

No. 73928-0-I

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Court of Appeals  
Division I  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RALPH SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury that the defense of justification applied to the lesser-included offenses of first and second degree manslaughter and not just to the charged offense of second-degree murder. CP 136, 139, 142, 144-45; RP 1698-1728.

2. The trial court abused its discretion in admitting extrinsic evidence of a witness's prior inconsistent statements after the witness had already acknowledged making the prior inconsistent statements. RP 1281, 1288-91, 1512-53, 1669-79; Ex. 186.

3. The State presented insufficient evidence to prove Mr. Smith's 2003 out-of-state prior offense for purposes of sentencing. CP 239; Sentencing Exs. 7, 8, 10.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in refusing to instruct the jury that justifiable homicide is a defense to manslaughter and not just to murder, and in refusing to instruct the jury that the State must prove the absence of justification beyond a reasonable doubt in order to convict a defendant of manslaughter.

2. Whether the trial court abused its discretion in admitting extrinsic evidence of a witness's prior inconsistent statements after the

witness had already acknowledged making the prior inconsistent statements.

3. Whether the State presented insufficient evidence to prove Mr. Smith's 2003 out-of-state prior offense, where the documents presented were not judgments or documents of comparable reliability.

C. STATEMENT OF THE CASE

Appellant William Ralph Smith lived with his girlfriend Chena Fisher in a trailer on Ron White's property. RP 306, 1203-04.<sup>1</sup> Although Smith and White got along, Mr. White was in the process of trying to evict Mr. Smith because the latter could not afford to pay rent. RP 309-10.

One night, several of Mr. White's acquaintances visited him at his home, which was down the hill from Mr. Smith's trailer. RP 313. Mr. White talked a lot with his visitors about how he really wanted Mr. Smith to leave the property. RP 729-30, 772.

The visitors included Nicole ("Nikki") McDonnell and her half-brother Jeremy McClellan, who would end up dying later that night. RP 518-21. The two had smoked methamphetamine prior to going to Mr. White's house. RP 577. Ms. McDonnell thought that Mr. McClellan seemed "angry" or "antsy" before they arrived. RP 580.

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<sup>1</sup> "RP" with no other designation refers to the sequentially paginated trial transcripts. Other proceedings are designated with "RP (date)".

After they arrived, Mr. McClellan immediately started yelling at Mr. White about some incident with his girlfriend. RP 316, 583. Mr. White was frightened of Mr. McClellan, because Mr. McClellan was a lot bigger than Mr. White. Accordingly, Mr. White called his friend Shaun Runnels into the room for backup. RP 316, 433-34. Mr. Runnels also knew Mr. McClellan to be somewhat aggressive. He explained:

When I first met Jeremy he was actually kind of inebriated. I was living across the street from Nikki at the time, and I was walking over to meet Nikki from the house that I was staying at and he's kind of protective and he'd come walking down the driveway and, you know, kind of challenging the people that were coming up and that's how I met Jeremy.

RP 634. Eventually, Mr. White and Mr. McClellan discussed and resolved their differences. RP 318.

At one point in the evening, Mr. McClellan asked Mr. White if he would provide him with a significant quantity of drugs. RP 320, 641. Mr. White refused. Mr. McClellan then left the property for several hours. RP 321. Ms. McDonnell was glad he left, because he seemed angry and agitated and Ms. McDonnell hoped he would “cool off” while away. RP 583-84.

After Mr. McClellan returned, Mr. Smith went to Mr. White's trailer and played foosball with Mr. McClellan, whom Mr. Smith just met that night. RP 326-33, 536. When Mr. McClellan wanted a drink, Mr.

Smith got some alcohol for him from his trailer. RP 334-35; ex. 184.

Eventually Mr. Smith went back to his own trailer to be with Ms. Fisher.

