argue his theory of the case and the outcome of the trial was not materially affected by the trial court’s evidentiary ruling. *State v. Bashaw*, 169 Wn.2d at 143; *State v. Powell*, 126 Wn.2d at 267.

Owens’ Assignment of Error No. 2 should be rejected by this Court.

B. Jury Instructions

1. The Relevant Instructions

Owens did not take exception to or otherwise object to any jury instructions. RP II 765. Any claim of instructional error has not been preserved and cannot be raised for the first time on appeal.

RAP 2.5(a).

The following jury instructions are relevant to this appeal:

No. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crimes beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 59; WPIC 4.01.

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; WPIC 26.02.

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; WPIC 16.02.

No. 13

“Great personal injury” means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

CP 68; WPIC 2.04.01.

No. 14

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

CP 69; WPIC 16.07.

No. 15

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 70; WPIC 16.08.

2. The Jury Was Given a Proper Reasonable
Doubt Instruction for Deliberations

The jury was given Instruction 4 on the State’s burden of proof and reasonable doubt. CP 56. Instruction 4 used the

language of WPIC 4.01. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (Holding the *Castle* instruction on reasonable doubt constitutional and affirming the conviction, but directing that courts use WPIC 4.01 in the future).

Owens does not assign error to Instruction 4. Owens assigns error to the trial court's comments made to the jury venire at the beginning of voir dire, but did not object to the court's comments. RP II 7-9. Any claim of error has not been preserved. RAP 2.5(a).

At the beginning of voir dire the trial court told the jury venire a reasonable doubt is one "for which a reason can be given:"

The defendant has entered a plea of not guilty. A plea of not guilty puts in issue every element of the crimes charged. The state, which is called the plaintiff, has the burden of proving beyond a reasonable doubt each element of every crime charged. The defendant has no burden of proving that a reasonable doubt exists, nor any duty to call witnesses or produce evidence.

The defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason can be given and 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. 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 II 8.

The trial court's comments are accurate statements of the law on burden of proof and reasonable doubt, and do not relieve the State of its evidentiary burden.⁷ *State v. Bennett*, 161 Wn.2d at 307. The Supreme Court's direction in *State v. Bennett* regarding use of WPIC 4.01 has not been extended to a trial court's comments to a jury venire. However, if the trial court's comments constitute error, then the error was cured by the trial court's final, written instructions to the jury. In addition to Instruction 4 on reasonable doubt, the trial court read Instruction 1 to the jury:

Instruction Number 1: It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. ***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. ***You must apply the law from my instructions*** to the facts that you decide have been proved, and in this way decide the case.

* * *

⁷ Defining reasonable doubt as a doubt for which "a sensible reason can be given" has been upheld as a correct statement of the law. *State v. Weiss*, 73 Wn.2d 372, 378-379, 438 P.2d 610 (1968).

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.

* * *

The order of these instructions has no significance
as to their relative importance. ***They are all
important.*** In closing arguments, the lawyers may
properly discuss specific instructions. During your
deliberations, ***you must consider the instructions
as a whole.***

(Emphasis added.)

RP II 767-769; CP 54.

Owens failed to object to the trial court's voir dire comments.
The comments, if error, were cured in the instructions given to the
jury for deliberations. There was no prejudice to Owens.

Owens' Assignment of Error 4 should be rejected by this
Court.

***3. Claimed Errors in Self-Defense Instructions are
Analyzed in the Same Manner as Any Other Instruction***

Erroneous jury instructions on self-defense are not
automatically of constitutional magnitude and presumed prejudicial.
State v. O'Hara, 167 Wn.2d 91, 101-103, 217 P.3d 756 (2009).
O'Hara overruled *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369
(1996), and clarified *State v. McCullom*, 98 Wn.2d 484, 656 P.2d
1064 (1983), and *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548

(1977), on which *LeFaber* was based. *State v. O'Hara*, 167 Wn.2d at 101-103. Claims of error in self-defense instructions are analyzed on a case-by-case basis to determine whether the claimed error is manifest constitutional error. *Id.* at 104. To determine whether an instruction is error of constitutional magnitude, the inquiry is whether the instruction omitted an element relieving the State of its burden of proof. *Id.* at 105. The State is not relieved of its burden of proof when a separate instruction provides that the State has the burden to prove the absence of self-defense beyond a reasonable doubt. *Id.* at 107.

