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COURT OF APPEALS
DIVISION II

NO. 37407-2-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
BY
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STATE OF WASHINGTON

Respondent,

v.

KENNETH LAMAR RILEY

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Nelson Hunt, Judge

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

While on a camping trip, Ken Riley was involved in a confrontation with several men he did not know from another campsite. Witness accounts of the incident varied wildly, but it is clear that what occurred can be accurately described as a racially-charged melee. The men threatened to “beat his ass” and one of them swung and hit Mr. Riley, knocking him to the ground. These men were from what was described by witnesses as being from “the redneck camp.”¹ Some witnesses testified that Mr. Riley went to his tent—which was nearby—and retrieved a fishing knife. Several witnesses stated that he also got a hammer that was located near his tent. Several testified that Mr. Riley held the knife and hammer and threatened people gathered near a bonfire at a campsite near Mr. Riley’s camp.

Another witness testified that Mr. Riley had a knife in his sleeve, but did not produce it during the confrontation with the three men. The witness testified that two of the men who attacked Mr. Riley left, but the third man continued after Mr. Riley, after being knocked to the ground by briefly detained by the witness’s cousin. The witnesses stated that Mr.

¹ The terms “redneck” and “the redneck camp” are used in this Brief in order to accurately reflect the nomenclature used by witnesses and the trial court judge, and is not intended to be disrespectful or inflammatory.

Riley produced the knife at that time but did not see a hammer.

Mr. Riley was subsequently charged with three counts of second degree assault and one count of harassment. Mr. Riley was convicted of one count of second degree assault. The jury deadlocked on another count of second degree assault; the third count was dismissed by the trial court. Mr. Riley was acquitted of harassment.

The State alleged at sentencing that Mr. Riley had two prior strike offenses and qualified for sentence of life without the possibility of parole under the Persistent Offender Accountability Act.

Despite testimony from three witnesses that Mr. Riley acted in self-defense after the confrontation with the men, the jury was not instructed regarding self-defense nor the appropriate burden of proof where a defendant acted in self-defense.

Mr. Riley submits that the trial court erred in refusing to exclude testimony regarding his post-arrest demeanor pursuant to ER 404(b).

Mr. Riley also submits that the persistent offender finding by the court, as opposed to a jury finding beyond a reasonable doubt, violated his rights under the United States and Washington Constitution.

A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Riley due process of law and his right to a fair trial where the jury was never instructed on self-defense, despite the testimony of three witnesses sufficient to warrant the instruction.

2. The trial court erroneously failed to instruct the jury that the State must disprove self-defense beyond a reasonable doubt, denying Mr. Riley due process.

3. The trial court erred under ER 404(b) when it admitted evidence of Mr. Riley's post-arrest behavior.

4. The trial court erred in ruling Mr. Riley was a persistent offender.

5. The trial court erred in entering Finding of Fact 2.2 that prior offenses for assault in the second degree and burglary in the first degree require that Mr. Riley be sentenced as a persistent offender. CP at 6.

6. The court violated Mr. Riley's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process when it found he had suffered two qualifying prior convictions and sentenced him to life without the possibility of the parole as a persistent offender.

7. The trial court erred in entering Finding of Fact 2.1,

convicting Mr. Riley of second degree assault while armed with a deadly weapon, contrary to RCW 9A.36.021(1)(c) insofar as the court refused to grant a requested instruction on self-defense. CP at 4.

8. The court erred imposing a sentence of life imprisonment without the possibility of parole in the absence of a jury verdict finding the two qualifying prior convictions beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Jury instructions must be supported by the evidence, permit the parties to argue their theories of the case, and accurately inform the jury of the law. Where self-defense is claimed, the jury must also be specifically instructed as to the State's burden of proof. Here, counsel claimed self-defense, but the court refused to accept the defense's proposed instructions on self-defense and refused to instruct the jury on self-defense, despite the testimony of three witnesses that supported a self-defense instruction. Was Mr. Riley denied due process of law and the right to fair trial where the jury was inaccurately instructed as to the law applicable to his case? Assignments of Error No. 1, 2, and 7.

2. Did the trial court err in allowing the State to introduce evidence, over defense objection, of Mr. Riley's combative and verbally abusive behavior following arrest when police officers contacted him and placed him under arrest? Assignment of Error No. 3.

3. A defendant possesses a Sixth Amendment right to a jury

trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every fact that increases the sentence beyond that authorized by the facts as found by the jury. A finding that the defendant is a persistent offender, which increases the sentence from a standard range term to life imprisonment without the possibility of parole, is made by the trial court at sentencing by a preponderance of the evidence. Did the trial court violate Mr. Riley's right to a jury trial when it found him to be a persistent offender, in the absence of a jury finding beyond a reasonable doubt that he had suffered two prior convictions that qualified as predicate offenses for a finding he was a persistent offender? Assignments of Error No. 4, 5, 6 and 8.

