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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 34354-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**RALPH PEREZ,**

**Appellant/Defendant.**

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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NO. 05-1-04938-5**

**THE HONORABLE THOMAS P. LARKIN,**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it permitted Mr. Ingram's testimony, and failed to conduct a meaningful hearing and render definitive findings concerning whether Mr. Ingram was intoxicated, where the Court, the appellant, and appellant's counsel all expressed concerns that Mr. Ingram was intoxicated while testifying.

2. The trial court erred when it prohibited defense counsel from cross-examining Mr. Ingram, who was the only eye witness to the events, concerning his mental capacity to recollect and testify accurately and truthfully.

3. The trial court erred when it prevented defense counsel from presenting Mr. Perez's theory of the case by disallowing the cross-examination of the deputies as to Mr. Perez's exculpatory statements where the deputies testified fully as to Mr. Perez's inculpatory statements.

4. The State failed to prove beyond a reasonable doubt that Mr. Perez entered Mr. Ingram's apartment or intended to commit a crime inside Mr. Ingram's apartment.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court deny Mr. Perez his due process rights where it allowed an apparently intoxicated witness to testify at trial? (Assignment of Error Number One.)

2. Did the trial court deny Mr. Perez his constitutional rights to due process and confrontation where it prohibited defense counsel from cross-examining Mr. Ingram concerning his mental condition while testifying when Mr. Ingram's capacity to recollect and testify accurately and truthfully was critical to the case? (Assignment of Error Number Two.)

3. Did the trial court deny Mr. Perez his constitutional due process rights when defense counsel was prohibited from completing the evidence and presenting his theory of the case by cross-examining the deputies as to Mr. Perez's exculpatory statements where the deputies testified to his inculpatory statements? (Assignment of Error Number Three.)

4. Did the record show beyond a reasonable doubt that “entry” occurred where the altercation between Mr. Perez and Mr. Ingram transpired outside Mr. Ingram’s apartment at his doorway, and where the State failed to prove that Mr. Perez intended to commit a crime inside the apartment? (Assignment of Error Number Four.)

### **III. STATEMENT OF THE CASE**

#### **1. Procedural History**

On October 10, 2005, the appellant/defendant Ralph Perez was charged by Information with one count of Burglary in the First Degree, one count of Malicious Mischief in the Third Degree, and one count of Assault in the Fourth Degree.<sup>1</sup> CP 1-4. The acts constituting the offenses were alleged to have occurred on October 7, 2006. CP 1-4. On November 8, 2006, Mr. Perez filed a Notice of Affirmative Defense (self-defense). CP 5.

Pre-trial motions, in which the arrest and the admissibility of

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RCW 9A.52.020(1)(b), RCW 9A.48.090(1)(a), RCW 9A.48.090(2)(a), RCW 9A.36.041(1), and RCW 9A.36.041(2).

Mr. Perez's custodial statement were challenged, were heard by the Honorable Linda CJ Lee on December 19, 2005.<sup>2</sup> RP 1A. Judge Lee concluded that the warrantless arrest of Mr. Perez inside his home violated both the Fourth Amendment to the U.S. Constitution and Article 1, Section 7 of the Washington Constitution. Consequently, all post arrest statements made by Mr. Perez were suppressed. Findings and Conclusions regarding the motions were subsequently entered on January 6, 2006. CP 67-69; RP 4A.

On January 3, 2006, the case proceeded to trial by jury before the Honorable Thomas P. Larkin. After the State and the Defense rested, the State moved to amend the gross misdemeanor charge of third degree malicious mischief to the misdemeanor charge of malicious mischief. On January 6, 2006, Mr. Perez was convicted of one count of first degree burglary, one count of third degree malicious mischief, and one count of fourth degree assault. CP 96-98.

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Two volumes of VRPs are unnumbered. For purposes of appellant's opening brief the unnumbered volumes are designated as follows: December 19, 2005 = RP 1A, January 6, 2006 (Judge Lee) = 4A.