The “to convict” instruction and self-defense instructions taken as a whole, correctly stated the law and allowed Owens to argue his self-defense theory of the case. *State v. O'Hara*, 167 Wn.2d at 105; *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991); Instructions 6, 12, 13, 14 15; CP 61, 67, 68, 69, 70.

4. The Jury Was Properly Instructed on Self-Defense

Owens assigns error to Instruction 12 because it did not include the slain person’s “intent to commit a felony” as an alternate grounds for self-defense. CP 67; RCW 9A.16.050. See, WPIC 16.02. Owens did not take exception to or otherwise object to

Instruction 12. RP II 765. The claimed error has been waived.

RAP 2.5(a).

Owens argues that preventing the rape of his mother was grounds for acting in self-defense. Owens bases this argument on the testimony of Ms. Brown that during a telephone conversation on December 19, 2008, Rick Tyler threatened to, in her words, “sexually assault” her. RP 528-529, 533-545. Ms. Brown did not testify that Rick Tyler threatened rape, or describe the actual language used by Rick Tyler. On cross-examination, Ms. Brown was questioned regarding her interview with police following the shooting. During that interview Ms. Brown described Rick Tyler’s statement on December 19 as wanting to have sexual relations with her when he returned home.

Q: Now you eluded (sic) to earlier on December 22nd that, I think it was December 22nd you had another conversation with him? Or am I mistaken? Maybe it was an earlier date.

A: It was an earlier date.

Q: Okay. And was it in that conversation where he said he wanted to get some?

A: Yes.

Q: And was that the language that he used?

A: Not exactly.

Q: Okay. So you understood that to mean that he wanted to have sex. Is that correct?

A: Yes.

Q: Okay. In your statement that you gave to the police, you did not indicate that he threatened to rape you. Is that correct? Is that correct?

A: I, I, I didn't use those words, no. I

Q: Okay. And you previously indicated that Rick had never physically assaulted you other than he pushed you. Is that correct?

A: Physically it had not gotten that far, but it was escalating.

RP II 614.

Ms. Brown did not discuss threats of sexual assault when she spoke to the police regarding the temporary restraining order.

RP II 515. Owens testified his mother told him Rick Tyler had threatened a "sexual assault" and she was afraid of Rick Tyler.

Owens was not told by Ms. Brown that Rick Tyler was going to rape her when Rick Tyler arrived at the home. RP II 668, 678, 731.

Although Owens feared for his mother's safety and his own safety, Owens did not believe Rick Tyler intended to rape his mother. RP 423, 424, 433, 461, 463, 746-747.

“Intent to commit a felony” as an alternate grounds for self-defense was not proposed, requested or given because there was no evidence to support such grounds.

Unlike *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) and *State v. Painter*, 27 Wn.App. 708, 620 P.2d 1001(1980), as relied upon by Owens,⁸ the definition of “great personal injury” in Instruction 13 did not eliminate or undermine the subjective element of Owen’s self-defense theory. Instruction 13 is identical to the language of WPIC 2.04.01 and has been specifically approved by the Supreme Court. *State v. Walden*, 131 Wn.2d at 477-478.

There is no error based on failure to instruct on “intent to commit a felony” because there was no evidence Owens believed Rick Tyler had such an intent. Defense counsel was clearly able to argue that Rick Tyler wanted “to get some” and “demanded unwanted sex,” causing Ms. Brown to fear a sexual assault and causing Owens to fear for his mother’s safety, and did so within the scope of fear of “great personal injury.” RP II 814, 815, 816, 817, 819, 821, 822, 823,826, 830, 834.

⁸ These cases reviewed a self-defense instruction requiring more than fear of “an ordinary battery with a fist or pounding with a hand.” That instruction was held to be inconsistent with the subjective element of self-defense and prejudicial to the defendants.