C. STATEMENT OF THE CASE

1. Procedural history:

Ken Riley was charged by amended information filed in Lewis County Superior Court with four counts of second degree assault while armed with a deadly weapon, contrary to RCW 9A.36.021(1)(c). Clerk's Papers [CP] at 65-68. The State filed an amended information on January 23, 2008, adding one count of harassment. CP at 61-64. The State filed a second amended information on the second day of trial, dismissing one count of second degree assault. CP at 54-55; 2Report of Proceedings [RP]

at 1.²

Mr. Riley was tried by a jury, the Honorable Nelson Hunt presiding. The State did not take any exceptions to requested instructions not given or object to instructions given. 2RP at 102. Defense counsel noted its exception to the court's refusal to "enter into the record defendant's proposed instructions Number 1, Number 2, Number 3, and Number 4, and a special verdict form all of which deal with the self defense claim."³ 2RP at 102.

Regarding the proposed self-defense claim, Judge Hunt stated:

I'm not sure whether this would be helpful in any other stage, but the reasons I'm denying the self defense is I believe all the evidence shows that, for lack of a better name since we don't have any names, the rednecks had withdrawn. Mr. Riley then went back to his tent area, maybe into his tent, armed himself, and then went to the bonfire a ways away. To my mind, that constitutes a withdrawal and a significant break in there such that he was no longer able to claim self defense as there was no imminent danger to himself or others.

2RP at 102.

In Instruction No. 7, the court instructed the jury that to convict Mr. Riley of Count 2, jurors must find that he intentionally assaulted Nyle

²The record consists of four volumes:

June 14, 2007, motion hearing.

1RP January 28, 2008, CrR 3.5 suppression motion and jury trial.

2RP January 29, 2008, jury trial.

3RP February 25, 2008, sentencing hearing.

³ The defense's proposed instructions and special verdict form were not were filed and not made part of the trial record .

Adamson with a deadly weapon. CP at 33.

The court dismissed Count 3, which according to the 'to convict' instruction, pertained to Dan McCorkendale. 2RP at 99.

The jury found Mr. Riley guilty of second degree assault with a deadly weapon against Nile Adamson as charged in Count 2. CP at 22. The jury acquitted Mr. Riley of harassment, as charged in Count 4. CP at 21A. The jury deadlocked on Count 1, which pertained to Chelsea Norton, and a mistrial was declared regarding that count. CP at 23-24.

At sentencing on February 25, 2008, the State alleged that Mr. Riley had two prior qualifying convictions that subjected him to life without the possibility of parole under the Persistent Offender Accountability Act [POAA], specifically: first degree burglary from 2000 and a 1998 conviction for second degree assault. Det. David Neiser of the Lewis County Sheriff's Office testified that Mr. Riley's fingerprints, taken following his arrest on May 26, 2007, were identical to fingerprints on a Judgment and Sentence entered in Pierce County cause number 98-1-04952-1 and a Judgment and Sentence in Pierce County cause number 00-1-00921-8. 3RP at 4-7. Mr. Riley's counsel did not contest that Mr. Riley has two prior strike offenses, but did orally move for a judgment notwithstanding the verdict. 3RP at 13. The court denied the motion and sentenced Mr. Riley to life without possibility of parole. 3RP at 13-14,

18.

In making his ruling, Judge Hunt stated:

I don't have any choice, but believe me, this is not something I want to do. I spent a fair amount of time after the verdicts came in, and then some time yesterday, looking for an alternative and I can't find one. I want to find, one, I can't. So I wanted to give you your opportunity, Mr. Renda, to give me a little factual background on this because I have to imposed the sentence which is the legislature requires. But I do have to say that this is just wrong. And if I were a judge at a different level, I would have the authority to do something about it, but I don't. This is just not right. And I just finished presiding over a trial of an individual who has now been convicted of his second killing, a reduction to Manslaughter in the First Degree or Second Degree after the Anders [sic] decision and then First Degree Murder which we just finished. He is not looking at life without the possibility of parole. So where---how this fulfills the purpose of the Sentencing Reform Act---and, Mr. Hayes, I'm not criticizing the Prosecutor's Office, I want you to understand that. The prosecutor's did what they felt they needed to do, and the result happened here is not the problem of the Prosecutor's Office. But to get back on this, how this sentence that I'm imposing today meets the purposes of the Sentencing Reform Act which were touted in 1984 when we went to this kind of a sentencing process. They are to ensure the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. This does not do that. How it promotes respect for the law by providing punishment which is just, this actually goes counter to that. Be commensurate with punishment on others for committing similar offenses, this does not do that. Protect the public, well, I supposed it protects the public, but that's impossible to apply to this particular offense. Offer the offender an opportunity to improve himself, certainly doesn't do that. Next one is make frugal use of state and local government resources, absolutely will not do that. And reduce the risk of reoffending by

offenders in the community, so I guess we get to the last one, and it will do that I suppose, although it is certainly possible to commit offenses in while under the supervision of the Department of Corrections while in custody. And Mr. Riley did that, apparently there is an escape in here somewhere, the facts behind that are not important to this decisions. If you go through all of those, life without the possibility of parole for the offenses I see here is just wrong. And if I could do anything about it, I would. I've tried, I really looked hard to come up with a way around it, I cannot do it. And I would be doing less in my job, as I understand it, if I just say, personally I'm offended by this so therefore I'm not going to do it. If that becomes the case, then the entire system breaks down. I have also read somebody, and I'm not sure who said it, the way to amend or change or get rid of an unjust law is to enforce it without mercy. I hope that's not true, but that's the sense that I get here is that a law I'm enforcing without mercy because I don't have the ability to do it. That's all I need to say. The sentence will be as recommended.

