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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Lof
DEPUTY

No. 36534-1-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH SLERT

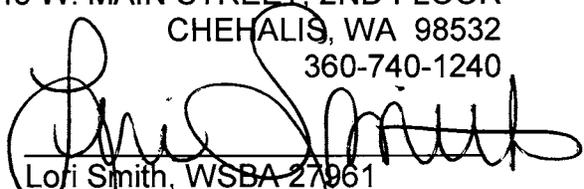
Appellant.

On Appeal from the Lewis County Superior Court

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
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by:


Lofi Smith, WSBA 27961
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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THERE WAS NO NEED FOR THE TRIAL JUDGE TO RECUSE HIMSELF.

Mr. Slert claims that it was error for Judge Hunt to fail to recuse himself. This argument is without merit. There is no rule that requires a judge to recuse himself from a case merely because he knows several of the witnesses who might testify in the case. Slert did not object to the trial judge's hearing this case, even after the Judge fully disclosed that he knew three of the potential State's witnesses quite well. See transcript of trial RP 108-110.

Due process standards, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to disqualify himself if he is biased against a party or if his impartiality could reasonably be questioned. State v. Dominguez, 81 Wn.App. 325, 328-30, 914 P.2d 141 (1996). An appearance of fairness doctrine challenge requires evidence of the judge's *actual or potential bias*. State v. Dudgan, 96 Wn.App. 346, 354, 979 P.2d

885 (1999); State v. Post, 118 Wn.2d 596, 618-19 & n.9, 826 P.2d 172 (1992); State v. Carter, 77 Wn.App. 8, 11-12, 888 P.2d 1230, rev. denied, 126 Wn.2d 1026, 896 P.2d 64 (1995); State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013, 902 P.2d 163 (1995).. Mere speculation as to bias is not enough. In re Personal Restraint of Haynes, 100 Wn.App. 366, 377 n.23, 996 P.2d 637 (2000). But the perceived bias must result from an actual personal interest in the outcome. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." State v. Ladenburg, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992). Impartial means the absence of bias, either actual or apparent. State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). But a judicial officer is *presumed to perform without prejudice*. Jones v. Halvorsen-Berg, 69 Wn.App. 117, 127, 847 P.2d 945 (1993)(emphasis added). "An assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges." State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007), citing Withrow v. Larkin, 421 U.S. 35, 47, 96 S.Ct. 1456, 43 L.Ed.2d 712

(1975); see also Jones v. Halvorson-Berg, 69 Wn.App. 117, 127, 847 P.2d 945 (1993) (there is a presumption that judges perform functions regularly and properly and without bias or prejudice). So, a party claiming bias or prejudice must present evidence of actual or potential bias because Washington Courts presume that judges perform their functions properly and without any bias. State v. Cantu, 156 Wn.2d 819, 834, 132 P.3d 725 (2006)(Johnson, J. dissenting); Dominguez at 328-29. The party seeking to overcome the presumption of judicial neutrality bears the burden of proving specific facts establishing bias. In re Personal Restraint of David, 152 Wn.2d 647, 692, 101 P.3d 1 (2004); State v. Borchert, 57 Wn.2d 719, 722, 359 P.2d 789 (1961) (party claiming bias must present evidence that the judge has a preconceived adverse opinion against him or his cause). But "[j]udicial rulings alone almost never constitute a valid showing of bias." In re Davis, 152 Wn.2d at 692.

CJC Canon 3(D)(1) provides in part:

Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer . . . in the matter in controversy. . ."

Id.; State v. Dominguez, 81 Wn.App. at 329 (emphasis added)

An "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Our courts have applied the doctrine of waiver to bias and appearance of fairness claims. See e.g., State v. Bolton, 23 Wn.App. 708, 714, 598 P.2d 734 (1979); In re the Welfare of Carpenter, 21 Wn.App. 814, 820, 587 P.2d 588 (1978). As stated by the Carpenter Court: "a litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal."

That is what happened in the present case: the defendant proceeded to trial without objection as to the Judge's alleged "bias." Given the fact that the trial judge made it very clear on the record that he had known the three witnesses for a long time. In the interest of full disclosure the trial Judge stated:

[I]t's something that everyone should know here--is that I have known all three of the players for a long time. Sheriff, then Deputy McCrosky--it was even before he was a sergeant--was the investigating officer on I think the second or third case that I worked on after I got here in 1979, and I worked with him extensively in many trials. It was

impossible then for me not to form an opinion as to whether I thought he was a credible person.

The same, however, is true of the other two people. Mr. Randolph was obviously a defense attorney from the day I got here until the day that he took over for me in 1995, and I have known of him as well.

What people may not know though is I knew Mr. Arcuri well before Mr. Randolph hired him as his chief criminal deputy. I interviewed him extensively--I think three times--to fill a spot that was eventually taken by someone else, and it was I who let Mr. Randolph know that Mr. Arcuri was available for a chief criminal deputy position when that became available early on in Mr. Randolph's career.

So I have had extensive dealings with all three of them, both professionally and to a certain extent away from the office, so this makes it a very difficult thing to sit and judge credibility on.

RP 108. 109. Thus, the trial Judge made it very clear on the record that he knew the three witnesses quite well. Even with this disclosure, Mr. Slert did not object to the Judge's hearing of this case. Therefore, Slert should not be able to complain about it now.

Indeed, simply being acquainted with a witness who comes before him does not mean that the judge is biased per se. It certainly is difficult in a smaller-sized county to find a situation where a judge *doesn't* know some of the witnesses or the attorneys in a case. As one court has noted, "[f]requency of appearance by an attorney before a judge is not in and of itself sufficient to create

an appearance of partiality such that the judge would be required to recuse himself from a matter in which that attorney's testimony is at issue." State v. Leon 133 Wash.App. 810, 812, 138 P.3d 159, (2006). If this were the criteria, then judges from every smaller county would have to recuse themselves constantly because they see so many of the same faces appearing in their courts over and over again.

The Defendant's claim now that Judge Hunt should have recused himself or that defense counsel should have requested that the judge recuse himself was never raised below, and, other than a conclusory assertion, the alleged "bias" by the judge is simply not supported by any evidence in the record. There is nothing that shows that the Judge in this case had a "personal" interest in the case or a personal bias towards the defendant. Accordingly, this claim is without merit and Sler's conviction should be affirmed.

II. THE JURY INSTRUCTIONS WERE PROPER, BUT IF ANY INSTRUCTION WAS IN ERROR, THE ERROR WAS HARMLESS.

Slert claims several errors in the jury instructions given in this case. Slert did not object to the instructions below. RP 715.

A challenged jury instruction is reviewed *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Challenged jury instructions are reviewed by "examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given." State v. Gerdtz, 136 Wn.App. 720, 727, 150 P.3d 627 (2007), citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert denied*, 518 U.S. 1026, 116 S.Ct. 25689, 135 L.Ed.2d 1084 (1996). "[A] jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and affects the

framework under which the trial proceeds.” State v. Eaker 113 Wn.App. 111, 120, 53 P.3d 37 (2002). Additionally, self defense instructions are subject to heightened scrutiny on appeal and must more than adequately convey the law of self defense. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Furthermore, “[a] jury instruction misstating the law of self defense amounts to an error of constitutional magnitude and is presumed prejudicial.” LeFaber, 128 Wn.2d at 900. However, even if presumed prejudicial, an erroneous jury instruction that misstates the law is subject to harmless error analysis. State v. L.B. 132 Wn.App. 948, 954, 135 P.3d 508 (2006); State v. Woods, 138 Wn.App. 191, 202, 156 P.3d 309 (2007). In fact, “most constitutional errors can be harmless.” Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the ultimate verdict. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003) (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)); State v. L.B., 132 Wn.App. 948, 954, 135 P.3d 508 (2006). Put another way, a “constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury

would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.3d 1182 (1985). The State has the burden of proving that the error was harmless beyond a reasonable doubt. Id.(citations omitted).