Even though Mr. Smith and Ms. Fisher did not know Mr. White's guests prior to the evening in question, the guests repeatedly visited Mr. Smith's trailer. RP 524, 1220; ex. 184. First, Ms. McDonnell and Cathy Lavarias went to Mr. Smith's trailer to ask if they had soda and cigarettes. RP 525, 1211. The women thought that Mr. Smith and Ms. Fisher were nice, and they ended up staying for a while and smoking methamphetamine with Ms. Fisher. RP 526, 735. Although Mr. Smith was also a methamphetamine user, he did not do drugs with the women that night. RP 1206-12.

Mr. McClellan also went to Mr. Smith's trailer multiple times. RP 897, 1219. The first time he knocked on the door Mr. Smith and Ms. Fisher did not answer, because it was late. RP 1218. But then Mr. McClellan "started hollering" for Mr. Smith to come out. RP 1219. Mr. Smith cracked the door open and told Mr. McClellan he was spending time with Ms. Fisher and could come down in a while. RP 537-40, 1219, 1222;

But shortly thereafter, Mr. McClellan came back and hollered again because he wanted a cigarette. RP 1223. Mr. Smith obliged but repeated that he was trying to spend time with his girlfriend. RP 1225. He

said Mr. McClellan could come back in 20 minutes. RP 537, 540; ex. 184.

Mr. Smith went back inside the trailer after a minute or two, and Mr.

McClellan returned to Mr. White's home. RP 537, 540, 1225.

About 30 minutes later, Mr. McClellan went to Mr. Smith's trailer for the third time. RP 1227. Before he did so, he said something to Mr. White like, "I want to go do you a favor." RP 453. He put his backpack in the car, then went to Mr. Smith's trailer. RP 541, 567-68. Mr. McClellan was gone for a while, and Ms. McDonnell became worried because "he'd been gone longer than usual and then thinking about his attitude and everything else prior to that." RP 610.

Mr. McClellan pounded on the side of Mr. Smith's and Ms. Fisher's trailer repeatedly. RP 1226-27; ex. 184. He again hollered for Mr. Smith to come outside. RP 1227. Mr. Smith and Ms. Fisher did not respond. RP 1228. Then Ms. Fisher thought she heard Mr. McClellan rummaging around in her truck, so she asked Mr. Smith to go outside and address whatever was happening. RP 1228-30; ex. 184. She explained:

I told Ralph, I said "just whatever is going on, you go take care of it". Like I don't know what is going on, but there's somebody out there.

Q. You were mad at the time when you told him to do that?

A. Yeah.

Q. And you wanted him to go take care of it?

A. Well, yeah. Like because I've been trying to get him to come lay down and obviously these people aren't going away. And so whatever is going on, I didn't know what they wanted.

RP 1230.

Mr. Smith went outside, and Ms. Fisher followed shortly thereafter with her dog. RP 1231-33. Ms. Fisher saw Mr. McClellan holding her axe, and “flinching” toward Mr. Smith. RP 1235. Mr. McClellan did not raise the axe, but he moved toward Mr. Smith in a threatening manner. RP 1236, 1238. Mr. McClellan told Mr. Smith that he and Ms. Fisher needed to leave. He also said something like, “we always get our money.” RP 890, 897, 1170-71, 1239.

At that point, Ms. Fisher’s dog ran off and she went after him. RP 1240. According to Mr. Smith, Mr. McClellan then punched him, resulting in the “goose egg” on his forehead that law enforcement later saw. RP 1414-15. The two began wrestling. RP 1243. Mr. McClellan fell on the ground, then got up and ran back to Mr. White’s home. RP 1244.

The others at Mr. White’s house began screaming to call 911 because Mr. McClellan had started bleeding badly. RP 1248. Nobody had a telephone, so Ms. Fisher immediately went to another neighbor’s house, borrowed a phone, and called 911 in a panic. RP 1248-50. She repeatedly

explained that the person who had come to their trailer wielding an axe was now critically wounded. Ex. 137. The operator kept asking her to identify which person was the “victim” or “patient” and which person was the “suspect,” but this question clearly confused Ms. Fisher. She tried to explain that the attacker and the injured party were one and the same. Ex. 137.