Mr. Perez was sentenced on January 27, 2006. Judge Larkin imposed fifty-seven (57) months in the Department of Corrections for the first degree burglary conviction, which represents the low end of Mr. Perez's presumptive range. Additionally, the Court imposed a three hundred sixty-five (365) day suspended sentence for the fourth degree assault conviction, and a ninety (90) day suspended sentence for the third degree malicious mischief conviction. CP 158-179. A timely Notice of Appeal was filed on the same date. CP 99.

## **2. Summary of Trial Testimony**

### **● William Brand**

William Brand is a patrol deputy with the Pierce County Sheriff's Department. Deputy Brand testified that on October 7, 2005, he was dispatched to a "neighbor dispute" at 14414 Second Avenue East, Apartment Number 1. RP 2 32. After arriving at the location he took a statement from Shaun Ingram, who was a resident of apartment one. Deputy Brand testified that while he and his back up, Deputy Inga Carey, contacted Mr. Ingram, Mr. Perez was "yelling and screaming."

RP 2 33.

Deputy Brand testified that Mr. Perez was “yelling that Mr. Ingram was high and I needed to give Mr. Ingram a drug test, yelling, screaming, cussing, F-word this F-word that.” RP 2 33. Mr. Perez declined to come out of his apartment, but talked to the officers through his open window. Deputy Brand testified that Mr. Perez stated he had gone to Mr. Ingram’s apartment to confront him about some rumors Mr. Ingram had started. Mr. Perez reportedly told Deputy Brand that he had given Mr. Ingram “the one-two-three.” RP 2 35. He further testified that Mr. Ingram’s shirt was torn and there was some redness on his forearm and on the center of his chest. RP 2 37-38. When asked during cross-examination whether Mr. Perez had made additional statements concerning the incident, Deputy Brand denied that Mr. Perez had. RP 2 43.

- **Inga Carey**

Inga Carey is a patrol deputy with the Pierce County Sheriff’s Department. Deputy Carey testified that while she and Deputy Brand

were taking Mr. Ingram's statement Mr. Perez began "yelling and cussing and screaming" at them from the courtyard area of the apartment complex. RP 2 52. Mr. Ingram then returned to his apartment. Deputy Carey testified to the same statements that Deputy Brand had attributed to Mr. Perez.

Deputy Carey further testified that Mr. Ingram identified Mr. Perez as "the guy that hit me." RP 2 52. She observed a hole in Mr. Ingram's wall behind his front door, as well as some dry wall on the floor. Deputy Carey concluded that the hole was caused by the door nob being pushed against the wall in a forced entry, but conceded that she didn't know how long the hole had actually been there. RP 2 55,65.

- **Shaun Ingram**

Mr. Ingram testified that on October 7, 2005, he was residing with his mother and her husband in apartment one at 14414 Second Avenue East in Tacoma. RP 3 82, 99. Mr. Perez resided in apartment three of the same complex. RP 2 83. Mr. Ingram was less than half the age of Mr. Perez at twenty-four (24) years, and substantially larger than Mr.

Perez at six (6) feet one (1) inch in height and three hundred fifteen (315) pounds. RP 2 101-103. Mr. Ingram was unemployed, had never worked, and had previously been convicted of possessing stolen property. RP 3 103. He testified that at the time of the incident he was drinking, but was also attending a recovery program called Center South. He had quit that program and was planning to register for another one named Reflections.

Shortly after becoming neighbors, Mr. Perez befriended Mr. Ingram and also employed him. Mr. Ingram performed cleaning and odd jobs inside Mr. Perez's apartment every other day. On October 7, 2005, Mr. Ingram heard a knock on his door. Upon opening the door he observed Mr. Perez walking away. Mr. Ingram testified that Mr. Perez ran at him and began hitting him. As Mr. Ingram attempted to shut his front door Mr. Perez pursued. "The door got shoved into the wall, and there was a hole in the wall behind the front door of where the closet sits." RP 3 85.