One Court explains harmless error as follows:

[A]n erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Moran, 119 Wn.App. 197, 210, 211, 81 P.3d 122 (2003),

citing State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

Moreover, Washington Courts "apply the overwhelming evidence test in determining harmless error. . . .[w]here the error involves an erroneous jury instruction, the test is whether the *evidence* is so overwhelming that it necessarily leads to a finding of guilt." State v. Bilal, 54 Wn.App. 778, 783, 776 P.2d 153 (1989)(citations omitted)(emphasis added).

And that is what we have in the present case: overwhelming evidence of guilt. Slett admitted to five law enforcement officers

and one jail inmate that he shot and killed the victim in this case. RP 155-161 (Ranger Nehring); RP 180, 181; 183-188 (Deputy Shannon); RP 215 (former Sheriff McCroskey); RP 300-320 (jail inmate Schwenk); 4 RP 340-351 (Deputy Wetzold); RP 534-541 (Detective Brown). The physical/forensic evidence supported the State's theory about how the killing happened in that Slert shot the victim at close range. RP 227-262 (Dr. Gosink); RP 272 (Mr. Kusimi); RP 628-631 (defense witness Dr. Selove). And while Slert claimed that the victim had attacked him, law enforcement did not see any marks or injuries on Slert's throat when he was arrested. RP 355, 393, 410-415, 505. Then there were the discrepancies in Slert's story. RP 399, 406, 408, 522, 610. Accordingly, due to the overwhelming evidence of guilt in this case, any error found in the jury instructions in this case as more fully discussed below, should be found to be harmless beyond a reasonable doubt.

A. The Court's Instruction to the Jury as to the Voluntary Intoxication of the Victim was Not Error Because the Instruction Went to the Particular Vulnerability of the Victim Which the Jury Found in Special Verdict Form B.

Slert specifically claims that the voluntary intoxication instruction pertaining to the intoxication of the victim was in error.

But Slert cites no cases that stand for that proposition. Additionally, there was no objection to this instruction by Slert below.

Furthermore, it appears that the detailed discussions regarding the jury instructions were done off the record. The only record that the State has been able to find regarding the jury instructions is contained in the clerk's minutes. Specifically, the Day 5 Jury Trial minute states:

10:04 Court in session.

The Court advising a Jury Instructions conference was completed this morning. At the Court's inquiry, there were no objections or exceptions by the State. Defense advised he had one exception. The Court declined to give defense instruction #14. For the record: the State advised there was a self-defense agreed instruction.

* * *

2:34 In the jury's absence the jury instructions and exhibits were inspected by both counsel. They were found to be true and correct. They were taken to the jury by the bailiff. . .

See Certified Copy of Clerk's Minutes, Pages 18, 19 (See Appendix).¹ Thus --and the record does not specifically reflect *why*--the instruction regarding voluntary intoxication that was ultimately submitted to the jury reads as follows:

¹ The Clerk's Minutes show that the jury instructions were taken to the jury at 2:34 p.m. and by 3:43 the bailiff advised that a verdict had been reached. This would seem to indicate the jury did not have any confusion about the instructions.

No act allegedly committed by Mr. Benson while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether ~~the defendant~~ *Mr. Benson* acted with intent.

CP 46 (Court's Instructions to the Jury). In this instruction-- which went to the jury--the words "the defendant" have a line through them and the words "Mr. Benson" [the victim] appear in hand-printed letters next to those words. Id. This handwriting appears to be the handwriting of the Judge. While there is no record in the transcripts as to why the name of the victim was written into this instruction, it is apparent from reading the State's closing argument that this instruction was evidently given because there was also a special verdict form for the jury to find the aggravating factor that the victim was "particularly vulnerable--" in part because of the acute intoxication of the victim. See Appendix, Special Verdict Form B; RP 755. And, in closing, the Deputy Prosecutor argued

The last one [special verdict form], that the victim was particularly vulnerable or incapable of resistance. He had a .23 blood alcohol level, blind, in the dark, unarmed, shot, paralyzed, on the ground. You know, I think almost anybody would say that he was particularly vulnerable or that he was incapable of resistance. . . .

7 RP 755. And, on Special Verdict Form B, the jury did return a finding that the victim was indeed particularly vulnerable.

Appendix, Special Verdict Form B; 6 RP 683- 686 (testimony regarding blood alcohol level of victim). Furthermore, it should be noted that Mr. Formosa--who testified about the blood alcohol level of the victim--was apparently a *defense* witness. RP 679-686.

Thus the jury instruction about the voluntary intoxication of the victim --as near as the State can tell from this record--was given in reference to the State's request for a special verdict as to the particular vulnerability of the victim, partly due to his extreme intoxication (the factors relied upon by the State in arguing for the vulnerability finding were extreme intoxication of the victim, his extremely poor eyesight without his glasses, the fact that it was dark, and the fact that he was probably paralyzed below his arms after the first shot--RP 755).

While the State has not been able to find any published Washington case law pertaining to the issue of giving a voluntary intoxication instruction pertaining to the *victim* in a case, it is also true that Mr. Slett does not cite any on-point authority that stands for the proposition that this particular instruction *cannot* be given regarding the intoxication of a victim as it relates to a victim's particular vulnerability. Surely if a victim is acutely intoxicated, such

evidence is relevant to the issue of the victim's vulnerability because the victim was incapable of resistance largely because of such intoxication. And again, it was the defense who put Mr. Formosa on the stand to talk about the intoxication of the victim in this case. 6 RP 683-686 (testimony by Defense witness Edward Formosa regarding victim's blood alcohol level of .23). Because Skert does not cite any authority which holds that a voluntary intoxication instruction cannot be given if it is referring to a victim's intoxication and his vulnerability because of that intoxication, Skert's argument to the contrary should be found to be without merit.

B. The Jury Instructions for Justifiable Homicide Were Correct.

Skert also claims that the trial court's instructions "stripped" Mr. Skert of his justifiable homicide defense and that it was error to fail to instruct the jury that Residential Burglary is a Felony. There is no basis for these arguments. The justifiable homicide instructions proposed by Skert modeled the WPICS almost word-for-word. In particular, the WPICS and the defendant's and the court's instructions state, in pertinent part:

Homicide is justifiable when committed in the lawful defense of the slayer when:

- (1) The slayer reasonably believed that the person slain intended to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is, or to inflict death or great personal injury; . . .

CP 34 (Court's instruction number 11). This instruction appears to be a compilation of WPICS 16.02 and 16.03. Although the WPIC's are not binding on the court, they are persuasive authority. State v. Davis, 115 Wn.App. 81, 96, 65 P.3d 661 (2003).

Slert does not cite any on-point authority stating that the justifiable homicide instructions he proposed are in error. Likewise, Slert cites no on-point authority which states that an instruction must be given to the jury stating that Residential Burglary is a felony. For that matter, neither justifiable homicide instruction in the WPICS (16.02 and 16.03) nor any of the commentary to those instructions states that the jury must be instructed that the underlying crime is a felony. In fact, one could read these instructions here, as to the issue of not instructing the jury that Residential Burglary is a felony, as being structured greatly in favor of Slert. For instance, as the commentary to WPIC 16.02 explains:

The statute states in part that the defense is applicable "when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony." For purposes of the defense, the

use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See State v. Nyland, 47 Wn.2d 240, 287 P.2d 345 (1955) (adultery is not a crime that imperils the life of the unoffending spouse or threatens personal injury). No self-defense instruction should be given when deadly force is used to repel an unlawful trespass that does not amount to a felony, because such force is excessive as a matter of law. State v. Griffith, 91 Wn.2d 572, 589 P.2d 799 (1979).

