COURT OF APPEALS NO. 31138-4-III

THE STATE OF WASHINGTON
COURT OF APPEALS DIVISION III

STATE OF WASHINGTON,
PLAINTIFF/RESPONDENT,

VS

MATTHEW DAVID LEONARD,
DEFENDANT/APPELLANT.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
HONORABLE JUDGE RUTH E. REUKAUF

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

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DEFENDANT/APPELLANT, PRO SE

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C. STATEMENT OF THE CASE

Defendant Matthew David Leonard charged with second degree (intentional) murder or second degree (felony) murder based upon second degree assault as a predicate felony with a lesser degree of first degree manslaughter. Leonard was convicted of second degree (felony) murder [FORM B] and [SPECIAL VERDICT FORM] that defendant was armed with a deadly weapon at the time of the commission of the crime.

The altercation that took place was at a tavern named Arty's Tavern, located in Yakima. The altercation involved two groups of peoples, the defendant's group; Sonya Martinez, Elsi GiGi White,Christine Cordova, and Rogoberto Villagomez.

The second group consisted the victim's group (Jason Linder) of; Shannon Vanderwood, David Wright, Kirby Shaul, and James Perry. The altercation was first initiated by Jason Linder by attacking 'Elvis' Rogoberto Villagomez (RP VOL.I, Pg. 32,9-25) and (Pg. 33, 1-25). Both groups were eventually ejected from the bar. Linder's group was first outside the bar. Defendant later exited the bar were he was confronted by Linder's group of friends (RP Pg. 914, 17-20). The fight ensued outside the Tavern to which ultimately led to Linder's death by one stab wound to the chest.

In Court, Trial Court instructed the jury of second degree (intentional) murder and second degree (felony) murder based on the predicate felony of second degree assault with a lesser degree of first degree manslaughter.(CP 150, 152, 154). Defendant now appeals his convictions.

C. ARGUMENT

1. TRIAL COURT ABUSED IT'S DISCRETION ALLOWING PREJUDICIAL EVIDENCE OF A KNIFE TO BE ADMITTED.

Discretion is abused when the trial Court's decision is

manifestly unreasonable or based upon untentable grounds or reasons. State V. Andrews, 293 P.3d 1203, 1206, 172 Wn.App. 703 (Wash.App. Div. 3 2013).

the Court allowing such evidence prejudiced the defendant by allowing the jury to infer criminal intent from evidence that had no bearing on the charges nor was verified or tested if in fact it was the murder weapon. Upon defense proved through Dr. Reynolds testimony that it was not the knife (RP Pg. 966, 3-25). Prosecutor knew it was not the knife, no DNA tests done on the evidence (RP Pg. 967,3-6). Prosecution stated on the record that 'this may or may not be the knife." weapon"'. (RP Pg. 971, 15).Prosecution went as far sa stating that the knife could have been cleaned (RP Pg. 972, 1-2). Prosecution used prejudicial evidence to convict the defendant. State V. Cordero, 284 P.3d 773, 781-82 (Wash.App. Div. 3 2012).

Trial Court's admittance of such evidence was abuse of it's discretion and, thus did not declare the law on such evidence. Id. at 699. As the Court in State V. McReynolds, said:

'The trial Court held that, "even considering all reasonable inferences [from this evidence] most favorable to the state..., there is insufficient ... evidence to prove that McReynolds owned or had knowledge, control, or possession of the item."' State V. McReynolds, 176 P.3d 616, 619, 142 Wn.2d (Wash.App. Div. 3 2008).

a. KNIFE ADMITTED INTO EVIDENCE WAS NOT THE MURDER WEAPON NOR WAS IT TESTED FOR VERIFICATION.

Trial Court allowed the knife even though it has not been admitted into evidence (RP Pg. 620, 15). This was during the testimony of Jeffrey M. McReynolds (Forensic Pathologist) whom testified that this blade couldn't have caused this injury (RP Pg. 620, 1-8). Admittance of this prejudicial weapon was and did in fact prejudice the defense, even though the state's Dr. testified it was not the murder weapon, including the prosecutor himself not sure (RP Pg. 971, 15).State V. Andrews, 293 P.3d 1203, 1206, 172 Wn.App. 703 (Wash.App. Div. 3 2013).