Mr. Ingram claimed that Mr. Perez was yelling at him to come

outside and hitting him at the same time. Mr. Ingram testified that he was able to get Mr. Perez out of the way by raising his voice and pushing him out with the door. RP 3 88. Once Mr. Ingram had closed the door he called 911. RP 3 85-88. Mr. Perez returned to his apartment, but continued to yell for Mr. Ingram to “come out.” RP 3 89. Mr. Ingram testified that his shirt was ripped and he was hit in the arm. RP 3 87, 89.

### **3. Competency “Hearing”**

Following Mr. Ingram’s direct examination the trial court sua sponte excused the jury because the Court had “some concerns whether the witness is under the influence of something.” RP 3 92. The prosecutor represented that, although he had not asked Mr. Ingram that question, according to Mr. Ingram’s mother Mr. Ingram is “mildly retarded.” RP 3 92. The Court stated:

Well, I don’t know. When I first asked him to walk up here, the way he walked, he stood up, couldn’t hold his arms up, his eyes were glazed. I’ve been doing this a long time, 19 years. This

is the second time - - or I'm in my 20<sup>th</sup> years, and it hasn't been since District Court that I raised the issue with a witness, and under questioning by the Court, he admitted that he was under the influence. So I have just raised this issue outside the presence of the jury because the Court has some concerns about this. RP 3 92.

Defense counsel interjected:

I had the same concern, my client has the same concern and he whispered in my ear on two occasions during direct examination "I think he's drunk" - and my client knows this man. So we've had the same concerns....RP 2 93.

Outside the presence of the jury Mr. Ingram was questioned by the Court, but not the attorneys. The Court advised Mr. Ingram that he appeared "confused" and "disoriented," and that the Court was concerned whether he was under the influence or alcohol or drugs. Mr. Ingram denied using any drugs or alcohol. RP 2 93. The following colloquy transpired:

**THE COURT:** Are you on any prescription drugs?

**MR. INGRAM:** Nope.

**THE COURT:** Are you taking any other drugs?

**MR. INGRAM:** No, your Honor.

**THE COURT:** Have you consumed any alcohol recently?

**MR. INGRAM:** No, your Honor.

**THE COURT:** Are you feeling okay?

**MR. INGRAM:** I'm sick, that's about it.

**THE COURT:** And what is your physical condition at this time?

**MR. INGRAM:** My lungs are filled up from smoking cigarettes.

**THE COURT:** So you're not in very good health; is that what you're telling me?

**MR. INGRAM:** That's basically what it is.

**THE COURT:** But your current condition that you're exhibiting here is a condition that you experience every day

then?

**MR. INGRAM:** No.

**THE COURT:** Are you under the care of a physician at this time, that means; are you under the care of a doctor?

**MR. INGRAM:** Yes, I am. I go see a doctor every day, basically.

**THE COURT:** Is he prescribing some medication for you?

**MR. INGRAM:** He just says I have to sit up in a sit-up position to where I don't lay flat when I'm sleeping, to where - -

**THE COURT:** Now, you said that you go to a doctor every day?

**MR. INGRAM:** To get it checked to see what it is.

**THE COURT:** This is every day of the week?

**MR. INGRAM:** It's not every day.

**THE COURT:** What is it?

**MR. INGRAM:** For two days.

**THE COURT:** You've done it for two days?

**MR. INGRAM:** I go see him so they can do a test to see if it's whatever, strep throat or whatever.

**THE COURT:** Where are you being treated?

**MR. INGRAM:** Summerview Clinic out on Canyon Road.

**THE COURT:** Were you there yesterday?

**MR. INGRAM:** I was there like the other day before that, way before that. But I've been here back and forth talking to Jerry, but the last Friday, that's all.

Following the Court's inquiry the trial continued. Defense Counsel was prohibited, however, from inquiring in the presence of the jury concerning Mr. Ingram's alcohol or drug consumption except for during the time of the incident. RP 3 98.

The substance of Mr. Ingram's testimony was frequently confused, unintelligible, and non-responsive. On no less than seventeen (17) occasions the trial court was compelled to admonish Mr. Ingram to listen to and respond to the questions asked.<sup>3</sup>

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RP 3 86, 87, 91, 100, 105, 106, 108, 109, 110, 113, 114, 121, 128, 129, 131.