Emergency medical workers arrived, but Mr. McClellan lost a significant amount of blood and died at the scene. RP 887. Law enforcement officers detained and interviewed Mr. Smith. RP 1602. He told them about Mr. McClellan’s repeated visits to their trailer and his ultimate threat with the axe. Ex. 184. He was afraid of Mr. McClellan for several reasons, including that Mr. McClellan was much younger than Mr. Smith. Ex. 184. Also, Mr. McClellan took off his watch and put it in his pocket, indicating an intent to fight. Ex. 184; RP 1627. Mr. Smith told the police that after Mr. McClellan punched him, they wrestled, and as they did so Mr. McClellan fell on a broken beer bottle. Ex. 184. Although Mr. Smith did not mention having used a knife to defend himself, one of his kitchen knives was later discovered to have Mr. McClellan’s blood on it. RP 1136, 1456. Mr. Smith was upset that Mr. McClellan died, and was crying. He said, “I didn’t mean to hurt nobody; I just meant to live.” Ex. 184.

The medical examiner determined that Mr. McClellan died from a stab wound to the neck. RP 930. The wound could have been caused by either a knife or a broken bottle. RP 932-33. There were also wounds on his back that were caused by a knife. RP 947-52.

When he died, Mr. McClellan had methamphetamine, marijuana, and alcohol in his blood. RP 957. According to the medical examiner, drugs can contribute to violent confrontations like the one that occurred here, and methamphetamine is “at the top of the list.” RP 1019. Drugs were also found in Mr. McClellan’s belongings in the car he and his sister had driven that night. RP 1128. The medical examiner found Mr. McClellan’s wristwatch in his pocket. RP 1030.

The State charged Mr. Smith with second-degree murder. CP 1-2. Mr. Smith requested jury instructions on justifiable homicide (self-defense and defense of others), as well as instructions on the lesser-included offenses of first and second degree manslaughter. CP 54, 59, 117; RP 1146. The State initially agreed that the jury should receive these instructions. Supp. CP \_\_\_\_ (sub no. 55) (Plaintiff’s Proposed Instructions); RP 1634, 1698, 1702, 1710. However, after the court and parties had already decided on the instructions, the State reversed course and argued that the defense of justifiable homicide could not apply to manslaughter but only to murder. RP 1715, 1719-20. Although the court was frustrated

with the State's last minute change, it granted the State's motion over Mr. Smith's objection. RP 1721-28. The jury was instructed that justifiable homicide was a defense to murder but was not instructed that it was a defense to manslaughter. CP 144-45. The jury was instructed that in order to convict Mr. Smith of murder, it had to find the State proved beyond a reasonable doubt that the homicide was not justifiable. There was no such instruction for manslaughter. CP 139, 142.

The jury acquitted Mr. Smith of murder but convicted him of first-degree manslaughter. CP 158-59. Mr. Smith moved for a new trial based on the instructional error, but the motion was denied. CP 183-91; RP (7/14/15) 1-23.

D. ARGUMENT

**1. The trial court erred in refusing to instruct the jury that the defense of justification applied to the lesser-included offense of manslaughter and not just to the charged offense of second-degree murder.**

- a. The defense of justifiable homicide is available for both murder and manslaughter, and a defendant is entitled to have the jury instructed on the defense if any evidence supporting it is presented.

“A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction.” *State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). The quantum of evidence necessary is simply *any* evidence. *State v. Hendrickson*, 81 Wn.

App. 397, 401, 914 P.2d 1194 (1996). The defendant need not show sufficient evidence was presented to create a reasonable doubt regarding the defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). Once any evidence supporting the defense is produced, “the defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate to support such a view of the case were he [or she] the trier of fact ....” *Id.* (internal quotation omitted).

The defense of “justifiable homicide” is available for both murder and manslaughter. RCW 9A.16.050; *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983); *State v. Hanton*, 94 Wn.2d 129, 614 P.2d 1280 (1980); WPIC 16.02. It is a specific application of self-defense and defense-of-others. *See* RCW 9A.16.020(3). The relevant statute provides:

Homicide is ... justifiable when committed either:

- (1) In the lawful defense of the slayer, ... or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
- (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW 9A.16.050.