The trial court's instructions on self-defense, including Instruction 12, correctly stated the law and allowed Owens to argue his self-defense theory of the case. *State v. O'Hara*, 167 Wn.2d at 105; *State v. Mills*, 154 Wn.2d at 7; *State v. Hoffman*, at 109.

Owens' Assignment of Error No. 3 should be rejected by this Court.

5. *The "To Convict" Instruction Did Not Erroneously Fail to Instruct the Jury on the State's Burden of Proof on Absence of Self-Defense*

Owens argues error was committed because the State's burden to prove the absence of self-defense was not included as part of Instruction 6 given to the jury, the "to convict" instruction on Murder in the First Degree. CP 61. Owens did not take exception to the trial court's "to convict" instructions and the instructions regarding self-defense. RP II 765; Instructions 6, 12, 13, 14, 15; CP 61, 67, 68, 69, 70.

The error claimed by Owens has been clearly addressed by the Supreme Court. *State v. Hoffman*, 116 Wn.2d at 109, *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984).

In *State v. Acosta*, 101 Wn.2d at 622, the Supreme Court held, "[T]he better practice is simply to give a separate instruction

clearly informing the jury that the State has the burden of proving the absence of self-defense beyond a reasonable doubt.”

In *State v. Hoffman* the Supreme Court addressed and rejected the identical issue raised by Owens:

[T]he jury was instructed to consider the instructions as a whole. No prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. The self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. In giving a separate instruction on self-defense, which included the State's burden of proof on self-defense, the trial court followed the method for instructing juries recommended by the Washington Supreme Court Committee on Jury Instructions, 11 Wash.Prac., *Washington Pattern Jury Instructions* 58-63 (Supp.1986); WPIC 26.02 comment, at 111 (Supp.1986); WPIC 35.02 comment, at 119 (Supp.1986). We perceive no error in this instructional mode. (Footnotes omitted.)

State v. Hoffman, 116 Wn.2d at 109.

The “to convict” instruction and self-defense instructions taken as a whole, correctly stated the law and allowed the Owens to argue his self-defense theory of the case. *State v. O’Hara*, 167 Wn.2d at 105; *State v. Mills*, 154 Wn.2d at 7; *State v. Hoffman*, 116 Wn.2d at 109. There was no prejudice to Owens.

Owens’ Assignment of Error No. 5 should be rejected by this Court.

C. There Was No Prosecutorial Misconduct

Owens assigns error to the State's closing argument as constituting prosecutorial misconduct.

Owens did not object to any of the State's argument or request a curative instruction. The failure to object to a prosecutor's improper statements during closing argument constitutes a waiver, unless the statement is shown by the defendant to be so flagrant and ill-intentioned that the resulting prejudice cannot be neutralized by a curative instruction to the jury.

State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)

(Defendant not prejudiced where prosecutor's three separate, flagrant misstatements on burden of proof and reasonable doubt where objected to by defense and curative instructions given);

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)

(Prosecutor's statements regarding Sikh cultural values held not to be misconduct); *State v. Belgarde*, 110 Wn.2d. 504, 508, 755 P.2d 174 (1988) (Prosecutor's inflammatory remarks equating the American Indian Movement with known terrorists and their organizations held to be misconduct so prejudicial remarks could not be neutralized by curative instruction).

Owens must show the prosecutor's conduct was improper and prejudicial in context of the entire record and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (Prosecutor's referral to hearsay rule preventing State's evidence from rebutting defense argument held not prejudicial in light of entire argument and evidence admitted); *State v. Magers*, 164 Wn.2d at 192 (Prosecutor asking jury to consider the dynamics of domestic violence relationships in relation to the total argument not flagrant or ill intentioned); *State v. Dhaliwal, supra*; *State v. Boehning*, 127 Wn.App. 511, 517, 111 P.3d 899 (2005) (Prosecutor's statement to jury that victim was not able to tell her story as well in court as she had during her interviews and referring to dismissed criminal counts was highly prejudicial, reversible misconduct).