Washington Pattern Jury Instructions, Volume 11, comment to WPIC 16.02, p. 179 (2d Ed. West 1994) (emphasis added).

Residential Burglary is not considered a "violent" felony. RCW 9A.52.025; Washington State Sentencing Guidelines Manual (2006) III-66.

In sum, the appellant cites no case --and respondent can find none-- that holds that the jury must be instructed that Residential Burglary is a felony in the justifiable homicide instructions given in this case. Accordingly, Slert's claim is without merit and his conviction should be affirmed.

III. TRIAL COUNSEL WAS NOT INEFFECTIVE.

The Defendant in this case also argues that his trial counsel was ineffective because he failed to object to the justifiable homicide instructions (regarding Residential Burglary as a felony)

and failed to object to Instruction Number 22 (voluntary intoxication of the victim). This argument is without merit as well.

A defendant demonstrates ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) (citing Strickland, 466 U.S. at 694, 100 S.Ct. 1945).

An attorney's failure to propose a legally-adequate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d at 228-29. In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice. Strickland v. Washington, 466

U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In the context of jury instructions, "to establish deficient performance or prejudice . . . [the defendant] must first show that if . . . counsel had objected to the . . . instruction. . . these objections would likely have been successful." State v. Gerdtz, 136 Wn.App. 720, 727, 150 P.3d 627 (2007). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995). When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of

counsel. McFarland, 127 Wn.2d at 335. The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763.; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

Here Slert invites us to find ineffective assistance of counsel because his counsel failed to object to a couple of the jury instructions--one of which was the voluntary intoxication of the victim instruction. First of all, Slert has not cited any law that states that any of the instructions given in this case were given in error. Secondly, as to the voluntary intoxication of the victim instruction, Slert himself put on one of the witnesses who gave evidence about the blood alcohol level of the victim. RP 683. Third, Slert cannot

show that the failure to object to the instructions was anything but legitimate trial strategy. State v. Neidigh, supra. Finally, Slerf has not shown that his counsel's objections to the instructions would have been sustained. Accordingly, Slerf's argument that his counsel was ineffective because he did not object to the jury instructions is without merit.

IV. "WITHOUT PREMEDITATION" IS *NOT* AN ELEMENT OF SECOND DEGREE MURDER.

Slerf also argues that "without premeditation" is an element of second degree murder by intentional killing and that the State thus had to prove that the murder was done "without premeditation." Slerf is wrong. This issue was decided in State v. Feeser, 138 Wn.App. 737, 744 158 P.3d 616 (2007). In Feeser the Court stated, "[w]e hold . . . that 'but without premeditation' does not function as an essential element of second degree murder" (emphasis added). Thus, pursuant to this Court's ruling in Feeser, Slerf's argument regarding murder in the second degree and the lack of premeditation fails, and Slerf's conviction should be affirmed.

CONCLUSION

The trial judge did not err when he did not recuse himself after stating openly on the record that he knew three witnesses involved in a pre-trial hearing in this case. Mr. Slett has not shown any specific instances that would indicate that the Judge had a personal bias towards either this case or this defendant. Furthermore, the jury instruction regarding voluntary intoxication of the victim was not objected to and was not improper. The voluntary intoxication of the victim was relevant to the State's requesting a special verdict of particular vulnerability of the victim. Likewise, the jury instruction for residential burglary was not objected to below and was also properly given. Nowhere that the State can find does the law say that the instruction must state that the particular crime is a felony. The justifiable homicide instruction was also correct and Mr. Slett has not cited to any case law that states this instruction, as given here, is in error. But even if any instruction was given in error, the error should be deemed harmless. Moreover, Mr. Slett has not shown that his trial counsel was ineffective, nor has he shown how he was prejudiced by the alleged ineffectiveness of his counsel. Finally, the State was not required

to prove the absence of premeditation as an element of Murder in the Second Degree. This issue was decided in State v. Feeser, supra.

Accordingly, all of Appellant's arguments are without merit and his conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 29 day of April, 2008.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by:



LORI SMITH, WSBA 27961

Deputy Prosecutor
Attorney for Respondent

Certified

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAY 11 2007

By Kathy A. Brack, Clerk
Deputy

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
KENNETH LANE SLERT,)
)
Defendant.)

NO. 04-1-00043-

SPECIAL VERDICT FORM B

We, the jury, having found the defendant, KENNETH LANE SLERT, guilty of Murder in the Second Degree, Manslaughter in the First Degree, or Manslaughter in the Second Degree, return a special verdict by answering as follows:

Was the victim, John Benson, a particularly vulnerable victim or incapable of resistance at the time of the commission of the crime?

ANSWER: Yes
"Yes" or "No"

DATED this 11th day of May, 2007.

Neil M. Jansing
Presiding Juror

Clerks Minutes

Monday, May 7, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

Certified

STATE OF WASHINGTON
Plff

Chris Baum present for State
Jason Richards present for the State

VS
KENNETH SLERT
Deft present in custody

Michael Hanbey, present for defendant

04-1-43-7 (165)

THIS MATTER CAME ON FOR JURY TRIAL

9:40 All present except the jury

Defendant was present with counsel.

Court announced pre trial agreements established before trial.

It was agreed voir dire would be limited to 20 minutes and 10 minutes.

Two alternate jurors would be selected.

Counsel stipulated that witnesses would be excluded from the courtroom other than for testimony.

Colloquy as to when pre trial motions would be heard.

Defendant advised of trial rights.

10:50 Prospective jurors entered the courtroom and were administered the voir dire oath by the court clerk

Court informed jurors of the case to be heard

Court paraphrased the Information, introduced the parties and read the prospective witness list.

General voir dire by the Court.

10:00 **Voir Dire by State**

10 :20 **Voir Dire by defense**

Morning recess until 11:00

Jurors 13, 29, and 40 were excused for cause.

11:13 **Voir Dire by State**

11:25 Voir Dire defense

11:44 Voir Dire ended

State's 1st Peremptory Challenge#4

Deft's 1st Peremptory Challenge #2

State's 2nd Peremptory Challenge #7

Deft's 2nd Peremptory Challenge #8

State's 3rd Peremptory Challenge#15

Deft's 3rd Peremptory Challenge #21

State's 4th Peremptory Challenge#16

Deft's 4th Peremptory Challenge #27

State's 5th Peremptory Challenge #25

Deft's 5th Peremptory Challenge #3

State's 6th peremptory challenge #accepted as seated

Deft's 6th Peremptory Challenge #18

No challenge to alternates at seated

12:10 The following jurors were sworn to hear the case at issue. The remaining jurors were thanked and excused.

1. D. Copsey
2. J. Adams
3. D. McMenemy
4. D. Green
5. J. Spacciante
6. S. Knapp
7. N. Lanning

8. L. Davidson
9. K. Schewfelt
10. S. Colson
11. L. Miller
12. S. Hughes
- 1st Alt: C. Dewitt
- 2nd Alt K. Nichols

The Court gave rules for jurors.

The jury was excused until 2:00 to allow for pretrial motions.

1:32 Court in session.

Pretrial motions were heard.

The Court denied the motion to suppress as to the taped statement in question. The Court disclosed that the Court knew all three people involved in this incident (prior sheriff, prior prosecutor and prior chief deputy prosecutor) and would have recused on the issue had the Court been aware of the particulars prior to the hearing. The Court made its findings for the record.

The Court heard the motion in limine as to testimony of Mr. Schwank. The Court denied that motion.

State argued motion as to prior criminal history of a witness. The Court ruled criminal history would be restricted to Robbery Second Degree and Residential Burglary.

Exhibits 1, 3, 18 admitted by stipulation.