Once some evidence of self-defense is presented, the defendant is entitled to have the jury instructed on the State's burden to prove beyond a reasonable doubt that the homicide was not justifiable. *McCullum*, 98 Wn.2d at 499-500; WPIC 16.02. Where the refusal to instruct on self-defense is based on a legal ruling rather than on a finding that no supporting evidence was presented, this Court reviews the propriety of the refusal *de novo*. *State v. George*, 161 Wn. App. 86, 94-95, 249 P.3d 202 (2011).

- b. The parties and court initially agreed that the jury should be instructed on the justification defense for both murder and manslaughter.

In this case, the trial court initially ruled that Mr. Smith was entitled to have the jury instructed on the justification defense for both the charged offense of second-degree murder and the lesser-included offenses of first and second degree manslaughter. RP 1654. Although case law does not require that self-defense be included in the to-convict instruction as opposed to providing a separate instruction, the parties and the court agreed that the State's duty to disprove justifiable homicide would be in the to-convict instructions for all three offenses. RP 1634, 1698; Supp. CP \_\_\_\_ (sub no. 55) (Plaintiff's Proposed Instructions).<sup>2</sup>

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<sup>2</sup> The defense had proposed in the alternative that the definitional instructions include this requirement. *See* CP 54, 59.

The parties and court also agreed that the separate “justifiable homicide” instruction would reference both the charged offense of second-degree murder and the lesser-included offenses of first and second degree manslaughter. RP 1702, 1710. The first sentence of the agreed instruction provided: “ It is a defense to a charge of murder in the second degree **and manslaughter in the first or second degree** that the homicide was justifiable as defined in this instruction.” Supp. CP \_\_\_\_ (sub no. 55) (Plaintiff’s Proposed Instructions) (emphasis added); *see also* CP 117 (similar introductory sentence proposed by defense). The instruction went on to explain that homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer’s presence so long as (1) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury; (2) the slayer reasonably believed that there was imminent danger of such harm; and (3) the slayer employed the level of force that a reasonable person would use under the circumstances. Supp. CP \_\_\_\_ (sub no. 55).

The parties and court also agreed to instruct the jury that a person is “entitled to act on appearances in defending himself or another. . . .” and that he has no “duty to retreat.” *Id.*; RP 1703. Finally, the parties and court agreed that the concluding instruction should direct the jury to find Mr.

Smith not guilty of the lesser-included offenses if it found him not guilty of murder based on justification. RP 1704-06.

- c. The State retracted its agreement and argued that justification was a defense to murder but not to manslaughter; the court altered the instructions over Mr. Smith's objection.

After the parties and court had agreed to the instructions described above, the State reversed course and stated, "We think that justification is not something that should be considered with manslaughter." RP 1714. The State had called an appellate prosecutor, Ms. Thulin, who appeared and said that Mr. Smith was not entitled to assert the defense of justification for manslaughter. RP 1715. The State agreed that Mr. Smith had presented sufficient evidence to support the defense, and that the instruction was therefore warranted for second-degree murder. RP 1715. But it claimed the defense was legally unavailable for manslaughter. *Id.*; RP 1719-20.

The court expressed frustration with the State for causing delay with its last-minute proposed changes. RP 1716. The defense urged the court to give the instructions the parties and court had previously agreed upon. RP 1717-18. The court tried to clarify what changes the State was proposing:

THE COURT: Well, where's the instruction that we worked on this morning? The one that talks about

making that determination.

MS. THULIN: You have it as relating to all alternative charges.

THE COURT: Right. Because if you find he's justified you can't find him guilty of anything.

MS. THULIN: And that's wrong, that's not the law.

RP 1720.

The defense disagreed with removing the defense of justification from the lesser-included offenses:

MR. FOLLIS: I'm sorry. The problem I've got is that the jury could proceed to manslaughter if they aren't satisfied there is an intent to kill. Quite apart from that, they're also considering justification.

RP 1721. Defense counsel noted that the pattern instruction for justifiable homicide specifically references both murder and manslaughter. RP 1725 (citing WPIC 16.02).