Additionally, the trial was interrupted when, during a break, Mr. Ingram talked to or attempted to talk to some of the jurors. RP 3 152-154; 165-172.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DENIED MR. PEREZ HIS RIGHT TO A FAIR TRIAL WHEN IT PERMITTED AN APPARENTLY INTOXICATED WITNESS TO TESTIFY.**

A denial of due process may occur where a trial court fails to conduct an inquiry into and render a determination of the competency of a witness. *State v. Watkins*, 71 Wash.App.164,857 P.2d 300 (1993).

In a case of first impression in Washington, the *Watkins* Court was presented with the issue of whether a trial court is required to conduct a sua sponte inquiry into a trial witness' competence in order to determine whether the witness is in fact competent to testify. The *Watkins* Court considered the approach of other jurisdictions and adopted the view that, while the imposition of a duty upon trial courts to make sua sponte inquiries and determinations would ordinarily violate public policy, in a case where a witness' competency is "clearly

in question” the trial court does have such a duty . Furthermore, the abdication of that responsibility may deny the defendant his or her right to a fair trial. State v. Watkins, *Id.* at 173 citing State v. Kinney, 35 Ohio App. 3d 84, 519 N.E. 2d 1386(1987); accord Darnell v. Commonwealth, 558 S.W. 2d 590 (KY. 1977) (duty may arise where witness exhibits “manifest signs” of incompetence).

Implicit in a trial court’s duty to inquire where a witness exhibits manifest signs of incompetence is, of course, the duty to conduct a meaningful inquiry and render a definitive decision on whether the witness is competent to testify.

Washington statute governs the competency of witnesses:

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination....(emphasis added).

RCW 5.60.050(1)

Generally, a presumption exists that a witness is competent to testify. RCW 5.60.020; ER 601. An exception exists, however, for persons who are intoxicated at the time they are to testify.

Additionally, “the competency of a witness is a preliminary fact question to be determined by the trial court.” *State v. Watkins, Id. at 171, citing State v. Smith*, 97 Wash.2d 801,803,650 P.2d 201 (1982); accord *State v. Froehlich*, 96 Wash. 2d 301,304,635 P.2d 127 (1981). The trial court determines the question of competency within the framework of RCW 5.60.050 and CrR 6.12(c). *State v. Morrison, supra* at 34.

The burden of proving incompetency under RCW 5.60.020 (1) is generally upon the party opposing the witness. *State v. Watkins, supra* at 170. The determination of competency lies within the trial court’s discretion. Ordinarily, therefore, the trial court’s decision will not be disturbed on appeal absent manifest abuse of discretion. *State v. Froehlich, supra* at 304. Where no objection is made to the testimony, or the trial court fails to make an “express inquiry or determination” concerning a witness’ competency, however, the appellate court can review the issue de novo assuming a sufficient record exists. *State v. Watkins, supra* at 171.

Washington appellate courts have periodically grappled with what constitutes a person of “unsound mind” for purposes of testifying. See State v. Morrison, 43 Wash. 2d 23,259 P.2d 1105 (1953). Under early common law rules, every person who had been adjudged insane was “absolutely incompetent as a witness.” *Id* at p. 28. The generally recognized common law rule in present day is that any person, even an insane one, “is competent to testify if at the time of his presentation as a witness he understands the nature of an oath and is capable of giving a correct account of what he has seen or heard.” *Id*, see also State v. Allen, 67 Wash.2d 238,406 P.2d 950 (1965). Cases that settle the question of what constitutes an unsound mind, however, do not resolve the issue of the intoxicated witness. RCW 5.60.050(1) and legal dicta suggest, however, that any witness who is intoxicated should never be permitted to testify. In other words, the standards applicable to persons of unsound mind are not the same as for persons who present to testify intoxicated.