2. PROSECUTORIAL MISCONDUCT COMMENTING ON EVIDENCE THAT WAS NEITHER AUTNENTICATED NOR TESTED.

A public prosecutor is "a quasi-judicial officer, reprersenting the state, and presumed to act impartially in the interest only of justice. But the safeguards, which the wisdom of ages has thrown around persons accused of crimes cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a duty of fairness towards the accused, is the highest commendation they can hope for. In re Hinton, 100 P.3d 801, 802-803, 152 Wn.2d 853 (Wash. 2004).

The right to a fair trial is a fundamental liberty secured by the VI Amendment and XIV Amendments to the United States

Constitution and Article I, § 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. In re Glasmann, 286 P.3d 673, 677, 175 Wn.2d 696 (Wash. 2012).

Prosecutor went on to state that 'Jason Linder was killed by a knife, by the defendant.' (RP Pg. 908, 20-21). 'Matthew Leonard, weren't finished with the fight (RP Pg. 927, 9-10). The prosecutor further stated, 'anger can lead a person to do many things. It lead Mr. leonard to do something that maybe now he regrets,.That is stabbing Mr. Linder (RP. Pg. 973, 1-3). 'When he lies to the detective, he gets rid of physical evidence and flees the scene. Clearly those establish a concious of guilt (RP Pg. 974, 9-12). 'Jason Linder was killed by a knife, by the defendant (RP Pg. 908, 21). 'It's not justification for killing someone, but he was for blood (RP Pg. Pg. 918, 1-2). 'When you lie to the police, it's conciousness of guilt (RP Pg. 922, 13-14);(15-22). "It clearly establishes that he did so with intent to kill (RP Pg. 924, 22-23). 'Whether it was this knife or any other double=edged weapon as described by the Dr. It clearly was a deadly weapon. **It did kill Jason Linder** (RP Pg. 925, 1-5).

"In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence. In re Yates, 296 P.3d 872, 900 (Wash. 2013). The prosecutors conduct is reviewed in full context. Id.

'A fair trial certainly imp½lies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the experince of his own belief of guilt into the scales against the accused.' In re Glasmann, 286 P.3d 673, 677, 175 Wn.2d 696 (Wash. 2012) [redacted] Although a prosecutor has a wide latitude to argue reasonable inferences from the evidence, a proecutor must "seek convictions based only on probative evidence and sound reason," Id.

The prosecution committed prosecutirial misconduct by misstating the evidence, misleading the jury, and making an 'inflammatory statement' in closing arguments, remarks. In re Martinez, 256 P.3d 277,280, 171 Wn.2d 354 (Wash. 2011).

a. PROSECUTOIAL MISCONDUCT USING INFLAMMATORY COMMENTS AND ARGUING THAT ARE NOT SUPPORTED BY THE EVIDENCE.

In order to demonstarte prosecutorial misconduct, one must show that 'the prosecuting attorney's conduct was both improper and prejudicial.' In re Yates, 296 P.3d 872, 900 (Wash. 2013).

Prosecutorial misconduct may deoprive a defendant of his constitutional right to a fair trial. In re Glasmann, Supra, at 677. A prosecutor must "seek convictions based only on probative evidence and sound reson." Id.

Prosecution continued commenting on defendat's actions as the aggressor. Matthew Leonard, weren't finished with the fight (RP Pg. 927, 9-10). 'anger can lead a person to do many things. It led Mr. leonard to do something that maybe now he regrets. That is stabbing Mr. Linder (RP Pg. 973, 1-3). 'he gets rid of physical evidence and flees the scene. Clearly thgose establish a concious of guilt.' (RP Pg. 974, 9-12).