The short personal story by the prosecutor regarding his adult son coming home late one night was used to illustrate that Rick Tyler entered his own home and was not a stranger to Ms. Brown or to Owens. RP II 782-783. Those facts were undisputed. Defense counsel used the prosecutor's story at length to distinguish the situation facing Ms. Brown and Owens. RP II 803-806. Defense counsel tied the prosecutor's story to defense counsel's

own personal story from his youth: a story about sneaking out of the house in the middle of the night, coming home late, and his awakened father properly pulling a gun on him out of fear. RP II 804. Defense counsel clearly made a legitimate strategic or tactical decision to use the prosecutor's story in his closing argument.

The prosecutor's argument did not attempt to shift the burden of proof to the defendant. The argument did not misstate the law on reasonable doubt, the elements of the crimes charged, or any other matter on which the jury was instructed. The argument did not ask the jury to base its deliberations upon facts not in evidence. The argument did not vouch for the truthfulness or credibility of any witness. The prosecutor's story was not emotional, ill-intentioned or flagrant, and was less than 20 lines in a closing argument spanning 26 transcript pages. RP II 775-801.

Looking at the entire context of the record and circumstances at trial, Owens has not shown the prosecutor's argument was improper and that Owens was prejudiced. Further, Owens has not shown the alleged misconduct was so ill-intentioned and flagrant that prejudice to Owens could not have been neutralized by a curative instruction. *State v. Warren*, 165 Wn.2d at 26-28; *State v. Belgarde*, 110 Wn.2d. at 508.

Owens' Assignment of Error No. 6 should be rejected by this Court.

D. There Was Not Cumulative Error

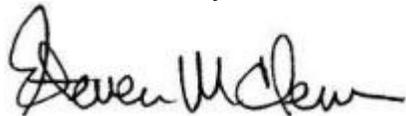
The cumulative error doctrine should not be applied to the trial in this case. There was no error committed. And there was certainly no combination of errors that effectively denied Owens a fair trial. The evidence admitted and the instructions given to the jury allowed Owens to argue the theory of the defense case. Owens received a fair trial.

Owens' Assignment of Error No. 7 should also be rejected.

III. CONCLUSION

There was no error at trial. Owens was able to fully present evidence supporting his theory of self-defense and to fully argue his theory to the jury. Owens received a fair trial. The State requests the judgment be affirmed.

Respectfully submitted this 11th day of June, 2012.



Steven M. Clem, WSBA #7466
Douglas County Prosecuting Attorn

APPENDIX A

A: And that was, that was the thing is that yeah, we knew he was coming over to get his stuff but he, we said don't come in. You're not allowed to come in. There's a restraining order. You can't come in.

Q: Okay. So when did you actually go over to mom's today?

A: Well, I got there early this morning. I had my snow tires put on, so I was there in the morning and, you know, so she told me he was coming in, she wanted me there by 2:30. So I got there a little bit after two.

PR II, Volume III, 405, ll. 2-8

Q: Okay. So, did you guys know that Rick was coming over to the house?

A: Yeah, he was supposed to come and get his vehicles. All his stuff is in his vehicles outside.

Q: And did, who told him that? You or your mother?

A: My mom. I didn't talk to him.

Q: You didn't talk to him.

A: No.

Q: Did you hear your mom talk to him?

A: Yeah.

Q: What do you recall your mom saying to him?

A: Um, just that, you know, he wasn't allowed in the house, because the restraining order paperwork, you know, [inaudible] by the door.

Q: Okay.

A: Uh, you know, but he needed to come, get his vehicles and leave. Um, she actually came next to me with the phone while he was saying that no piece of paper's going to keep me, you know, I'm coming in the house and getting what's mine. [inaudible]. This is a break-up. She realized that he wants more than she's going to give him and

Q: Okay.

A: I mean I [inaudible] to that, what's his and what isn't his.

RP II, Volume III, 419, l. 22 – 420, l. 16.

Q: Okay. Uh-huh. And you said you heard a shaking at the door?

A: Yeah, like he was

Q: What door was this?

A: The front door.

Q: Okay.

A: You know he was physically, and then he went down and i heard the garage door fling up and

Q: Did you look outside to see who it was or

A: Uh, well, no. Once he was shaking the door and the garage door, we knew it was him.

Q: Okay.

A: Um, and, you know, I knew that he was in the garage. I yelled, Rick, don't come up the stairs. I have a weapon. And he just came walking up the stairs.

