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ARGUMENT

I. JUDGE HUNT ADMITTED BIAS ON THE RECORD AND ACKNOWLEDGED THAT HE WOULD HAVE RECUSED HIMSELF “IF THERE HAD BEEN ANY WAY THAT [HE] COULD HAVE.”

Mr. Slert sought suppression of statements given to Sheriff McCroskey based on a violation of the privacy act. The outcome of this motion depended on conflicting accounts from Sheriff McCroskey and former Chief Deputy Prosecutor David Arcuri.¹ RP (4/25/07) 55-98. Judge Hunt acknowledged prior relationships with both McCroskey and Arcuri, as well as Prosecuting Attorney Jeremy Randolph. Judge Hunt admitted he had a preconceived idea of the Sheriff’s credibility in particular, and told the parties he was uncomfortable at having to make the difficult decision required of him. RP (5/7/07) 108-109. In the end, he denied Mr. Slert’s motion, holding that he could not “imagine the circumstances under which Mr. Randolph and now Mr. McCroskey would deliberately violate the privacy rights of Mr. Slert.” RP (5/7/07) 109. Based on his connection to the three witnesses, the trial judge said on the record that “judges usually recuse themselves” under the circumstances

¹ The state also submitted an affidavit from Prosecuting Attorney Jeremy Randolph claiming no recollection of the events. Supp. CP 59-61.

and that he would have recused himself “if there had been any way that [he] could have.” RP (5/7/07) 108.

Judge Hunt’s candid admissions provide “some evidence” of actual or potential bias. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999). Respondent does not dispute these facts, which establish a clear violation of the appearance of fairness rule. *Dugan, supra*. Instead, Respondent suggests that the issue is waived. Brief of Respondent, p. 4. Even assuming the waiver argument applies to the jury trial, it cannot apply to the court’s ruling on the motion, because the judge did not make his remarks until after the motion had been argued. RP (5/7/07) 108-110.

The undisputed facts establish a violation of the appearance of fairness doctrine. *Dugan, supra*. The conviction must be reversed and the case remanded for a new trial before a different judge.

II. BECAUSE OF ERRORS IN THE COURT’S INSTRUCTIONS, THE LAW ON JUSTIFIABLE HOMICIDE WAS NOT MADE “MANIFESTLY CLEAR” TO THE AVERAGE JUROR.

By reversing Mr. Slert’s first conviction, this Court implicitly determined that the evidence against Mr. Slert was not overwhelming. *See State v. Slert*, No. 31876-8-II. Respondent’s assertion to the contrary is misplaced. *See* Brief of Respondent, p. 9.

A. The actual criminality of Benson’s actions was irrelevant, and the instruction on his “voluntary intoxication” may have distracted the

jury from Mr. Slert's reasonable belief that Benson intended him harm.

At trial, Mr. Slert argued he was resisting a burglary perpetrated by Benson. His theory was that he "reasonably believed that [Benson] intended to commit a felony..." by unlawfully entering the tent with intent to commit a crime. Instructions Nos. 11, 17-21, Supp. CP 16, 23-27.

The only purpose served by Instruction No. 22 (addressing Benson's voluntary intoxication) was to defeat this defense. Based on this instruction, if the jury found Benson too drunk to form intent, it could have improperly disregarded Mr. Slert's claim that he lawfully used force in resisting a felony. Respondent suggests that the instruction related to Benson's vulnerability as a victim. Brief of Respondent, p. 12-13. Nothing in the record shows that Instruction No. 22 related to this purpose. First, the instruction does not refer to Benson's particular vulnerability. Instruction No. 22, Supp. CP 27. Instead, it addresses the criminality of his actions and his ability to form intent, which was relevant only to Mr. Slert's defense. Second, the prosecutor did not refer to the instruction, to the criminality of Benson's actions, or to Benson's ability to form intent in arguing particular vulnerability. RP 755.

The jury could reasonably have interpreted the instruction as permitting them to disregard Mr. Slert's justifiable homicide claim based

on Benson's voluntary intoxication. Instead of making the relevant legal standard "manifestly apparent," Instruction No. 22 confused the issue and may have prevented the jury from properly considering Mr. Slert's justifiable homicide defense. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007).

The erroneous instruction is constitutional error, and is presumed prejudicial. *State v. Lefaber*, 128 Wn.2d 896 at 900, 913 P.2d 369 (1996). Because Mr. Slert was denied his constitutional right to a fair trial, the conviction must be reversed and the case remanded for a new trial.

Lefaber, supra.

B. The court's instructions on justifiable homicide contained a logical gap that precluded the jury from considering Mr. Slert's claim that he used force in resisting the felony of Residential Burglary.

Instructions on self-defense and justifiable homicide must make the relevant legal standard "manifestly apparent" to the average juror.