'Jason Linder was killed by a knife, by the defendant.' (RP Pg. 908, 21). Prosecutor statd Leonard was mad having his [redacted] friend being knocked out (RP Pg. 917, 21-25), but it's not justification for killing someone, but he was for blood (RP Pg. 918, 1-2). 'when you lie to police, its conciousness of guilt (RP Pg. 922, 13-14; 15-22). 'whether it was this knife or any other double-edged weaopon as described by the Dr. it clearly was a deadly weapon. It did kill Jason Linder.' In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence. However, prosectuing attorney has wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. In re Yates, 296 P.3d 872, 900 (Wash. 2013). The prosecutor's conduct is reviewed in full context. Id.Prosecutor missta3ed evidence and mislead the jury. In re Martinez, 256 P.3d 277, 280, 171 Wn.2d 354 (Wash. 2011); In re Hinton, 100 P.3d 801, 802, 152 Wn.2d 853 (Wash. 2004).

b. CLOSING ARGUMENTS WERE MADE TOWARDS THE PASSION AND PREJUDICE OF THE JURY TO CONVICT.

For the sake of brevity, defendant asks this Court to (see this motion Pg. 2-7). Defendant argues that prosecutor's remarks were targeted towards the passion and prejudice of the jury so as to convict. In re Glasmann, 286 P.3d 673, 677, 175 Wn.2d 696 (Wash. 2012). The prosecutor should not use arguments calculated to influence the passions or prejudices of the jury. Id.

c. THE PROSECUTION DID NOT CARRY THE BURDEN OF PERSUASION BEYOND A REASONABLE DOUBT.

Counsel should be accorded latitude by the trial Court his opening statement, but when he deliberately attempts to influence and sway the jury by a recital of matters foreign to the case, matters he knows or ought to know cannot be shown by competent or admissibale evidence, or makes a statement through accident, inadvertance or misconception which is patently improper or harmful to the opposing side, can constitute basis for a new trial or reversal for a reviewing Court of a judgment favorable to the party represented by such counsel. City of Columbus V. Hamilton, 78 Ohio App.3d 657, 605 N.E.2d 1004 (1992)(citing Maggio V. Cleveland, 151 Ohio St. 136, 84 N.E.2d. For the sake of brevity, defendant once again

to (see this motion Pg.s 2-8). Were the record clearly shows the prosecution relyed merely on personal opinions and matters outside of the evidence.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a soverighty whose obligation to govern impartially is as common as it's obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. It is as much his duty to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one. United States V. Maccini, 721 F.2d 840, 846 (1st Cir. 1983)(citing United States V. Capone, 683 F.2d 582, 585 (1st Cir. 1982); see also Berger V. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed.2d 1314, 1321 (1935).

Prosecutorial abuses occur most frequently during closing arguments to the jury. Improper vouching for witnesses veracity or credibility arguments designed to inflame the passion of the jury, and arguments that convey the personal opinion of the prosecutor. United States V. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981); Donnelly V. DeChristoforo, 416 U.S. 637, 646-47, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431, 438-39 (1974); see also "ABA Prosecution Standards, Std. 3-5.8, which states that the

prosecutor should not use arguments calculated to appeal to the prejudices of the jury or divert the jury from it's duty to decide the case on the evidence. Bates ▮ Bell, 402 F.3d 635 (6th Cir. 2005).

Opinions are replete with comments such as that of the first circuit in United States V. Maccini, 721 F.2d 840 (1st Cir. 1983). That despite our content warnings to the government we should still be called upon to admonish against such conduct is reprehensible per se because it constitutes a disregard to our directives. But additionally, it is particularly pernicious because it results in an unnecessary waste of judicial resoueces, both at the trial and appellate level, by diversion and attention to review of what by now should be understood to be totally unaccepatble conduct by those who lay claim to representing the Government of the Unie Stts. United States v. ▮▮ Maccini, 721 F.2d at 846.

arguments aimed at arousing the passions or sympathies of the jury are the paradigm example of prosecutorial misconduct during closing arguments. Such arguments distract juries from thier ▮▮▮▮▮▮▮▮ true fact-finding function and are highly improper. United States V. Payne, 2 F.3d 706, 711 (6th Cir. 1993)

In Washington V. State, 668 S.W.2d 715, 719 (Tex. Ct.App. 1984)., that reversal granted even though defense counsel had failed to object because the argument was so prejudicial that no instruction could cure the harm. Id. at 719. see also Jennings

V. State, 453 So.2d 1109 (Fla. 1984); Ryan V. State, So.2d 1084 (Fla. Dist. Ct.App. 1984); Commonwealth V. Palmariello, 392 Mass. 126, 466 N.E.2d 805 (1984); People V. Wisw, 134 Mich.App. 82, 351 N.W.2d 255 (1984). see also NOTE: Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate, 14 Suff L. rev. 1095, 1102-1103 (1980); Singer, Forensic Misconduct by Federal Prosecutors And How It Grew, 20 Ala. L. Rev. 227 (1968).