The court nevertheless granted the State's motion to remove the defense of justification from the manslaughter instructions, and to remove the reference to manslaughter from the justifiable homicide definitional instructions. RP 1725-28; CP 139, 142, 144, 145. Defense counsel repeated his objection to the removal, again noting that the State's new position was inconsistent with the pattern instruction. RP 1728.

The instructions retained the defense of justification for second-degree murder. CP 136, 144, 145. The court also retained the concluding instruction directing the jury to find Mr. Smith not guilty of the lesser-included offenses if it found him not guilty of murder based on justification. CP 154. But if the jury found him not guilty of murder for a different reason – e.g. failure to prove intent to kill – it would go on to consider manslaughter *without* considering the justification defense. CP 139, 142, 144, 145, 154.

- d. Mr. Smith was acquitted of murder but convicted of manslaughter; he moved for a new trial on the basis that the jury was wrongly denied the opportunity to acquit him of manslaughter based on justifiable homicide.

After the court instructed the jury as described above, the parties delivered their closing arguments. Mr. Smith’s counsel emphasized that Mr. Smith did not intend to kill the decedent and that he was acting in self-defense. RP 1811-13.

The jury found Mr. Smith not guilty of murder, but guilty of first-degree manslaughter. CP 158-59. Mr. Smith moved for a new trial on the basis that the jury was wrongly denied the opportunity to acquit Mr. Smith of manslaughter based on self-defense. CP 183-91 (citing, inter alia, *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983); *State v. Hanton*, 94 Wn.2d 129, 614 P.2d 1280 (1980); WPIC 16.02).

In its response to the motion, the State acknowledged that – contrary to Ms. Thulin’s earlier position – the defense of justification is available for manslaughter. CP 192. But the prosecutor cited *Hanton* for the proposition that even though the defense applies, it need not be included in the jury instructions. CP 193. The State did not acknowledge that *McCullum* abrogated *Hanton* on that point. *See McCullum*, 98 Wn.2d at 498-500. In *McCullum*, the Court concluded:

[O]ur opinions in *Savage*, *Hanton*, *Burt*, and *King* are hereby modified to reflect the view expressed in *State v. Roberts*, [88 Wn.2d 337, 346, 562 P.2d 1259 (1977)] that when self-defense is properly raised the jury should be “informed that the State has the burden to prove absence of self-defense beyond a reasonable doubt.”

*McCullum*, 98 Wn.2d at 500.

At the hearing on the motion for a new trial, defense counsel reiterated his view that the State wrongly urged the court to change the instructions at the last moment. He emphasized, “self-defense, defense of others, and resistance to a threatened felony are defenses to offenses that have recklessness at least, and in my view probably negligence as mental states, and we did not clearly instruct the jury in that manner.” RP (7/14/15) 5. The State objected to the motion for a new trial on the basis that the jury was “instructed by the Court that if they were to find the Defendant not guilty based on justification of Murder in the Second

Degree, they were to find him not guilty on the other two offenses.” RP (7/14/15) 6.

The Court pointed out that the problem was the jury could have found Mr. Smith not guilty of second-degree murder for a different reason and then they would have moved on to manslaughter with no opportunity under the instructions to apply the justification defense to the lesser crime. RP (7/14/15) 11, 18. The State claimed that the jury was required to have reached and rejected the justification defense in order to move on to the lesser-included offense. The State did not explain a basis in either the law or the instructions for this position. RP (7/14/15) 13, 18.

Ultimately, the court denied the motion for a new trial, but it indicated it had reservations about the ruling:

I’m very frustrated that we didn’t have time, because this is the kind of analysis that I spent about three hours on yesterday is what should have been done before the trial before we got to the point of dealing with jury instructions, but it wasn’t done, because we didn’t have this issue raised to the Court at that time. It was raised to the Court [by the State] at the last possible minute ...

So what we should have done, I think, in hindsight is I think Instruction 19 should have said it’s a defense to Murder in the Second Degree **and manslaughter** because that is what is in the WPICs. They’re both bracketed phrases, and then we would have probably covered all of the bases, and I think we would have been in good enough shape.