In the case at bar, the trial court properly conducted an inquiry

when its own concerns were aroused by Mr. Ingram's manifestations of intoxication. The Court stated that, based on Mr. Ingram's physical appearance, his walk, his demeanor, and the Court's extensive experience, Mr. Ingram created concerns for the Court that he "is under the influence of something." RP 3 92. When questioned by the Court Mr. Ingram denied being under the influence, but his responses clearly did not make sense. Based on the Court's stated impressions of Mr. Ingram, defense counsel's similar impressions, as well as Mr. Ingram's responses during direct examination that gave rise to the Court's concerns, the Court had a duty to conduct further inquiry and make definitive findings as to whether Mr. Ingram was intoxicated.<sup>4</sup>

The trial court erred when it abdicated its duty to resolve the issue of Mr. Ingram's intoxication, and permitted him to testify.

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Additionally, the prosecutor's improper comments that he is a licensed psychologist, amounted to vouching for the sobriety of Mr. Ingram and should not have been considered by the trial court. RP 3 92.

**B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR OF CONSTITUTIONAL MAGNITUDE WHEN IT SUBSTANTIALLY PRECLUDED THE CROSS-EXAMINATION OF WITNESSES AND THUS PREVENTED THE DEFENSE FROM PRESENTING ITS THEORY OF THE CASE.**

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22, guarantee a defendant the right to confront and fully cross-examine adverse witnesses. *State v. McDaniel*, 83 WnApp. 179, 185,920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997). To ensure this right, the court should allow the defendant to ask leading questions, that is, questions which suggest the desired answer, when cross-examining an adverse or hostile witness. ER 611(c); 5A Teglund, Wash. Pract., Evidence § 250, at 281 (3d ed 1989). The Court also should allow the defendant to question and develop various phases of a subject which was brought up on direct examination. *State v. Dickenson*, 48 Wn.App. 457,465-66, 740 P.2d 312 (1987). Finally, the court must allow extra latitude when the defendant cross-examines to show lack of credibility, especially when a particular State's witness is

essential to its case. *State v. Smith*, 130 Wn.2d 215,227,922 P.2d 81 (1996); *State v. York*, 28 Wn.App.33,36,621 P.2d 784 (1980).

1. **Cross-examination of Mr. Ingram as to his mental state or condition was permissible and necessary to allow the defense to impeach Mr. Ingram's competence and credibility.**

Although the trial court did not expressly find that Mr. Ingram was not intoxicated, that is, that he was competent to testify, the Court allowed the trial to proceed. Defense counsel, however, was prohibited from inquiring as to Mr. Ingram's use of intoxicants except for the date of the incident. RP 3 96-98. Under Washington law such a ruling was clearly erroneous. As our Supreme Court has stated:

Once a trial judge determines a person...is competent, i.e., that he understands the nature of the oath and is not incapable of giving a correct account of what he has seen or heard, *State v. Morrison, supra*, the jury must then determine the extent to which the witness has the required capacities to observe, recollect and communicate truthfully because they also affect credibility. *State v. Froehlich, supra at 307.*

Cross-examination as to a mental state or condition, to impeach a witness, is permissible. Annot., Cross-examination of Witness as to his Mental State or Condition, To Impeach Competency or Credibility, 44 A.L.R. 3d 1203,1210 (1972), and cases cited therein. Cross-examination is one of several recognized means

of attempting to demonstrate that a witness has erred because of his mental state or condition. *State v. Froehlich, supra* at 306.

In the present case, the Court should have allowed defense counsel great latitude in cross-examining Mr. Ingram as he was an essential State's witness, and was also extremely difficult if not hostile. *State v. Smith*, 130 Wn.2d at 227; *State v. York*, 28 Wn.App. at 36. Indeed the trial Court admonished Mr. Ingram on at least seventeen (17) occasions to listen and respond to the questions asked. As the Court noted Mr. Ingram's demeanor was that of a "confused" and "disoriented" person. RP 2 93. Defense counsel, however, was never permitted to explore the reasons for Mr. Ingram's manifestations leaving the jury to perhaps sympathize with Mr. Ingram rather than understand that he may have been testifying intoxicated. A conclusion that Mr. Ingram was intoxicated while testifying would also be consistent with the defense theory that Mr. Ingram was also intoxicated at the time of the altercation between he and Mr. Perez.