2:07 The jury entered the courtroom.

Opening statements from the State

2:34 Opening statements from the defense

The Court gave the jury instructions on note taking and notepads were handed out to the jury.

2:55 Edna Kay Benson was called, sworn by the Court and examined by the Court.

ID 62 was marked and identified. No objection to admission.
Admitted as Exhibit 62.

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2:59 Exam by the State.
Witness stepped down.

Recess until 3:25 pm

3:28 All present except the jury.

The Court advised that during recess the Court was relayed a message by the bailiff that one of the jurors relayed to the bailiff that she may know more about this case than first expected.

It was agreed that Juror #1 would be brought into the courtroom for further voir dire.

After voir dire was completed, it was agreed to excuse juror #1.
Juror #1 was thanked and excused.

3:39 Juror #1 was replaced by the 1st alternate.

3:40 The jury entered the courtroom.

3:41 Shane Benson was called, sworn by the Court and examined by the State.

Exhibit 63 was referenced.

3:50 Cross exam-defense

3:54 Exam by the State.
Witness stepped down

3:55 Ranger Uwe Nehring was called, sworn by the Court and examined by the State.

Defendant identified for the record.

Exhibit 1 referenced.
Exam continued

Objection-sustained
Exam continued

Objection-sustained

Exam continued

Objection-sustained
Exam continued

4:10 Exam by defense

4:18 Exam by State.

4:19 Exam by defense.
Witness stepped down

4:20 Deputy Sue Shannon was called, sworn by the Court and examined by the State.

Defendant was identified for the record
The witness read Miranda warnings from card

IDs 11, 33, 34, 35, 15 were marked and identified.
Exhibits 11, 33, 34, 35, 15 admitted with no objection after proper description.

Objection by defense was sustained
Exam continued

4:45 Exam by defense.
Witness stepped down

4:48 The jury was excused for the evening.
Court to reconvene at 9:30 tomorrow morning.
Adjourned

DAY 2 JURY TRIAL

Tuesday, May 8, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:35 Court in session. The jury was not present.

The Court noting a conference was held in chambers to discuss the alternate juror who called in ill this morning. It was agreed the trial would proceed without alternate number 2 leaving no alternate.

9:40 The jury entered the courtroom.

9:40 Dr. Robert Burrows was called, sworn by the Court and examined by the State.

ID 110 was marked and identified.
ID 110 was not offered

9:46 Exam by defense.

9:49 Exam by State.
Witness stepped down

Exhibit 110 admitted with no objection.

10:55 Detective Ross Kenepah was called, sworn by the Court and examined by the State.

Reference exhibit 63.

9:56 Exam by defense.

9:58 Exam by State.

Objection by Mr. Hanbey, outside scope.

State moved to reopen.

Mr. Hanbey objected.

The Court allowed stating the State could re-call the witness, so questioning was allowed.

10:01 Exam by defense
Witness stepped down

10:02 John McCroskey was called, sworn by the Court and examined by the State.

Objection by defense was overruled.
Exam continued

Objection by defense was overruled
Exam continued

Objection by defense was overruled
State rephrased

Exam continued

Objection by defense was sustained
Exam continued

Objection by defense was sustained as to what was said
Exam continued

10:16 Exam by defense

10:18 Exam by State

10:19 Exam by defense
Witness stepped down

10:20 Dr. Paul Gosnick was called, sworn by the Court and examined by the State.

ID 68 was marked and identified.
No objection to admission
Exhibit 68 admitted

ID 9 was marked and identified
No objection to admission
Exhibit 9 admitted.

IDs 6 and 7 were marked and identified

Morning recess until 11:00

11:05 All present including the jury.

Dr. Gosnick retook the witness stand, exam continued by the State.

IDs 53 and 97 were marked and identified.
No objection to admission of IDs 6, 7, 53, 97.
Exhibits 6, 7, 53, 97 admitted

Objection by defense
State would rephrase
Exam continued

ID 98, 52, and 8, 28 were marked and identified.
No objection to admission.
Exhibits 98, 52, 8, 28 admitted

Exhibits 7, 8, 9 published to the jury

11:31 Exam by defense

Exhibit 9 referred to.
Exam continued

11:47 Exam by State

Objection by defense was sustained

State moved to reopen
Defense stated same objection as prior same objection on another witness
Court allowed the State to reopen.
Exam continued

11:55 Exam by defense
Witness stepped down at 12:00

Court in recess until 1:30

1:37 Court in session.

Court noting a chamber's conference was held at 1:30 regarding State's request to recall Dr. Gosnick over defense's objection.
The Court allowed the State to recall Dr. Gosnick.

1:41 The jury entered the courtroom.

1:41 Dr. Gosnick retook the witness stand, examination by the State.

1:46 Exam by defense
Witness stepped down

1:46 Raymond Kusumi was called, sworn by the Court and examined by the State.

Reference Exhibit 1.

ID 64 was marked, identified and admitted with no objection.
Exhibit 64 admitted.

Reference Exhibits 6, 7, 8, and 68.
Exam continued

Objection by defense was overruled

Exam continued
Objection by defense was sustained
Exam continued
Objection by defense was sustained
Exam continued
Objection by defense was sustained
Exam continued

2:13 Exam by defense

2:22 Exam by State
Witness stepped down but not excused

Side Bar at States request

Recess until 2:45

2:55 The jury entered the courtroom.

2:55 Douglas Schwenk (in custody) was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

Objection by defense was overruled

Objection by defense was overruled

Objection by defense, moved to strike
Overruled
Exam continued

Objection by defense was overruled

3:20 Exam by defense

Objection by State was overruled

Objection by State was sustained

Deft ID 111 was marked and identified.
Exam continued

3:38 Exam by State

Reference ID 111 was referred to

Side Bar at State's request
Exam continued

3:44 Exam by defense
Witness stepped down

3:45 Kurt Wetzold was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

ID 36 was marked, identified and admitted with no objection
Exhibit 36 admitted
Exam continued

Objection by defense
State would rephrase
Exam continued

ID 5 was marked only.

IDs 10, 12, 13, 14, 17, 19, 20, 21 were marked and identified.
No objection to admission
Exhibits 10, 12, 13, 14, 17, 19, 20, 21 admitted
Exhibits were published to the jury

Objection by defense.
State would rephrase
Exam continued

5:00 Court adjourned for the evening.

DAY 3 JURY TRIAL
Wednesday, May 9, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:37 All present. The jury entered the courtroom.

9:37 Kurt Wetzold resumed the witness stand.
Continued exam by the State.

Objection by defense
State would clarify
Exam continued

Objection by defense, leading
Sustained
Exam continued

Objection by defense
Side Bar
Court announced objection by defense sustained, answer to be stricken
The jury was instructed to disregard
Exam continued

Objection by defense sustained
Exam continued

Objection by defense overruled
Exam continued

Objection by defense overruled
Exam continued

2 Objections by defense sustained
Exam continued

ID 37 was marked and identified
Defense objected to admission of the 5
Voir dire by defense
Exhibit 37, 38, 39, 40, 41 admitted

IDs 22, 23, 24, 25, 26, 27, were marked, identified, admitted no objection.
Exhibits 22, 23, 24, 25, 26, 27 admitted

Morning recess until 10:55.

11:01 Court in session. Jury not present
For the record: the side bar sustained objection stricken from the record that
occurred earlier in testimony was placed on the record

11:02 The jury entered the courtroom

ID 69 and 70 were marked and identified.
Both IDs identical.
Defense objected to both being admitted.

ID 69 was admitted, ID 70 denied.

Exhibit 69 admitted

Witness stepped down to exhibit 69 (diagram)

11:09 Exam by defense

Reference Exhibit 36

Exhibit 36 published to the jury

Reference Exhibit 35, 37, 39

Exhibits published to the jury

Exam continued

Reference Exhibit 23

Exhibit 23 was published to the jury

Objection by State was overruled

Exam continued

1:36 Court in session. The jury not present.