RP (7/14/15) 21 (emphasis added). In other words, the court agreed with the defense that the jury instruction on justifiable homicide should have referenced both murder and manslaughter. *Compare id.* to CP 117 (defense-proposed instruction) *and* Supp. CP \_\_\_ (sub no. 55) (Plaintiff's Original Proposed Instructions tracking WPIC 16.02 and including manslaughter); RP 1702-03 (defense agrees with plaintiff's original version in all relevant respects<sup>3</sup>).

Despite recognizing that the jury instructions should not have been changed at the last minute and that the jury should have been instructed that the justification defense applied to manslaughter, the court denied Mr. Smith's motion for a new trial. The court adopted the State's argument that the instructions given were "clear enough." RP (7/14/15) 23. The court again expressed doubt about its ruling:

So I'm going to deny the motion for a new trial on that basis. I'm not absolutely certain about that, but I'm certain enough that I think that's the decision I will make at this time.

RP (7/14/15) 23.

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<sup>3</sup> The defense would have used the word "defendant" instead of the word "slayer," but that disagreement is immaterial to the issue on appeal.

- e. The trial court erred in failing to instruct the jury that justifiable homicide was a defense to manslaughter, requiring reversal and remand for a new trial.

The court erred in acceding to the State's last-minute request to remove justifiable homicide as a defense to manslaughter. Without question, the defense is available for manslaughter in addition to murder. *Hanton*, 94 Wn.2d at 133; *State v. Crigler*, 23 Wn. App. 716, 717, 598 P.2d 739 (1979); RCW 9A.16.020(3); RCW 9A.16.050; WPIC 16.02. Without question, the jury should have been informed of that fact and should have been informed that the State bore the burden of disproving the defense beyond a reasonable doubt. *McCullum*, 98 Wn.2d at 500. Instead, the jury was informed that justifiable homicide was "a defense to a charge of murder in the second degree," CP 144-45, and that in order to prove murder in the second degree, the State had to prove beyond a reasonable doubt that "the homicide was not justifiable." CP 136. The jury was not informed that the justification defense also applied to manslaughter or that in order to convict Mr. Smith of manslaughter it had to find the State proved beyond a reasonable doubt that the homicide was not justifiable. CP 139, 144-45.

The State wrongly claimed that the instructions given adequately conveyed the law because they informed the jury that if it acquitted Mr.

Smith of murder based on justification it should acquit him of manslaughter also. But there is no basis in law for the proposition that this was the only available reason to acquit Mr. Smith of murder. To the contrary, it is axiomatic that the jury must acquit if the State fails to prove *any* element of the crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

If the jury acquitted Mr. Smith of murder because it found the State failed to prove intent to kill, Mr. Smith was entitled to have the jury consider the justification defense when it evaluated the lesser-included offense of manslaughter. The instructions did not permit this to occur. Accordingly, the instructions did not adequately convey the law.

The remedy for the error is reversal and remand for a new trial. *George*, 161 Wn. App. at 101. The State may retry Mr. Smith for manslaughter, but may not retry him on the murder charge of which he was acquitted. U.S. Const. amend. V; *State v. Linton*, 156 Wn. 2d 777, 783, 132 P.3d 127 (2006).

**2. The trial court abused its discretion in admitting extrinsic evidence to impeach a witness who had already acknowledged her prior inconsistent statements.**

- a. If a witness admits making a prior inconsistent statement, extrinsic evidence of that statement is inadmissible.

The Rules of Evidence govern the manner in which a party may challenge a testifying witness's credibility or bias based on the witness's prior statements. The relevant rule provides:

- (a) **Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.
- (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 613.

In interpreting this rule the Supreme Court has held, "if the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible." *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991(2006).

Thus, in *Dixon*, extrinsic evidence of the alleged victim's prior inconsistent statements was properly excluded because she admitted she had previously stated that she did not know whether the alleged crime happened or if it was a dream. *Id.* Similarly in this case, as explained below, extrinsic evidence of prior statements should have been excluded because the witness admitted she made the prior statements.