Mr. Ingram's competence and credibility were both very much at issue since he was the only person aside from Mr. Perez who was

present during the incident. His ability to correctly recollect and accurately and truthfully give an account of what happened was imperative. The trial Court committed constitutional error by unduly restricting defense counsel in his efforts to confront Mr. Ingram. *State v. Johnson*, 90 Wn.App. at 69; *State v. McDaniel*, 83 Wn.App. at 187. Thus, the error is presumed prejudicial and requires reversal unless the remaining, untainted evidence introduced is so overwhelming that it necessarily leads to a finding of guilt. *State v. McDaniel*, 83 Wn.App. at 187-88. Because Mr. Ingram was the only eye witness to the incident between he and Mr. Perez, no forensic evidence was introduced, and the deputies were relying almost exclusively on his version of the events, the State's evidence was not so overwhelming that it would necessarily lead to a finding of guilt. Reversal of Mr. Perez's conviction is required.

**2. Cross-examination of Deputies Brand and Cary as to Mr. Perez's exculpatory statements was permissible and necessary to present Mr. Perez's theory of the case.**

Defense counsel sought to introduce Mr. Perez's statements to

Deputies Brand and Carey that he had acted in self-defense. RP 2 18-22. Although the trial court reserved ruling on the State's pretrial motion to exclude Mr. Perez's exculpatory statements, the State's objections in this matter were continuously sustained during the trial. Consequently, the testimony presented to the jury was false in its incompleteness. For example, Deputy Brand testified at trial that Mr. Perez confessed he struck Mr. Ingram by giving him "the one-two-three." RP 2 35. During pretrial testimony, however, Deputy Brand testified that Mr. Perez stated: "After Mr. Ingram swung at me, I gave him the old one ,two, three." RP 1A 13. Deputy Brand compounded the deception when, in front of the jury, he completely denied that Mr. Perez had made any additional statements concerning the incident. RP 2 43. Additionally, Mr. Perez's statements to Deputy Carey included that he had acted in self-defense. RP 1A 33. Because of this, the jury was not provided with the whole truth. This violated the common law rule of completeness and was fundamentally unfair.

The rule of completeness in the context of the admissibility of

the whole of a defendant's confession implicated numerous fundamental rights contained in the United States and Washington State Constitutions. Wash. Const. art. 1, sect.3; Wash. Const. art.1, sec. 22; U.S. Const. Amend XIV; U.S. Const. amend VI. The right to present evidence to the jury about the credibility and reliability of a confession is rooted in the due process and confrontation clauses of the federal and state constitutions, which combine to guarantee criminal defendants a meaningful opportunity to present a complete defense, especially the opportunity to be heard. *Crane v. Kentucky*, 476 U.S. 683,688,106 S.Ct.2142, 90 L.Ed.2d 636 (1986).

Under ER 106,

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Washington Rules of Evidence, ER 106.

The rule is a partial codification of the "rule of completeness,"

discussed above.<sup>5</sup> U.S. v. Moussaoui, 382 F.3d 453 at 481 (4<sup>th</sup> Cir. 2004). The purpose of ER 106 is “to prevent a party from misleading the jury.” Moussaoui, at 481, quoting United States v. Wilkerson, 84 F.3d 692,696 (4<sup>th</sup> Cir. 1996). The rule applies to oral statements (as well as written or recorded statements). State v. Larry, 108 Wn.App.894 at 909-910,34 P.3d 241(2001), review denied, 146 Wn.2d 1022 (2002).

A statement is admissible under ER 106 if it passes either of two tests. Under the first test (the “Alsup” test), a partial statement must be completed where the partial statement distorts the meaning of the whole or excludes information that is substantially exculpatory. State v. Larry, supra. at 909, quoting State v. Alsup, 75 Wn.App. 128 at 133-134,876 P.2d 935 (1994).