3, INEFFECTIVE ASSISTANCE OF COUNSEL ALLOWING INTO EVIDENCE A KNIFE THAT HOLDS NO RELEVANCE TO THE CHARGE.

Ineffective assistnce of counsel claims are governed by the analytical framework established in Strickland V. Washington, 466 U.S. 668,104 S.Ct. 2052,80 L.Ed.2d 674 (1984). In re Yates, 296 P.3d 872, 889 (Wash. 2013).

Trial counsel's representation of the defendant fell below an objective standard of reasonableness, allowing the admittance of the knife. The admittance of the knife prejudiced the defende which constituted deficient represtation and performance on the trial counsel. Id.

Trial counsel himself stated in closing arguments that the knife admitted was in fact not the knife, thus why the prosecution knew this and did not test for DNA (RP Pg. 966, 3-25)(RP Pg. 967, 3-6; 24-25) and (RP Pg. 971, 15). These were in fact not trial tactics. In re Yates, 296 P.3d at 889; se also Strickland, [redacted] V. Washingotn, 46 U.S. 668,104 S.Ct. 2052,80 L.Ed.2d 674 (1984)).

This action denied defendant's constitutinal VI Amendment right to counsel.

a. COUNSEL WAS INEFFECTIVE FRO NOT ADMITTING INSTRUCTIONS FOR EXCUSABLE HOMICIDE.

The convicted defendant must show that (1) 'counsel's representation fellbelow an objective standard of reasonableness' and (2) 'the deficinet performance prejudiced the defense.' In re Yates, 296 P.3d 872, 889 (Wash. 2013); see also Strickland V. Washington, 466 U.S. 668,104 S.Ct. 2052,80 L.ed.2d 674 (1984)).

Defendant testified that upon going outside the bar, Linder and his group were still there, waiting for him (RP Pg. 825, 21-22). He saw Linder hitting his sister (RP Pg. 831, 10-25). All both groups got ejected from the bar, had no right to be there (RP Pg. 928, 1-7). Defenant walked out the bar after sometine after [redacted] everyone else did, when the fight re-started (RP Pg. 973, 11-15). Defendant testified he was going to his car wit his sister when he got hit from behind, he turned around and Linder pulls out a knife, defendant is now in fear of imminent danger for his own and his sister's life (RP Pg. 834, 1-25). During the struggle defendan tgot the knife away from Linder still kept assaulting the defendant, defendant out of fear and desperation and without thinking, struck out in defense of self, out of a reaction, accidently stabbed Linder in the chest (RP Pg. 837, 3-15). He had no time to think, everything happened instantaneously (RP Pg. 839, 3-12).Only one stab was thrown by defendant. Id.

WASHINGTON'S EXCUSABLE HOMICIDE STATUTE READS:

Homicide is excusable when commited by accident or misfortune in doing any lawful act by lawful means, without criminal negligence or without any unlawful intent. State V. Brightman, 122 P.3d 150, 159, 155 Wn.2d 506 (Wash. 2005).

Mr. leonard feared Linder that he was about to commit another felony upon him besides the assault, the infliction of death or great personal injury and that there was imminent danger that the felony or injury will be accomplished. Defendant acted with reasonable force, nondeadly force in self-defense until such time that Linder pulled out a knife which led to Linder's accidental killing. Brightman, 122 P.3d at 159-60.

Even so, there is no dispute that self-defense historically is one of the primary justifications for otherwise unlawful conduct. Martin V. Ohio, 107 S.Ct. 1098, 1107, 480 U.S. 228 (U.S. Ohio 1987). This is not to say that defednat's conduct at the time was in fact justifiable and lawful from the proven facts on the record and circumstances of such volume and quality as to overcome the presumption of innocence. Coleman V. Johnson, 132 S.Ct. 2060, 2064 (U.S. 2012). Thus, the defednt was required that the apprehension of danger as percieved by the actor be reasonable under the circumstance. State V. Penn, 89 Wn.2d 63, 799, 568 P.2d 797 (1977). Defendant has in fact proven justification, self-defe, accidental/excusable homicide in the presence of danger.