- b. The trial court abused its discretion in admitting a recording of Chena Fisher's prior statements, because Ms. Fisher had already admitted making the prior inconsistent statements.

Mr. Smith's girlfriend, Chena Fisher, was understandably shaken by the events of March 22, 2015. RP 1306-07. She had sent Mr. Smith outside because it scared her that Mr. McClellan kept returning to their trailer, banging on the side, and apparently rummaging through the things in her truck. RP 1216, 1219, 1223, 1226-30. She went outside after Mr. Smith did, and saw Mr. McClellan approach Mr. Smith with an axe and "flinch" in a threatening manner. RP 1235. Then her dog ran away, and she went after him. RP 1240. From afar she saw Mr. McClellan and Mr. Smith wrestling on the ground, then saw Mr. McClellan get up and run toward Ron White's home. RP 1243-44. People at Mr. White's house suddenly started screaming to "call 911." RP 1248.

Ms. Fisher immediately went to a neighbor's house, borrowed their cell phone, and called 911 in a panic. RP 1248-50. She repeatedly explained that the person who had come to their trailer wielding an axe was now critically wounded. Ex. 137. As she walked back to the trailer, Mr. Smith said to her, "you seen him coming at me with that axe, right?" RP 1269-70. Later that day, Ms. Fisher told Detective Francis that she saw Mr. McClellan raise the axe as he approached Mr. Smith. RP 1275. She also told him that she wasn't aware of a broken beer bottle. RP 1283-84.

A couple of days later, on March 24, Ms. Fisher told Detective Francis that she never saw Mr. McClellan with an axe and that Mr. Smith broke a beer bottle after the incident. RP 1288, 1291. She told the detective she interpreted Mr. Smith's statement about Mr. McClellan coming at him with an axe to be an indication that this was to be their "story" about the events of the night. RP 1291.

In multiple subsequent interviews and in her trial testimony, Ms. Fisher's explanation of what happened was consistent with her statements to the 911 operator right after the incident: she said that Mr. McClellan did approach Mr. Smith with an axe, but that he never raised it above his head. RP 1235-36, 1316-18, 1343. Instead, Mr. McClellan flinched at Mr. Smith in a threatening manner while holding the axe with the blade facing down. RP 1272.

When the prosecutor asked her about her March 24<sup>th</sup> statements to Detective Francis, she acknowledged that she made the statements. She reaffirmed (1) that Mr. Smith broke a beer bottle after the fight, RP 1281; (2) that she told Detective Francis she interpreted Mr. Smith's question to be their "story," RP 1291; and (3) that she told Francis Mr. McClellan did not have an axe. RP 1291. She then explained that she was wrong when she gave the latter statement to Detective Francis, and that the truth was that Mr. McClellan did approach Mr. Smith with an axe – it just wasn't raised over his head. RP 1297.

Notwithstanding her acknowledgement of the prior inconsistent statements, the prosecutor sought to introduce the first four minutes of the recording of Detective Francis's March 24 interview of Ms. Fisher. RP 1512-14, 1518. The State incorrectly claimed that Ms. Fisher denied making the statements to Francis, and therefore the extrinsic evidence was necessary. *Compare* RP 1291 *with* RP 1525. The defense pointed out that this was wrong, and that Ms. Fisher had already admitted making the statements. RP 1514-16, 1522, 1536, 1648-50. Thus, admission of the extrinsic evidence would be improper under both ER 613 and ER 403. RP 1536-40, 1548, 1553. The trial court nevertheless admitted the recording, and instructed the jury that it could rely on the recording to evaluate Ms. Fisher's bias and credibility. RP 1669-75; CP 133.

As explained above, the admission of this extrinsic evidence was improper. The evidence was inadmissible because Ms. Fisher admitted making the prior inconsistent statements. *Dixon*, 159 Wn.2d at 76; ER 613(b); ER 403. On remand, the recording should be excluded unless the witness fails to acknowledge the prior statements. *See id.*

**3. The State presented insufficient evidence of Mr. Smith’s alleged 2003 out-of-state prior offense, requiring reversal of the sentence and remand for resentencing.**

- a. The State bears the burden of proving a defendant’s offender score for purposes of sentencing.