Woods, supra. Here, there was a gap in the instructions: Instruction No. 11 told the jury that deadly force could be used to resist a felony, and Instructions No. 17 defined Residential Burglary, but nothing linked the two. Supp. CP 16, 23. If one of the jurors believed that Residential Burglary was not a felony, she or he may have decided to deny the justifiable homicide argument on that basis.

Although the instructions here were derived from pattern instructions, this should not be dispositive. Pattern instructions often endure for years before they are found to be incorrect. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern instruction on accomplice liability erroneous); *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (WPIC 16.02 “clearly erroneous,” *Studd*, at 545); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (knowledge is an element of Unlawful Possession of a Firearm; standard instruction omitting that instruction erroneous); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000) (although not before the court, validity of WPIC 39.16 is doubtful).

The absence of an instruction telling the jury that Residential Burglary is a felony created a logical gap in the instructions: nothing linked the lawful use of force in resisting a felony to the crime of Residential Burglary. As given, the instructions on justifiable homicide were not manifestly clear. The conviction must be reversed and the case remanded for a new trial.² *Woods, supra; Lefaber, supra.*

² Respondent’s erroneous assertion that deadly force cannot be used in resisting a Residential Burglary is incorrect. *See State v. Douglas*, 128 Wn. App. 555 at 568, 116 P.3d 1012 (2005). Indeed, this court reversed Mr. Slert’s first conviction on this basis. *See State v. Slert*, No. 31876-8-II.

C. Mr. Slert was denied the effective assistance of counsel.

1. Defense counsel's failure to object to Instruction No. 22 prejudiced Mr. Slert.

Instruction No. 22 (on Benson's voluntary intoxication)

undermined Mr. Slert's case and had no basis in law. Defense counsel should have objected, and there can be no strategic basis for his decision not to. Mr. Slert used the fact of Benson's intoxication to show that he was aggressive; he never suggested that Benson lacked the ability to form intent. Instruction 22 had no part in the defense case, contrary to Respondent's implied suggestion. *See* Brief of Respondent, p. 19. Benson's blood alcohol level was relevant. The criminality of his actions and his actual mental state were not relevant.

Counsel's deficient performance prejudiced Mr. Slert: his defense was premised on justifiable use of force, and the instruction turned the jury's attention away from his own reasonable belief (that Benson was committing Residential Burglary) and focused it on Benson's actual mental state (which was irrelevant). Instead of determining whether or not Mr. Slert reasonably believed Benson intended him harm, the instruction directed the jury to evaluate Benson's mental state, which was not relevant to the charge or the defense. Accordingly, the conviction must be reversed

and the case remanded for a new trial. *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004).

2. Mr. Slert was prejudiced by the lack of an instruction informing the jury that Residential Burglary is a felony.

Defense counsel proposed instructions on justifiable homicide with a logical gap; this constitutes deficient performance. The jury could not acquit based on justifiable homicide in resisting Residential Burglary without knowing that Residential Burglary is a felony. Mr. Slert was prejudiced by the instructions, because without an instruction telling the jury that Residential Burglary is a felony, the jury could not consider Mr. Slert's resistance-of-a-felony defense. The conviction must be reversed and the case remanded for a new trial. *Woods, supra*.

III. THE ABSENCE OF PREMEDITATION IS AN ELEMENT OF MURDER IN THE SECOND DEGREE THAT MUST BE INCLUDED IN THE "TO CONVICT" INSTRUCTION (INCLUDED FOR PRESERVATION OF ERROR).³

Mr. Slert stands on the argument made in the Opening Brief.

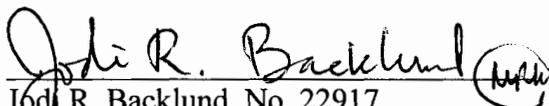
³ This Court has decided that the absence of premeditation is not an element of Murder in the Second Degree. *State v. Feeser*, 138 Wn. App. 737, 158 P.3d 616 (2007). A petition for review is pending in *Feeser*.

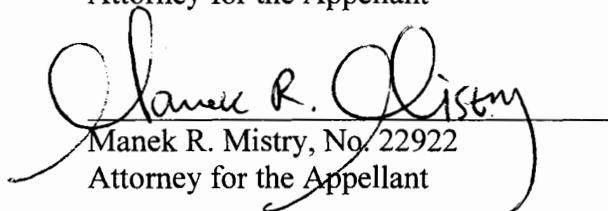
CONCLUSION

For the foregoing reasons, Mr. Slert's conviction must be reversed. The case must be remanded for a new trial before a different judge. In addition, upon retrial, the court should not give an instruction on voluntary intoxication, and should inform the jury that Mr. Slert could use deadly force to resist an attempt to commit Residential Burglary.

Respectfully submitted on June 26, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Ken Slert, DOC 872135
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Walla Walla, WA 99362

And to the office of the Lewis County Prosecutor at their address of record,

and that I sent the original and one copy to the Court of Appeals, Division II,
for filing, all postage prepaid, on June 26, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on June 26, 2008.

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