4. STATE DID NOT APPRAISE DEFENDANT ON COMMON LAW ASSAULT TO PROPERLY DEFEND AGAINST.

No Washington statute defines the term "Assault" As a result the Courts have looked to the common law for a definition.[1] They have arrived at a definition that contains three alternatve means for commiting an assault: (1) battery; (2) attempted battery; and (3) creating an apprehension of bodily harm.[2], By definition, an assault requires the use of unlawful force. since the use of force in self-defense is lawful, self-defense negates an elemnt of assault, the state bears the burden of proving that the defendant did not act in self-defense.[3]

1. Peasley V. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 504, 125 P.2d 681, 690 (1942).

2. State V. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320, 323 (1994) (citing treatise).

3. State V. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997); State V. Foster, 91 Wn.2d 466, 471-472, 589 (1979). Under the forme statute, simple assault was held not to be uncluded within third degree negligent assault, since it is possible to commit the lesser crime without committing the greater, State V. Sample, 52 Wn.app. 52, 757 P.2d 539 (1988). The Court did not consider whether simple assault was alesser degree crime. see § 106. Under the new statutory scheme, fourth degree assault is clearly a lower degree of the same crime as third degree assault.

5. INSUFFICEINT EVIDENCE TO CONVICT ON SECOND DEGREE ASSAULT AS A PREDICATE FELONY.

The record clearly shows and supports that the defendant was not the aggressor, did not initiate a fight, and did not assaultanyone, including Linder. 'What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause.' The prosecutor failed to prove all the elements beyond a reasonable doubt. State V. Smith, 2013 WL 1456391, *4 (Wash.App. Div. 3 2013).

States witnesses, Shannon Vanderwood, testified he told Jason Linder, for them to leave. Linder stated hold on, then goes and punches, assault 'Elvis' punching him in the face. (RP Pg. 32, 9-25). Vanderwood asks why he asaulted 'Elvis' when Linder goes after the defendant as wll (RP Pg. 33, 1-25)(RP Pg. 79, 1-25). Linder went on to hit three people (RP Pg. 86, 16-21).

Another state witness, Kirby O'Sullivan testified Leonard was fighting both vanderwood and Jason Lindr (RP Pg. 135, 1-11).

Third state witness, James Perry, testified linder satted I'm going to knock this fool out (RP Pg. 220, 2-17).After Linder hit the guy 'Elvis' he went aftyer the preppy guy, then he went after the defendant (RP Pg. 221, 1-5) Knocked out the first guy, swung at another, then went after defendant (RP Pg. 283, 12-25). Linder was only one throwing blows (RP Pg. 285, 5-6).

Anothe witness, Sonya Martinez, tstified she saw Linder hit GiGi with closed fists and was scared for her when linder was on tp of her (RP Pg. 745, 10-25). Martinez told defendant Linder was assaulting GiGi (RP Pg. 746, 24-25).

Next witness, Rigoberto Villagomez, testified he saw a guy beating up Leonard's sister (RP Pg. 778, 24-25). He later saw Linder's group trying to coax Leonard outside the bar (RP Pg. 786

The prosecutor stated that Leonard, some time, some time before he comes out of the tavern (RP Pg. 914, 17-20). That linder should have gone home (RP Pg. 961, 16-17). Everyone was ejected and had no right to be ther and should have gone their seperate way (RP Pg. 928, 1-7). Prosecutor admitedly stated that Linder was in fact the first actor (RP Pg. 927, 7).

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the state, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State V. Andrews, 293 P.3d 1203, 1205, 172 Wn.App. 703 (Wash. Div. 3 (2013). Record tstimony clearly proves that the defendant did in fact defend himself, making him the actual victim in self-defense.

We infer specific xcriminal intent from conduct that plainly indicates such intent as a matter of logical probability. Andrews, 293 P.3d at 1205. (se this moton at Pg. 2, 4, 6, 8, and 13).