Under the second test (the “Velasco” test), a statement must also be admitted if it (1) explains other statements already admitted, (2)

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The Washington rule is substantially the same as the federal rule. Comment to ER 106.

places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *State v. Larry, supra.* at 910, citing *United States v. Velasco*, 953 F.2d 1467 (7<sup>th</sup> Cir., 1992).

Mr. Perez's statements to the deputies should have been admitted under either test. The prosecutor selected statements that supported the State's theory and excluded the defense theory. This distorted the sense of the entire series of statements and omitted exculpatory information that supported Mr. Perez's self-defense claim. The statements to Deputies Brand and Carey would have placed Mr. Perez's statements in context, would have helped avoid misleading the jury, and would have helped ensure a fair and impartial trial. The jury in Mr. Perez's trial was misled because it heard only that Mr. Perez had confessed to assaulting Mr. Ingram, but not that he had done so in self-defense.

Washington's general self-defense statute, RCW 9A.16.020, is available to a person charged with the crime of assault as long as the factual requirement is met. A plea of self-defense, if established, constitutes a complete justification and does not merely serve to

mitigate or reduce the crime charged. *State v. Rodrigues*, 21 Wn.2d 667,668,152 P.2d 970 (1944). A defendant charged with assault is justified in defending himself if, acting as a prudent man, he believed himself in actual danger. *State v. Miller*, 141 Wash. 104,105-06,250 P.645 (1926). To raise the claim of self-defense, the defendant must first offer some evidence tending to prove self-defense; the burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn.App.55,982 P.2d (1999).<sup>6</sup>

The exclusion of the self-defense testimony prevented Mr. Perez from presenting and arguing his theory of the case. Ultimately, therefore, it relieved the State of its burden to disprove self-defense. The travesty was exacerbated because of the prosecutor's repeated references to Mr. Perez's confession during his opening statement, his examination of the witnesses, and closing arguments. As the record shows, Mr. Perez's incomplete statements formed the crux of the

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The record shows that the defense fully intended to present a self-defense theory, as evidenced by the defendant's notice of affirmative defense and proposed jury instructions. CP 5; 15-32.

State's case. This abundant use of Mr. Perez's statements was undoubtedly due to the weakness of the State's chief witness, Mr. Ingram. Finally, the State's repeated inquiries concerning Mr. Perez's statements on direct examination opened the door to defense counsel completing the statements.

The trial court should have not excluded the statements Mr. Perez made to the deputies. The exclusion of these statements violated ER 106 and denied Mr. Perez a fair trial. Because of this, the assault conviction must be reversed. Because the first degree burglary conviction was predicated upon the assault it must be reversed also.

**C. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. PEREZ OF FIRST DEGREE BURGLARY BECAUSE THE STATE FAILED TO PROVE THAT HE ENTERED A BUILDING OR INTENDED TO COMMIT A CRIME INSIDE A BUILDING.**

The applicable standard of review for determining whether the evidence is sufficient is whether any rational trier of fact could have found guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Green*, 54 Wn.2d 216,616

Moreover, in considering the evidence, credibility determinations are reserved for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60,794 P.2d 850 (1990). Due process requires that the State bear the burden of proving every element of the crime charged beyond a reasonable doubt. *Seattle v. Gellein*, 112 Wn.2d 58,768, P.2d 470 (1989).

Mr. Perez's jury was instructed as follows:

**INSTRUCTION NO. 7**

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person assaults any person.

**INSTRUCTION NO. 8**

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7<sup>th</sup> day of October, 2005, the defendant

entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That is so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and

(4) That the acts occurred in the State of Washington.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubts as to any one of these elements, then it will be your duty to return a verdict of not guilty.

#### **INSTRUCTION NO. 9**

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

#### **INSTRUCTION NO. 10**

A person enters or remains unlawfully in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

#### **INSTRUCTION NO. 11**

The term enter includes the entrance of the person, or the insertion of any part of the person's body.