RP II, Volume III, p. 406, ll 1-13.

A: I can't guess where he was at, but I mean he was, it was dark, I mean lights weren't on, no one was down there, so, but as he's coming up the stairs, I move up the stairs and I fired the .410.

RP II, Volume III, p. 4098, ll 1-3.

Q: Okay. How many times you shoot?

A: I fired twice. I fired the .410 and then I fired the .22.

Q: Okay. So was it like, was it simultaneously?

A: You can't fire, I mean, when you fire that rifle it automatically kicks in the safety.

Q: Okay.

A: And so I fired it and I looked down to just like to get ready to shoot in case he was still coming. I didn't know and wound up he was close to the landing.

Q: Okay.

A: And so I fired again. I didn't tell him, you know, I was going fire again. I said Rick, don't come up. He kept coming. I fired.

Q: So when you fired the first round, that was the, what round was that?

A: The .410, shot shell.

Q: The shot shell.

A: Yeah. It was just a little

Q: Okay. So the first one was a .410 and the second one was the

A: Twenty-two.

RP II, Volume III, p 410, ll. 9-25.

Q: So after you shot him with the .410 was he still moving up the stairs?

A: I think so. I mean, because, I mean, I fired, you know, down, then when I fired the .22 I was firing, you know, by that point I was towards the top of the stairs in the house. You know, like I said I was halfway down, I saw him coming up and I started walking up the stairs when I fired the .410. And then by the time I had the setting switched around to the .22, I was able to aim at him, towards, he was closer to the landing. I don't know.

Q: Was he still walking?

A: I don't know.

Q: Don't know.

A: I don't know.

RP II, Volume III, p. 411, ll. 10-20

Q: Okay. All right. So I just want to Did anything else happen. Did I miss anything there?

A: I was there I go see My mom has had really bad relationships you know. When I was five years old she was with this guy and he was really into alcohol and coke and just bad

Q: Sure.

A: Because then I can't count on hands the times he kicked in the doors there, beat her up.

Q: You talking about Rick or another [inaudible]?

A: No. An old boyfriend at the house when I was

Q: A little guy? Okay.

RP II, Volume III, p. 414, ll. 14-24.

Q: We were talking, she'd been in and out of bad relationships but she's been with Rick off and on for the last seven years?

A: Yeah, I mean, that's seven, that's [inaudible]. Like I said, I haven't really been involved in their relationships.

Q: Sure. Can I ask you a question? Today you go to your mom's to be with her. Were you guys anticipating problems today?

A: Well, I mean I brought my rifle.

Q: And why did you bring your rifle?

A: Like I said because he's a big man [inaudible] protect my mom.

Q: Okay. So that [inaudible] you went over there today with your firearm to protect your mom?

A: And you know what we told people? She told the police, you know, like you can't come over here. We do have weapons in case he does try to force his way in. God!

Q: So, let me ask you this Chris. You hear him knocking at the door and then you hear the door fling open. You tell him. Did you give him an opportunity to, to stop, after you said Rick, don't come upstairs, I mean, did you give him an opportunity to stop?

A: Well, yeah, except that, you know, before he was on the stairs, and you know I shot him on the stairs.

Q: Okay. So before you shot him [inaudible], did you say, you know, hey, Rick stop?

A: Well, like I said, I was looking down. I don't know if the lights were on. I know in the basement the lights weren't on.

Q: Okay.

A: I don't remember if the light in the, in the hallway was on.

Q: Okay. So how about when you first physically saw him?

A: Uh-huh.

Q: Did you give, you know, did you warn him again?

A: I only warned once.

Q: You warned once.

A: I warned once.

Q: And when you warned once, did you happen, could you see that it was him?

A: Well, I, I couldn't facially. I didn't know, you know, I couldn't say that it was him. The size, you know, the movement I guess. I knew it was him.

Q: Okay.

A: I could tell it was him.

Q: Okay. So at that point, and then, is that when you told him, Rick don't come up the stairs, I got a firearm?

A: I said don't come up the stairs before I could see him.

Q: Okay. And then, did he say anything?

A: He didn't say a word.

Q: Okay.