There is insufficient evidence tyo support defendant's conviction under the standard set forth in Jackson V. Virginia, 443 U.S. 307,99 S.Ct. 2781,61 L.Ed.2d 560 (1979). a reviewing Court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact would have agreed with the jury. Coleman V. Johnson, 13 .C. XXXXXX 2060, 2062 (U.S. 2012). In order for a jury's inferences to be permissable, the Court reasoned, they must flow from facts and circumstances proven in the record 'that are' of such volume and quality as to overcome the presumption of innocence. Johnson, 132 S.Ct. at 2064. (this motion Pg. 4-8).

A convtction based on insufficeint evidence contravenes the Due Process Clause of the Fourteenth Amendment and thus results in unlawful restraint. In re Martinez, 256 P.3d 277, 280, 171 Wn.2d 354 (Wash. 2011) Defendant clearly established he did not assault no one and was assaulted himself.(This motion Pg. 6-7).

Appelate Court's reversal for insufficincey of the evidence is in effect a determination that the government's cae against the defendant was so lacking that the tria Court should have entered a judgment of acquital. McDaniel V. Brown, 130 S.Ct. 665, 672, 558 U.S. 120 (U.S. 2010). The Jackson standard ...

loks to whether there is sufficient evidence which, if credited, could support the conviction. Id. at 673.

ASSAULT IN THE SECOND DEGREE:READS:

(1) A person id guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the First degree:

(a) intentionally assaults another and thereby inflicts substantial bodily harm; or

(b) assaults another with a deadly weapon; or

(e) with intent to commit a felony, asault another.

RCW 9A.36.021; see also this motion Pg.11-14).

GENERAL REQUIREMENTS OF CULPABILITY, READS:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intenmtionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which are described by a statute defining an offense.

(c) RECKLESS. A person is reckless or acts reckless when he or she knows of and disregards a substantial risk that a

wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wringful act may occur and his or her failure to be aware of such substantial risk cionstitutes, a gross deviation fromthe standard of care that a reasonable person would exercise in the same situation. RCW 9A.08.010 GENERAL REQUIREMENTS OF CULPABIL.

a. STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITED AN ASSAULT BY STRIKING OUT TO[redacted] DEFEND HIMSELF.

For the sake of brevity, (see this motion Pg.15-16), which clearly state the testimonies from the state witnesses and defense witnesses that Jason Linder was the agressopr and assaulted the defendant as well.

The prosecution bears the burden of proving all elements of the offense charged and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of thes elements. State V. Smith, 2013 WL [redacted] 1456391, *4 (Wash.App. Div. 3 2013). A corollary of the Due Process requirement that a j jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdct of not guilty if the state does not carry it's burden. Id,

We may infer XXXXXX specific criminal intent from conduct that plainly indicates such intent as a matter of logical probability. State V. Andrews, 293 P.3d 1203, 1205, 172 Wn.App. 703 (Wash.App. Div. 3 2013).

A reviewing Court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fcat would have agreed with the jury. Coleman V. Johnson, 132 S.Ct. DD 2060, 2062 (U.S. 2012). In order for a jury's inferences to be permissable, the court reasoned, they must flow from facts and circumstances proven in the record 'that are' of such volume and quality as to overcome the presumption of innocence. Johnson, Supra, at 2064. see also Jackson V. Virginia, 99 S.Ct. 2781, 2783, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

b. PROSECUTION FAILED TO PROVE INTENT TO ASSAULT JASON LINDER.

State failed as defedant clearly argued (see this motion Pg.13-14, and 14-19). More preciously 15-16). The intent to commit a crime may also be infered if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. State V. Cordero, 284 P.3d 773, 781, (Wash.App. Div. 3 2012).

6. INSUFFICIENT EVIDENCE TO CONVICT ON SECOND DEGREE (FELONY) MURDER BASED ON SECOND DEGREE ASSAULT(PREDICATE).

For the sake of brevity, please see this (motion at page. 13 14) and (15-18) and (19-20). The defendant arghues that not only is the evidence insufficent to convict for second degree (felony) murder, the conviction rest on **"nonexistent crime."** As in Andress, this Court held assault cannot serve as the predicate felony for second degree 'felony' murder uner the statute as amende in 1975. State V. Wright, 203 P.3d 1027, 1032, 165 Wn.2d 783 (Wash. 2009). (citing In re Hinton, 100 P.3d 801, 152 Wn.2d 853 (Wash. 2004).