The Sentencing Reform Act creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime and the defendant’s offender score. RCW 9.94A.505, .510, .520, .525; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court’s calculation of the offender score. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

“Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). A foreign conviction for a crime that is not comparable to a Washington felony may not be included in the

offender score. *State v. Thomas*, 135 Wn. App. 474, 477, 144 P.3d 1178 (2006).

The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process. U.S. Const. amend. XIV; *State v. Hunley*, 175 Wn. 2d 901, 917, 287 P.3d 584 (2012). Furthermore, “fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Ford*, 137 Wn.2d at 481.

b. The State presented insufficient evidence of Mr. Smith’s alleged 2003 California conviction for purposes of the offender score calculation.

At sentencing, the State urged the court to find that Mr. Smith’s offender score was nine, while defense counsel argued the offender score was five. RP (8/10/15) 70, 109. The court ruled that Mr. Smith’s offender score was six, and imposed a sentence of 218 months. CP 239-41.

The discrepancy between Mr. Smith’s calculation and the court’s calculation involved an alleged 2003 California conviction for possession of a controlled substance. RP (8/10/15) 109, 112; CP 239; Sentencing Exs. 7, 8, 10, 12. Defense counsel noted that this conviction had not been included in Mr. Smith’s offender score at a prior sentencing in Skagit County. RP 109; Sentencing Ex. 12. He also argued that the exhibits the

State submitted to prove this conviction were not judgments and sentences:

[T]hey don't contain the Defendant's signature. They don't contain a judge's signature. They appear to be, you know, essentially the clerk's notes is the way they look to me, and there may be a box check there that has an "F" over it, and the State is arguing that that is sufficient evidence to establish a felony."

RP (8/10/15) 76.

The court rejected the argument. It acknowledged that "the best evidence of a prior conviction is a certified judgment and sentence," but said "due process only requires information bearing some minimal indicia of reliability beyond mere allegation." RP (8/10/15) 110.

This Court should hold that the documents the State presented to prove the 2003 conviction do not bear the necessary indicia of reliability. As defense counsel emphasized and the sentencing court recognized, "[t]he best evidence of a prior conviction is a certified copy of the judgment." *Hunley*, 175 Wn.2d at 910 (quoting *Ford*, 137 Wn.2d at 480). Although the State may introduce other documents to prove criminal history, those documents must be of "comparable" reliability. *Id.* In *Adolph*, for example, the State met its burden of proving a prior DUI by presenting a DOL driving record abstract and DISCIS criminal history, because both of those documents "are official government records, based

on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule. *In re the Personal Restraint of Adolph*, 170 Wn. 2d 556, 570, 243 P.3d 540 (2010). Here, the evidence did not meet similar standards of reliability. *See* RP (8/10/15) at 26-110; Sentencing exs. 1-18. Accordingly, Mr. Smith asks this Court to reverse the sentence and remand for resentencing.

E. CONCLUSION

Because the trial court erred in failing to instruct the jury that the justification defense also applied to manslaughter, Mr. Smith asks this Court to reverse his conviction and remand for a new trial. At the new trial, extrinsic evidence of Chena Fisher's prior statements should be excluded unless she fails to acknowledge having made the statements.

In the alternative, because the State presented insufficient evidence of Mr. Smith's 2003 prior out-of-state conviction, Mr. Smith asks this Court to reverse his sentence and remand for resentencing.

DATED this 27th day of June, 2016.

Respectfully submitted,

/s Lila J. Silverstein  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 73928-0-I
	)	
WILLIAM RALPH SMITH,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |       |  |                     |  |
|-------|--|---------------------|--|
| [ X ] | ERIC RICHEY<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>[Appellate_Division@co.whatcom.wa.us]<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | ( )<br>( )<br>( X ) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [ X ] | WILLIAM SMITH<br>371193<br>CLALLAM BAY CORRECTIONS CENTER<br>1830 EAGLE CREST WAY<br>CLALLAM BAY, WA 98326                             | ( X )<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF JUNE, 2016.

X \_\_\_\_\_ 