A: Um, and like I said I was halfway down. I mean, he just, if he looked up he would have seen me with the gun.

Q: Okay. You know if he did?

A: I don't think he did.

RP II, Volume III, p 415, l. 25 – p. 417, l. 22.

Q: Are you afraid of Rick?

A: I, uh, I, I didn't want to get in a physical fight with him. And that's part of why I brought my gun.

Q: Had you ever been in a physical fight with Rick?

A: We've argued, you know, and that kind of stuff, but I mean never physically fighting, never you know to the point where [inaudible].

RP II, Volume III, 418, ll.15-20

Q: Did he was he threatening your mom at all?

A: Well, I mean, how do you take that? He had a restraining order and the person on the phone saying I'm going to break it and come in your house.

Q: Sure. But, and I understand that part of it. But I mean did he say like, uh, you know, I'm going to, you know, I don't care what, you know, I'm going to come and beat you up or I'm going to do this or do that or anything like that?

A: I didn't hear anything like that.

RP II, Volume III, p. 420, l. 21 – p. 421 , l. 2

Q: Okay. Chris, let me ask you this. Did you feel like you had any other option?

A: Ohh

Q: I'm asking you because I mean you were there. I wasn't there. I don't know.

A: What was going through my mind at the [inaudible] what if I actually shoot him, you know, then what if I miss him and I only have these two shots, you know.

Q: So you had two shots in there? The .410 and the .22.

A: The .22.

Q: Okay. And can you only load two rounds at a time?

A: Two rounds at a time.

Q: Okay.

A: Um, it breach loads, you pull the latch, put one in on the bottom and the latch is closed.

Q: Okay. So I mean did you feel like you had any other options?

A: Ohh. Not to be there.

Q: Not to be there?

A: Yeah.

Q: Outside of that?

A: I don't know. You know, uh, he's a scary person. He can be a scary person. Um, like I said he's six inches taller than me, very long, [inaudible] I didn't want to get in a physical fight with him.

Q: Okay. But he never said a word coming in the house.

A: No.

RP II, Volume III, p. 422, l. 11 - 423, l. 9

Q: Do you think he was coming in to beat your mom up?

A: [no audible response]

Q: Don't know?

A: I don't know. You know, it, that's the history. You know.

Q: Has he been, I can't remember. Has he been physical with your mom? Physically abusive?

A: I don't know. I don't know. Um

Q: But you said that's the history and that's the reason I asked.

A: Well, when I was a kid, that's just what I remember.

Q: Are you talking about other relationships?

A: Other boyfriends beating her up and cops don't get there in time.

Q: Sure.

A: There's nothing that I could do. I was five years old and my

Q: Yeah. Kind of hard when you're five.

A: I just didn't want to see it get to that.

Q: I appreciate that.

A: I just couldn't let him do that.

RP II, Volume III, p. 424, ll. 10-16

Q: Could this have turned out any other way, Chris?

A: Well there's a lot of ways this could have turned out [inaudible]. Most of them probably better. You know, like I said, that the worst would be if he started beating my mom or something. And, you know, I don't know if he would. Dawn said that he got violent with her and Dawn's his ex-wife.

RP II, Volume III, p. 426, l. 25 – p. 427, l. 4.

Q: So when you shot the second time, was he laying down or was he upright?

A: I think he was upright. I mean, he wasn't standing, but like, you know, but he was still coming up the stairs.

Q: So he wasn't, so was he on his hands and knees?

A: I don't know. I saw his head come up above, you know, the ledge there and I don't know if I said don't, you know, don't keep coming or something like that. Then I fired again.

Q: Okay. So you don't know So when you fired the second round, you don't know if he was, you don't believe he was on his feet, or do you know?

A: I

Q: I'm not trying to put words, you know, I'm just trying to understand.

A: He was, he was still coming up the stairs is all I could think of and—

Q: And that was more, and that was the more like the side.

A: Well his head had come up, you know, the stairs there is a drop-off. I know his head come up and I just fired again.

Q: Okay.

A: Just fired again.

Q: Okay. All right.

A: I mean I, like I said, I was so worried about hitting him and at the same time I was worried about missing him.