A conviction under former RCW 9A.32.050 resting on assault as the underlying felony is not a conviction of a crime at all. Wright, 203 P.3d at 1032. see also SDtate V. Schwab, 185 P.3d 1151,152-53, 163 Wn.2d 664 (Wash. 2008).

The prosecution was not sure if the knife admitted was in fact the actual weapon used to stab Mr. Linder (RP Pg. 971, 15). He even commenbted that it could have be cleaned (RP Pg. 972, 1-2). Defense counsel also argued these facts as wel and why it was not tested (RP Pg. 966, 3-25) and (RP Pg. 967, 7-25). When a homicide is commited in the resistance of an attempt to commit a felony upon the slayer, then the use of deadly force is per se reasonable. State V. Brightman, 122 P.3d 150, 154, 155 Wn.2d 506 (Washj. 2005); see aldo this motion Pg. 6-8). The trial Court

must view the evidence from the stand point of a "reasonable prudent person who knows all the defendant knows and sees all the defendant sees. State V. Brightman, 122 P.3d 150, 157, 155 Wn.2d (Wash. 2005).; see this moton pg. 4-8).

The Nylan Court also noted that "a killing in self-defense is not justifiable unless the attack on the defednant's person threatens life or great bodily harm. Id. Just as the case in Brightman, defendant aslo argue the "Washington's Excusable Homicide. see this motion pg. 12-13). see also this page and on, so-forth on means reus and actus rea.

a. PROSECUTOR FAILED TO PROVE ACTUS REUS AND MENS REA FOR SECOND DEGREE (FELONY) MURDER.

We generally consider a crime to be made up of two parts: (1) the actus reus and (2) the mens rea. State V. Deer, 287 P.3d 539, 541, 175 Wn.2d 725 (Wash. 2012). As paRT OF THE ACtus reus of any crime, the state must prove beyond a reasonable doubt that a defednat voluntarilly engaged in the prescribed conduct. Id. see this motion Pg. 15-16).

In State V. Higgins,it states: 'to compare the "clearly expressed" element to self-defense and impose the same burdens on the state -- to show from the defendant's perspective lack of consent was clearly expressed. 278 P.3d 693, 698, 168 Wn.App. 845 (Wash.App. Div. 3 2012).

As the Cout of Appeals correctly observed: "as a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. State V. eaton, 229 P.3d 704, 706, 168 Wn.2d 476 (Wash. 2010).

Actus reus is defined as 'the wriongful deed that comprises the physical components of a crime.' and the **mens rea** is 'the state of mind that the prosecution ... must prove that a defendant had when commiting a crime. Eaton, 229 P.3d at 706.

Defendant argues that as in the Eaton case such as instant case, "An involunatry act, as it has no claim to merits, so neither can it induce any guilt." Id. FN2; see also this motion Page. 15-16). Where defendant was clearly defendaing himself, both inside the tavern and upon going outside to which testimony from state's woitnesses support this argument.

D. **CONCLUSION**

Defendant/appelant requests to dismiss the charge of second degree (felony) murder for insufficient evidence, invalidity due to predicate of assault, remand for a new trial, or more appropriately submit/enter first degree manslaughter.

Respectfully submitted this 8 day of July, 2013.

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DEFENDANT/APPELLANT, PRO SE

DECLARATION OF SERVICE

I certify and declare that I caused service of a copy of the following documents:

(1) ADDITIONAL GROUNDS, CAUSE NO. 11-1-00556-4
COURT OF APPEALS, DIVISON III, NO. 31138-4-III

Documents upon counsel of record at:

Kevin Gregory Eilmes
James Patrick Hagarty
Prosecuting Attorney;s Office
128 N. 2nd St. Rm 211
Yakima - WA 98901-2639

[X[U.S. POSTAGE PRE-PAID [mail-box rule]

I certify and declare under the penalty of perjury and the laws of the State of Washington pursuant to RCW 9A.72.085 that the foregoing is true and correc.

Submitted this 8 day of July, 2013.

M David Leonard

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