**INSTRUCTION NO. 12**

Dwelling means any building or structure which is used or ordinarily used by a person for lodging.

**INSTRUCTION NO. 13**

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.  
CP 72-95.

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A person commits first degree burglary if with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

*State v. Brown*, 100 Wash.App.104, 995 P.2d 1278 (2000). The ~~firm~~ of first degree burglary charged here requires an unlawful entry with intent to commit a crime therein and an assault while entering the building or in immediate flight from the building. RCW 9A.52.020(1)(b). The intent required for burglary is an intent to commit any crime inside the burglarized premises. *State v. Bergeron*, 105 Wn.2d 1,4,711 P.2d 1000 (1985). (Emphasis added.)

Pursuant to RCW 9A.52.010 (2) and (3):

“Enter”. The word “enter” when constituting an element of part of a crime, shall include the entrance of the person, or the insertion of any part of his body, or any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.

“Enters or remains unlawfully”. A person “enters or remains unlawfully” in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

In Mr. Perez’s case, the State’s repeated leading questions assumed the fact that the scuffle occurred “inside” Mr. Ingram’s apartment. A closer inspection of the record, however, reveals that Mr. Perez was never inside Mr. Ingram’s apartment.

Mr. Ingram testified that he heard a knock on his door. RP 3 106. The knock was a normal knock, and no one was yelling. RP 3 131. When Mr. Ingram opened his door no one was standing at the door or at the threshold of the door. RP 3 107. When Mr. Ingram “looked around the corner of the right side” he saw an individual (Mr. Perez) “at the end of the sidewalk.” RP 3 107. Mr. Ingram then returned to his apartment with Mr. Perez following behind him. RP 3 109,132. Mr. Ingram stopped “on the little spot by [his] front door.”

**Q:** So you were standing inside your apartment?

**A:** No. When I was getting ready to close the door, that’s when he ran in.

**Q:** The door was not quite closed when this individual was starting to run at you, correct?

**A:** Correct, the door was not closed. When he started running, that’s when the door went all the way. That’s when it hit the wall.

**Q:** Had you closed the door and it latched?

A: I was - - I almost had it closed, and that when the door got out of my hand and hit the wall, that's when. RP 3 109-110.

Mr. Ingram testified that he was standing in the doorway when Mr. Perez ran towards him "telling me to come outside." RP 3 87. Notably, Mr. Ingram is six feet, one inch in height, three hundred and fifteen pounds, and twenty-four years of age, while Mr. Perez is fifty-one years of age and of small stature.<sup>7</sup> Although Mr. Ingram's testimony is often convoluted and sorely lacking in precision, the record is clear that in fact, Mr. Ingram blocked Mr. Perez from entering his apartment. RP 3 101. He halted Mr. Perez by simply raising "his voice" and using the door to "glide him" away. RP 3 88. Given the relative sizes of the two men the only reasonable conclusion is that Mr. Ingram in fact prevented entry.

Furthermore, Mr. Perez did not intend to enter Mr. Ingram's apartment to commit a crime. As the record supports, he repeatedly requested that Mr. Ingram "come outside." RP 3 87, 122, 142. While Mr. Perez did wish to confront Mr. Ingram he wanted to do so outside.

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CP 158, RP 3 193.

The “intent to commit a crime therein” element was also not proved by the State beyond a reasonable doubt. See also State v. Miller, 90 Wash.App.720,954 P.2d 925 (1998). Because the State failed to prove entry or the intent to commit a crime inside the dwelling, Mr. Perez’s first degree burglary conviction must be reversed.

**V. CONCLUSION**

For all of the foregoing reasons and conclusions, Mr. Perez respectfully requests that this Court determine that Mr. Perez was denied his due process rights and reverse his convictions for all three crimes. Alternatively, Mr. Perez request that this Court reverse his conviction for first degree burglary because the evidence was insufficient as to that crime.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of August,  
2006.



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Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 24, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave.South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Ralph Perez, DOC # 819339, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, WA. 99362, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on August 24, 2006.

  
Norma Kinter

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