Stipulation document was submitted to the Court that Mr. Sler's clothing was tested positive by the crime lab. Therefore a crime lab technician would not have to be called as a witness.

It was agreed that the document would be marked and admitted as an exhibit at the appropriate time.

1:37 The jury entered the courtroom.

Kurt Wetzold resumed the witness.

Exam continued by defense.

1:53 Exam by State

2:02 Exam by defense

2:10 Court took a short recess at State's request

2:18 State advised the Court of the situation regarding notes that were referred to by Detective Wetzold. Mr. Hanbey advised he prepared cross-examination on discovery submitted to him and objected to these notes being marked and identified (the notes were mislabeled as belonging to Detective Brown and not this witness)

Mr. Hanbey did make a suggestion as how this problem be resolved by asking the witness specific questions by the State.

2:29 The jury entered the courtroom.

2:30 Exam by State
ID 112 was marked and identified.

2:32 Exam by defense
Witness stepped down.

2:35 Dr. Alford was called, sworn by the Court and examined by the State.

Objection by defense-foundation
State would lay foundation

2:48 Exam by defense

2:53 Exam by State
Witness stepped down.

3:00 Detective Stacy Brown was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

ID 29, 30, 31, 32, were marked and identified. No objection to admission.
Exhibits 29, 30, 31, 32 admitted.

ID 4 was marked and identified. No objection to admission.
Exhibit 4 admitted

ID 5 was marked and identified. No objection to admission
Exhibit 5 admitted

IDs 48, 49, 50, 51, were marked and identified.
Exhibits 48, 49, 50, 51 admitted.

3:25 Afternoon recess until 3:45

3:55 The jury entered the courtroom

3:55 Detective Stacy Brown retook the witness stand.
Continued exam by the State.

IDs 101 was marked and identified. No objection to admission.
Exhibit 101 admitted

Objection by defense was overruled

Objection by defense was sustained

Objection by defense was overruled

Objection by defense was overruled

ID 99 was marked and identified. No objection to admission
Exhibit 99 admitted.

Objection by defense was sustained

Objection by defense was overruled

Objection by defense was sustained

Objection by defense
State would clarify
Exam continued

Objection by defense
State would rephrase
Exam continued

Objection by defense
Sustained

ID 59 was marked and identified. No objection to admission.
Exhibit 59 admitted

IDs 54, 56, 58, 55, 57 were marked and identified. No objection to admission.
Exhibits 54, 58, 55, 57 admitted

ID 113 was marked and admitted by stipulation
Exhibit 113 Written stipulation admitted

Argument as to transcript of exhibit 59-cassette tape being handed out to the jury
Court ruled the transcript of the tape would be a listening aid only. The transcript
will not go back with the jury unless counsel agreed to that.

5:05 adjourned

DAY 4 JURY TRIAL

Thursday May 10, 2007

Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:40 All present.

The jury entered the courtroom.

It was agreed the taped statement (exhibit 59) would be played for the jury.
It was further agreed a transcript of the tape would be handed out to each juror
to follow along. The transcript would not go back to the jury.

The taped statement was played for the jury.

10:15 the tape ended

The transcripts were collected from the jury

10:16 Stacy Brown resumed the witness stand. Exam continued by the State.

ID 100 was marked and identified. No objection to admission
Exhibit 100 admitted

10:21 Exam by defense

Reference Exhibit 33 and 34.

Objection by State overruled

Morning recess

10:56 Court in session. The jury entered the courtroom.

Stacy Brown resumed the witness stand.
Exam continued by the defense.

Reference Exhibit 69.

Reference Exhibit 10.

Exam continued

Reference Exhibit 30 31 32

Exhibit 32 published to the jury

Exam continued

Reference Exhibit 28

Objection by State was sustained

Reference Exhibit 15

Exam continued

11:41 Re-direct exam-State

Court in recess until 1:30

1:35 All present including the jury.

1:35 Stacy Brown retook the witness stand. Examination by the State.
Witness stepped down

1:37 THE STATE RESTED

1:37 (??) Weld was called, sworn by the Court and examined by defense.

Defendant was identified for the record.

Exam continued

No exam by State

Witness stepped down.

1:45 Dr. Daniel Selove was called, sworn by the Court and examined by the defense.

2:07 Exam by the State

2:12 Exam by defense

2:13 Exam by the State

Witness stepped down

2:16 Kay Sweeney was called, sworn by the Court and examined by the defense.

Reference Exhibit 50

Deft ID 47 was marked and identified.
Defense moved to admit. No objection from the State.
Exhibit 47 admitted

Reference Exhibit 11

2:47 Exam by State

Afternoon recess

3:15 All present except the jury.
Argument as to admission of ID 114 the defense will be offering.
The State, for the record will be objecting, the witness is present.
The Court advised the objection will be overruled and admission allowed but the
State has made its record.

3:20 The jury entered the courtroom.

ID 114 was admitted when offered by defense.
Exhibit 114 admitted

Kay Sweeney resumed the stand. Examination by the State.

3:35 Exam by defense
Witness stepped down

3:40 Dr. Formosco was called, sworn by the Court and examined by the
defense.

ID 105 was marked and identified.
Exhibit 105 admitted

3:49 Dr. Brett Trowbridge was called, sworn by the Court and examined by the
defense.

4:09 Exam by the State

The witness read from his notes
Witness stepped down

4:25 THE DEFENSE RESTED

The jury was excused until 10:00 tomorrow morning.
Adjourned

DAY 5 JURY TRIAL

Friday, May 11, 2007

Judge Nelson Hunt, presiding

Cheri Davidson, Court Reporter

Clerk, Kristine Walker

10:05 Court in session.

The Court advising a Jury Instructions conference was completed this morning.

At the Court's inquiry, there were no objections or exceptions by the State. Defense advised he had one exception. The Court declined to give defense Instruction #14.

For the record: the State advised there was a self-defense agreed instruction.

10:15 The jury entered the courtroom.

The Court advised the jury that this was not an instruction, but for their information the Court would recess for the weekend at 5:00 today and should it be necessary the jury would return on Monday morning. No one on the panel expressed a concern should they have to return on Monday.

10:16 The Court read 33 Instructions to the jury.

10:38 Jury Instruction reading ended

10:38 Closing arguments from Mr. Richards for the State.

11:50 Lunch recess until 1:30

1:33 Court in session.

1:34 The jury entered the courtroom.

1:35 Closing arguments from Mr. Hanbey

2:17 Closing arguments from Mr. Richards for the State

2:24 The bailiffs were sworn to take charge of the jury.

2:34 In the jury's absence the jury instructions and exhibits were inspected by both counsel. They were found to be true and correct. They were taken to the jury by the bailiff. A witness mistakenly took Exhibit 68 autopsy report. The clerk marked another copy this morning by agreement.

3: 43 The bailiff advised the Court a verdict had been reached.

3:51 The jury entered the courtroom with their verdict.

The presiding juror handed the verdict to the Court who in turn handed it to the Clerk who read the verdict:

**Guilty to the charge of Second Degree Murder
Special Verdict Form A: Yes
Special Verdict Form B: Yes**

The jury was polled.
Each juror answered yes individually to the question: was this your verdict and was this the verdict of the jury.
The verdicts were accepted and filed.