RP II, Volume III, p. 430, l. 16 – p. 431, l. 10.

Q: [inaudible] that have been good?

A: I don't know. You don't, you don't pull a gun on someone unless you're going to use it.

Q: Okay. Was that your intention? Was it your intention to kill him?

A: No. I don't know.

Q: But what was your intention?

A: To protect my mom.

Q: Okay. All right.

A: And to protect myself. I didn't, I said I didn't want to get into a physical fight with him because he would beat me up.

RP II, Volume III, 432, l. 22 – p. 433, l. 6

Q: Oh, we're just trying to piece together what happened, you know?

A: Yeah. You know, if I did something wrong, I did something wrong.

Q: Okay.

A: It was just a, I didn't know what he was going to do. You know. He knew he wasn't supposed to be in there and he came in.

Q: Okay.

A: I don't know what his intentions were.

RP II, Volume III, p. 433, ll. 21-24

Q: Did you ever see anything first-hand with how he treated your mom?

A: Well nothing, no violence. I never saw him hit her.

RP II, Volume III, p. 441, ll. 6-7.

Q: Okay. So mom At what point did you know that Rick was coming back into town? When did you know that?

A: Today.

Q: Okay. Was that when you and mom were doing the tires or—

A: It was obvious that he was going to have to come back and get his stuff off the property and that kind of stuff or have a family member come and get it and she had talked about that for, you know, a lot.

Q: Okay.

A: Um, but no, I knew, I found out it was today that he was going to be coming at 2:30.

RP II, Volume III, p. 442, l. 20 – p. 443, l. 4.

A: You know, she didn't ask that I bring a weapon. I brought it [inaudible].

Q: So why did Well let me ask you this. Why did you do that?

A: Because, like I said, he's a big man.

RP II, Volume III, p. 443, ll. 21-23.

Q: Okay. Could you tell, Chris, if he was still, was he on his feet going upstairs when you fired the second round?

A: He was moving.

Q: He was moving. So you don't know if he was on his feet or

A: You know, I, I don't.

Q: Okay. So is that accurate to say? So the first round, you shot down the stairwell.

A: Uh-huh.

Q: The down. The second round, were you, were you, had you reached the top of the stairs?

A: I, I may have. It was, you know, top I'm pretty sure I was on the stairwell

Q: And so you were like upstairs?

A: Right. I walked up here. I wasn't sure, like I said, I didn't know if I'd even hit him, where I hit him. I didn't know. When I got up and looked up from changing the mechanism around, I saw him, you know, up in this area. So I, I

Q: So the second round then was shooting down, down the stairs.

A: Yeah. Down, opposite, kind of opposite direction.

Q: Do you know where that hit him or if you hit him?

A: I aimed for his head.

Q: You aimed for his head.

A: When his head came up above the thing, I shot again.

Q: Okay. What happened then?

A: He went back, he went down that time.

RP II., Volume III, p 452, l. 7 – p. 453, l. 4

Q: Why did you do what you did?

A: Well, I was concerned for my mom's safety and my safety.

Q: And what, can you help me out? Can you help me understand then? What, what is that based on?

A: Well, I mean it's based on, you know, what I witnessed growing up as a kid.

Q: What did you witness growing up as a kid?

A: My mom getting beat up.

Q: By who?

A: Boyfriends.

Q: So Rick?

A: No, I said I've never seen Rick actually physically hurt her. I know he's gotten agitated and thrown stuff. I can't say at her, or he's hurt her. I don't know, but other boyfriends certainly have. Yeah.

RP II, Volume IV, p. 461, l. 16 – p. 462, l. 3.

Q: Did you feel threatened? Did you feel that you had no other option but to

A: I certainly did feel threatened. Just the fact that he knew you know there was a restraining order and he couldn't be coming in and he, he was just walking in.

Q: Could you have, could you have told him to stop, you know, give him another warning? [inaudible]

A: We, uh, you know, I could have given him a dozen warnings, but, you know, my concern is that he was coming and he didn't, he didn't pause. He was coming. Um, I've never been in that situation before. I was probably just scared and just did it.

RP II, Volume IV, p. 462, l. 19 – p. 463, l. 2.