3:55 The jury was excused.
Sentencing was set for June 11, 2007 at 1:00 pm
Conditions of release to remain the same.
Adj

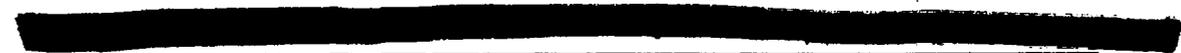
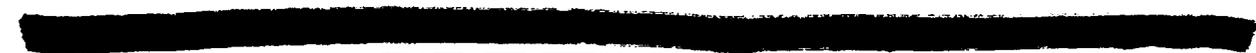
EXC
STATE
DEFENS

STRUCK JUROR LIST

Monday, May 7, 2007

Panel 1 Judge: Judge Nelson E. Hunt
Dept: 05 Call Group: _____ Court: Lewis County Superior Court
Case No: 04-1-00043-7B

Juror #1
Replaced at
3:40 5/7

		Control #	Voir Dire Code
			Pla Def Cs NR Sw Alt
1	COPSEY, DEBRA E	507084	() () () () () ()
2	HUNTER, AUDIE MICHAEL	507184 D1	() () () () () ()
3	YEARIAN, CALVIN K	05 507396	() () () () () ()
4	COREY, MEAGAN SELENA	S1 507085	() () () () () ()
5	PRESTEGORD, STACIE A	507291	() () () () () ()
6	ADAMS, JOAN M	906002	() () () () () ()
7	ENGEL, LARRY	S2 507117	() () () () () ()
8	BRADSHAW, THOMAS G	D2 507041	() () () () () ()
9	RUIZ, MARY HELEN	507311	() () () () () ()
10	MCMENAMY, DENNIS L	407229	() () () () () ()
11	GREEN, DAVID D	507148	() () () () () ()
			
13	GALLANGER, GAIL	EXC 407115	() () () () () ()
14	LUNDSTROM, TANZEL J	507226	() () () () () ()
15	SCHWARTZ, TESSA MARIE	S3 507319	() () () () () ()
16	MUSIC, TIMOTHY JAY	S4 507255	() () () () () ()
			
18	BICKFORD, DOUGLAS	D6 1106035	() () () () () ()
			
20	SPACCIANTE, JOSEPH V	507337	() () () () () ()

Jurors this Group: 20

Clerks Minutes

Monday, May 7, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

Certified

STATE OF WASHINGTON
Plff

Chris Baum present for State
Jason Richards present for the State

VS
KENNETH SLERT
Deft present in custody

Michael Hanbey, present for defendant

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THIS MATTER CAME ON FOR JURY TRIAL

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Colloquy as to when pre trial motions would be heard.

Defendant advised of trial rights.

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Jurors 13, 29, and 40 were excused for cause.

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11:25 Voir Dire defense

11:44 Voir Dire ended

State's 1st Peremptory Challenge#4

Deft's 1st Peremptory Challenge #2

State's 2nd Peremptory Challenge #7

Deft's 2nd Peremptory Challenge #8

State's 3rd Peremptory Challenge#15

Deft's 3rd Peremptory Challenge #21

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Deft's 5th Peremptory Challenge #3

State's 6th peremptory challenge #accepted as seated

Deft's 6th Peremptory Challenge #18

No challenge to alternates at seated

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8. L. Davidson
9. K. Schewfelt
10. S. Colson
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12. S. Hughes
- 1st Alt: C. Dewitt
- 2nd Alt K. Nichols

The Court gave rules for jurors.

The jury was excused until 2:00 to allow for pretrial motions.

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Juror #1 was thanked and excused.

3:39 Juror #1 was replaced by the 1st alternate.

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Witness stepped down

3:55 Ranger Uwe Nehring was called, sworn by the Court and examined by the State.

Defendant identified for the record.

Exhibit 1 referenced.
Exam continued

Objection-sustained
Exam continued

Objection-sustained

Exam continued

Objection-sustained
Exam continued

4:10 Exam by defense

4:18 Exam by State.

4:19 Exam by defense.
Witness stepped down

4:20 Deputy Sue Shannon was called, sworn by the Court and examined by the State.

Defendant was identified for the record
The witness read Miranda warnings from card

IDs 11, 33, 34, 35, 15 were marked and identified.
Exhibits 11, 33, 34, 35, 15 admitted with no objection after proper description.

Objection by defense was sustained
Exam continued

4:45 Exam by defense.
Witness stepped down

4:48 The jury was excused for the evening.
Court to reconvene at 9:30 tomorrow morning.
Adjourned

DAY 2 JURY TRIAL

Tuesday, May 8, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:35 Court in session. The jury was not present.

The Court noting a conference was held in chambers to discuss the alternate juror who called in ill this morning. It was agreed the trial would proceed without alternate number 2 leaving no alternate.

9:40 The jury entered the courtroom.

9:40 Dr. Robert Burrows was called, sworn by the Court and examined by the State.

ID 110 was marked and identified.
ID 110 was not offered

9:46 Exam by defense.

9:49 Exam by State.
Witness stepped down

Exhibit 110 admitted with no objection.

10:55 Detective Ross Kenepah was called, sworn by the Court and examined by the State.

Reference exhibit 63.

9:56 Exam by defense.

9:58 Exam by State.

Objection by Mr. Hanbey, outside scope.

State moved to reopen.

Mr. Hanbey objected.

The Court allowed stating the State could re-call the witness, so questioning was allowed.

10:01 Exam by defense

Witness stepped down

10:02 John McCroskey was called, sworn by the Court and examined by the State.

Objection by defense was overruled.

Exam continued

Objection by defense was overruled

Exam continued

Objection by defense was overruled

State rephrased

Exam continued

Objection by defense was sustained
Exam continued

Objection by defense was sustained as to what was said
Exam continued

10:16 Exam by defense

10:18 Exam by State

10:19 Exam by defense
Witness stepped down

10:20 Dr. Paul Gosnick was called, sworn by the Court and examined by the State.

ID 68 was marked and identified.
No objection to admission
Exhibit 68 admitted

ID 9 was marked and identified
No objection to admission
Exhibit 9 admitted.

IDs 6 and 7 were marked and identified

Morning recess until 11:00

11:05 All present including the jury.

Dr. Gosnick retook the witness stand, exam continued by the State.

IDs 53 and 97 were marked and identified.
No objection to admission of IDs 6, 7, 53, 97.
Exhibits 6, 7, 53, 97 admitted

Objection by defense
State would rephrase
Exam continued

ID 98, 52, and 8, 28 were marked and identified.
No objection to admission.
Exhibits 98, 52, 8, 28 admitted

Exhibits 7, 8, 9 published to the jury

11:31 Exam by defense

Exhibit 9 referred to.
Exam continued

11:47 Exam by State

Objection by defense was sustained

State moved to reopen
Defense stated same objection as prior same objection on another witness
Court allowed the State to reopen.
Exam continued

11:55 Exam by defense
Witness stepped down at 12:00

Court in recess until 1:30

1:37 Court in session.

Court noting a chamber's conference was held at 1:30 regarding State's request to recall Dr. Gosnick over defense's objection.
The Court allowed the State to recall Dr. Gosnick.

1:41 The jury entered the courtroom.

1:41 Dr. Gosnick retook the witness stand, examination by the State.

1:46 Exam by defense
Witness stepped down

1:46 Raymond Kusumi was called, sworn by the Court and examined by the State.

Reference Exhibit 1.

ID 64 was marked, identified and admitted with no objection.
Exhibit 64 admitted.

Reference Exhibits 6, 7, 8, and 68.
Exam continued

Objection by defense was overruled

Exam continued
Objection by defense was sustained
Exam continued
Objection by defense was sustained
Exam continued
Objection by defense was sustained
Exam continued

2:13 Exam by defense

2:22 Exam by State
Witness stepped down but not excused

Side Bar at States request

Recess until 2:45

2:55 The jury entered the courtroom.

2:55 Douglas Schwenk (in custody) was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

Objection by defense was overruled

Objection by defense was overruled

Objection by defense, moved to strike
Overruled
Exam continued

Objection by defense was overruled

3:20 Exam by defense

Objection by State was overruled

Objection by State was sustained

Deft ID 111 was marked and identified.
Exam continued

3:38 Exam by State

Reference ID 111 was referred to

Side Bar at State's request
Exam continued

3:44 Exam by defense
Witness stepped down

3:45 Kurt Wetzold was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

ID 36 was marked, identified and admitted with no objection
Exhibit 36 admitted
Exam continued

Objection by defense
State would rephrase
Exam continued

ID 5 was marked only.

IDs 10, 12, 13, 14, 17, 19, 20, 21 were marked and identified.
No objection to admission
Exhibits 10, 12, 13, 14, 17, 19, 20, 21 admitted
Exhibits were published to the jury

Objection by defense.
State would rephrase
Exam continued

5:00 Court adjourned for the evening.

DAY 3 JURY TRIAL
Wednesday, May 9, 2007
Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:37 All present. The jury entered the courtroom.

9:37 Kurt Wetzold resumed the witness stand.
Continued exam by the State.

Objection by defense
State would clarify
Exam continued

Objection by defense, leading
Sustained
Exam continued

Objection by defense
Side Bar
Court announced objection by defense sustained, answer to be stricken
The jury was instructed to disregard
Exam continued

Objection by defense sustained
Exam continued

Objection by defense overruled
Exam continued

Objection by defense overruled
Exam continued

2 Objections by defense sustained
Exam continued

ID 37 was marked and identified
Defense objected to admission of the 5
Voir dire by defense
Exhibit 37, 38, 39, 40, 41 admitted

IDs 22, 23, 24, 25, 26, 27, were marked, identified, admitted no objection.
Exhibits 22, 23, 24, 25, 26, 27 admitted

Morning recess until 10:55.

11:01 Court in session. Jury not present
For the record: the side bar sustained objection stricken from the record that
occurred earlier in testimony was placed on the record

11:02 The jury entered the courtroom

ID 69 and 70 were marked and identified.
Both IDs identical.
Defense objected to both being admitted.

ID 69 was admitted, ID 70 denied.
Exhibit 69 admitted

Witness stepped down to exhibit 69 (diagram)

11:09 Exam by defense

Reference Exhibit 36
Exhibit 36 published to the jury
Reference Exhibit 35, 37, 39
Exhibits published to the jury

Exam continued

Reference Exhibit 23
Exhibit 23 was published to the jury

Objection by State was overruled
Exam continued

1:36 Court in session. The jury not present.
Stipulation document was submitted to the Court that Mr. Sler's clothing was tested positive by the crime lab. Therefore a crime lab technician would not have to be called as a witness.
It was agreed that the document would be marked and admitted as an exhibit at the appropriate time.

1:37 The jury entered the courtroom.

Kurt Wetzold resumed the witness.
Exam continued by defense.

1:53 Exam by State

2:02 Exam by defense

2:10 Court took a short recess at State's request

2:18 State advised the Court of the situation regarding notes that were referred to by Detective Wetzold. Mr. Hanbey advised he prepared cross-examination on discovery submitted to him and objected to these notes being marked and identified (the notes were mislabeled as belonging to Detective Brown and not this witness)
Mr. Hanbey did make a suggestion as how this problem be resolved by asking the witness specific questions by the State.

2:29 The jury entered the courtroom.

2:30 Exam by State
ID 112 was marked and identified.

2:32 Exam by defense
Witness stepped down.

2:35 Dr. Alford was called, sworn by the Court and examined by the State.

Objection by defense-foundation
State would lay foundation

2:48 Exam by defense

2:53 Exam by State
Witness stepped down.

3:00 Detective Stacy Brown was called, sworn by the Court and examined by the State.

Defendant was identified for the record.

ID 29, 30, 31, 32, were marked and identified. No objection to admission.
Exhibits 29, 30, 31, 32 admitted.

ID 4 was marked and identified. No objection to admission.
Exhibit 4 admitted

ID 5 was marked and identified. No objection to admission
Exhibit 5 admitted

IDs 48, 49, 50, 51, were marked and identified.
Exhibits 48, 49, 50, 51 admitted.

3:25 Afternoon recess until 3:45

3:55 The jury entered the courtroom

3:55 Detective Stacy Brown retook the witness stand.
Continued exam by the State.

IDs 101 was marked and identified. No objection to admission.
Exhibit 101 admitted

Objection by defense was overruled

Objection by defense was sustained

Objection by defense was overruled

Objection by defense was overruled

ID 99 was marked and identified. No objection to admission
Exhibit 99 admitted.

Objection by defense was sustained

Objection by defense was overruled

Objection by defense was sustained

Objection by defense
State would clarify
Exam continued

Objection by defense
State would rephrase
Exam continued

Objection by defense
Sustained

ID 59 was marked and identified. No objection to admission.
Exhibit 59 admitted

IDs 54, 56, 58, 55, 57 were marked and identified. No objection to admission.
Exhibits 54, 58, 55, 57 admitted

ID 113 was marked and admitted by stipulation
Exhibit 113 Written stipulation admitted

Argument as to transcript of exhibit 59-cassette tape being handed out to the jury
Court ruled the transcript of the tape would be a listening aid only. The transcript
will not go back with the jury unless counsel agreed to that.

5:05 adjourned

DAY 4 JURY TRIAL

Thursday May 10, 2007

Judge Nelson Hunt, presiding
Cheri Davidson, Court Reporter
Clerk, Kristine Walker

9:40 All present.

The jury entered the courtroom.

It was agreed the taped statement (exhibit 59) would be played for the jury.
It was further agreed a transcript of the tape would be handed out to each juror
to follow along. The transcript would not go back to the jury.

The taped statement was played for the jury.

10:15 the tape ended

The transcripts were collected from the jury

10:16 Stacy Brown resumed the witness stand. Exam continued by the State.

ID 100 was marked and identified. No objection to admission
Exhibit 100 admitted

10:21 Exam by defense

Reference Exhibit 33 and 34.

Objection by State overruled

Morning recess

10:56 Court in session. The jury entered the courtroom.

Stacy Brown resumed the witness stand.

Exam continued by the defense.

Reference Exhibit 69.

Reference Exhibit 10.

Exam continued

Reference Exhibit 30 31 32

Exhibit 32 published to the jury

Exam continued

Reference Exhibit 28

Objection by State was sustained

Reference Exhibit 15

Exam continued

11:41 Re-direct exam-State

Court in recess until 1:30

1:35 All present including the jury.

1:35 Stacy Brown retook the witness stand. Examination by the State.
Witness stepped down

1:37 THE STATE RESTED

1:37 (??) Weld was called, sworn by the Court and examined by defense.

Defendant was identified for the record.

Exam continued

No exam by State

Witness stepped down.

1:45 Dr. Daniel Selove was called, sworn by the Court and examined by the defense.

2:07 Exam by the State

2:12 Exam by defense

2:13 Exam by the State

Witness stepped down

2:16 Kay Sweeney was called, sworn by the Court and examined by the defense.

Reference Exhibit 50

Deft ID 47 was marked and identified.
Defense moved to admit. No objection from the State.
Exhibit 47 admitted

Reference Exhibit 11

2:47 Exam by State

Afternoon recess

3:15 All present except the jury.
Argument as to admission of ID 114 the defense will be offering.
The State, for the record will be objecting, the witness is present.
The Court advised the objection will be overruled and admission allowed but the
State has made its record.

3:20 The jury entered the courtroom.

ID 114 was admitted when offered by defense.
Exhibit 114 admitted

Kay Sweeney resumed the stand. Examination by the State.

3:35 Exam by defense
Witness stepped down

3:40 Dr. Formosco was called, sworn by the Court and examined by the
defense.

ID 105 was marked and identified.
Exhibit 105 admitted

3:49 Dr. Brett Trowbridge was called, sworn by the Court and examined by the
defense.

4:09 Exam by the State

The witness read from his notes
Witness stepped down

4:25 THE DEFENSE RESTED

The jury was excused until 10:00 tomorrow morning.
Adjourned

DAY 5 JURY TRIAL

Friday, May 11, 2007

Judge Nelson Hunt, presiding

Cheri Davidson, Court Reporter

Clerk, Kristine Walker

10:05 Court in session.

The Court advising a Jury Instructions conference was completed this morning.

At the Court's inquiry, there were no objections or exceptions by the State. Defense advised he had one exception. The Court declined to give defense Instruction #14.

For the record: the State advised there was a self-defense agreed instruction.

10:15 The jury entered the courtroom.

The Court advised the jury that this was not an instruction, but for their information the Court would recess for the weekend at 5:00 today and should it be necessary the jury would return on Monday morning. No one on the panel expressed a concern should they have to return on Monday.

10:16 The Court read 33 Instructions to the jury.

10:38 Jury Instruction reading ended

10:38 Closing arguments from Mr. Richards for the State.

11:50 Lunch recess until 1:30

1:33 Court in session.

1:34 The jury entered the courtroom.

1:35 Closing arguments from Mr. Hanbey

2:17 Closing arguments from Mr. Richards for the State

2:24 The bailiffs were sworn to take charge of the jury.

2:34 In the jury's absence the jury instructions and exhibits were inspected by both counsel. They were found to be true and correct. They were taken to the jury by the bailiff. A witness mistakenly took Exhibit 68 autopsy report. The clerk marked another copy this morning by agreement.

3: 43 The bailiff advised the Court a verdict had been reached.

3:51 The jury entered the courtroom with their verdict.

The presiding juror handed the verdict to the Court who in turn handed it to the Clerk who read the verdict:

Guilty to the charge of Second Degree Murder

Special Verdict Form A: Yes

Special Verdict Form B: Yes

The jury was polled.

Each juror answered yes individually to the question: was this your verdict and was this the verdict of the jury.

The verdicts were accepted and filed.

3:55 The jury was excused.

Sentencing was set for June 11, 2007 at 1:00 pm

Conditions of release to remain the same.

Adj

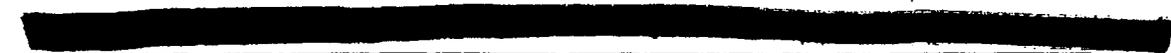
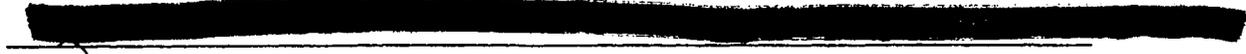
EXC
STATE
DEFENS

STRUCK JUROR LIST

Monday, May 7, 2007

Panel 1 Judge: Judge Nelson E. Hunt
D63 1
Dept: 05 Call Group: _____ Court: Lewis County Superior Court
Case No: 04-1-00043-7B

*Juror #1
Replaced at
3:40 5/7*

		Control #	Voir Dire Code Pla Def Cs NR Sw Alt
1	COPSEY, DEBRA E	507084	() () () () () ()
2	HUNTER, AUDIE MICHAEL	507184 <i>D1</i>	() () () () () ()
3	YEARIAN, CALVIN K	<i>D5</i> 507396	() () () () () ()
4	COREY, MEAGAN SELENA	<i>S1</i> 507085	() () () () () ()
5	PRESTEGORD, STACIE A	507291	() () () () () ()
6	ADAMS, JOAN M	906002	() () () () () ()
7	ENGEL, LARRY	<i>S2</i> 507117	() () () () () ()
8	BRADSHAW, THOMAS G	<i>D2</i> 507041	() () () () () ()
9	RUIZ, MARY HELEN	507311	() () () () () ()
10	MCMENAMY, DENNIS L	407229	() () () () () ()
11	GREEN, DAVID D	507148	() () () () () ()
			
13	GALLANGER, GAIL	<i>EXC</i> 407115	() () () () () ()
14	LUNDSTROM, TANZEL J	507226	() () () () () ()
15	SCHWARTZ, TESSA MARIE	<i>S3</i> 507319	() () () () () ()
16	MUSIC, TIMOTHY JAY	<i>S4</i> 507255	() () () () () ()
			
18	BICKFORD, DOUGLAS	<i>D6</i> 1106035	() () () () () ()
			
20	SPACCIANTE, JOSEPH V	507337	() () () () () ()

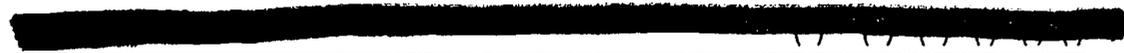
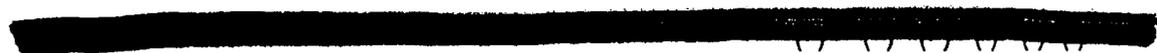
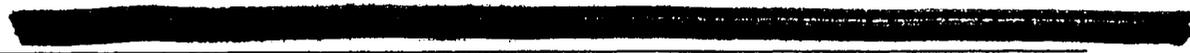
Jurors this Group: 20

STRUCK JUROR LIST

Monday, May 7, 2007

Page 2

Panel 1 Judge: Judge Nelson E. Hunt
D63 1
Dept: 05 Call Group: _____ Court: Lewis County Superior Court
Case No: 04-1-00043-7B

		Control #	Voir Dire Code Pla Def Cs NR Sw Alt
21	SCHWARTZ, JEANETTE LUCILLE	507318	D3 () () () () () ()
			
23	KNAPP, SCOTT R	507206	() () () () () ()
24	LANNING, NEIL M	507211	() () () () () ()
25	ROSE, ALLEN P	55 507307	() () () () () ()
26	DAVIDSON, LOREN L	507100	() () () () () ()
27	GARDIN, DAVID	04 507139	() () () () () ()
28	SHEWFELT, KRISTI M	507323	() () () () () ()
29	ZIMMER, CECIL M	Exc 207396	() () () () () ()
30	COLSON, SHANA K	507081	() () () () () ()
31	MILLER, LYNETTE	507246	() () () () () ()
32	HUGHES, STEVEN R	507182	() () () () () ()
A1 33	DEWITT, CAROLYNNE R	507104	() () () () () ()
			
35	GUSTAFSON, JUDY L	507150	() () () () () ()
			
A2 37	NICHOLS, KAREN K	507264	() () () () () ()
38	GUTSCHE, MICHAEL P	1006128	() () () () () ()
39	HAMES, ROBBIN ROBINSON	507154	() () () () () ()
40	MAY, ANDREA K	Exc 507232	() () () () () ()

Jurors this Group: 20

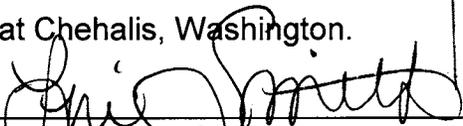
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 36534-1-II
Respondent,)
vs.)
KENNETH SLERT)
Appellant.)
_____) DECLARATION OF
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County, Washington, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On April 30, 2008, I mailed a copy of the Respondent's Brief by depositing same in the United States Mail, postage pre-paid, to the Attorney for Appellant at the name and address indicated below:

BACKLUND & MISTRY
203 East 4th Ave. Suite 404
Olympia, WA 98501

DATED this 30 April 2008, at Chehalis, Washington.


Lori Smith, WSBA 27961
Lewis County Prosecutor's Office
340 NW North Street MS:PRO01
Chehalis, WA 98532-1900
360-740-1186

FILED
COURT OF APPEALS
DIVISION II
08 MAY - 1 PM 12:40
STATE OF WASHINGTON
BY DEPUTY