3RP at 15-18.

Timely notice of appeal was filed on February 25, 2008. CP at 3.

This appeal follows.

2. Substantive facts:

Ken Riley was camping near the entrance to Taidnapim Park near Riffe Lake, Lewis County, Washington with his wife and children on May 25, 2007. 1RP at 28, 112. A number of other people including Daniel McCorkendale, his sister Christina Sledg, and Nile Adamson were staying at a second campsite nearby. Mr. McCorkendale stated that his campsite was located about 25 to 50 feet from Mr. Riley's campsite. 1RP at 28, 30,

2RP at 13.

There was a large bonfire at the McCorkendale campsite, around which a group of approximately 25 people had gathered. 1RP at 30, 2RP at 5, 21.

Mr. McCorkendale testified that after midnight on May 26, two to three men entered the campsite and demanded money from Mr. Riley and “threatened to beat his ass.” 1RP at 31. Mr. McCorkendale stated that he heard people call Mr. Riley a “nigger” and that he heard other people threatening him, and that Mr. Riley was reacting to those threats against him. 1RP at 31, 50-51. Mr. McCorkendale said that Mr. Riley became very upset. 1RP at 31. He stated that he saw one of the men “take a swing on Kenneth” and that the other man came over and hit Mr. Riley on the back of the head. 1RP at 31. He said that a “[a] [c]ouple of guys came over with there—actually got physical with him, jumped him at one point.” 1RP at 32. He stated that Mr. Riley went to his tent and got a knife and also got a hammer. 1RP at 32. He stated that the two men who threatened and assaulted Mr. Riley had left the campsite at that point. 1RP at 34.

Mr. McCorkendale stated that Mr. Riley was angry and threatened the man who was previously there but had left. 1RP at 35. He stated that Mr. Riley “turned the knife against” Mr. McCorkendale and his cousin.

1RP at 36. He stated that he saw Mr. Riley come physically close to the two men who had threatened him while Mr. Riley was holding the knife. 1RP at 38. Mr. McCorkledale stated that Mr. Riley was holding the knife and hammer until the police arrived about thirty minutes later, and to him, it appeared as though Mr. Riley was “[t]rying to defend himself” against the two other men. 1RP at 40. He said that he heard Mr. Riley ask his wife to get a gun from the tent. 1RP at 40-41. No gun was seen by any witness. 1RP at 51.

Mr. McCorkendale stated that the two men who confronted Mr. Riley—one of whom had hit him, were by the bonfire in the McCorkendale camp but left, at which point the fight died down. 1RP at 51. Mr. Riley went to his tent and approximately thirty minutes later the police arrived. 1RP at 51.

Nile Adamson, who was camping at the McCorkendale campsite, testified that Mr. Riley was confronted by two to three men from another campsite. 2RP at 13, 15, 71, 72. The camp where the men came from was described as witnesses as “the redneck camp.” 2RP at 74. He stated that one of the men who attacked Mr. Riley was “going crazy[,]” and was “belligerent, drunk, [and] was falling down. . . .” 2RP at 5, 15. The man was shirtless, “throwing punches, screaming, [and] threatening” Mr. Riley. 2RP at 15. The other man was holding him back. 2RP at 15, 16. This

fight lasted approximately two to three minutes. 2RP at 16. He stated that after that they went back toward their campsite, passing through the McCorkendale campsite. 2RP at 5, 16. Mr. Adamson said that Mr. Riley then came back from his campsite with a fishing knife and a hammer. 2RP at 5. Mr. Adamson said that Mr. Riley was “very angry” and that he was yelling. 2RP at 6. Mr. Adamson said that as Mr. Riley came to the campsite, he threatened them as they were sitting at the fire, saying that “if any of you have a problem with me, come get some. I’ll end all of you right now.” 2RP at 6-7. Mr. Adamson said that Mr. Riley was swinging the knife and hammer. 2RP at 7. Mr. Adamson said that he feared for his safety. 2RP at 8. He told him to go back to his campsite, and he left after five to seven minutes. 2RP at 8, 20.

Mr. Adamson said that no one had threatened Mr. Riley before he came over to the campsite. 2RP at 9. Mr. Adamson said that Mr. Riley’s wife was there and that Mr. Riley told her go to their car to get a gun, but that he did not believe that they had a gun. 2RP at 10. Mr. Adamson said that Mr. Riley was about four feet from the campfire during the incident. 2RP at 10.

Mr. McCorkendale’s sister—Christina Sledg—stated that after the fight with the two “rednecks,” they returned to their campsite. 1RP at 61. She said that there appeared to be a total of about 25 people from the

redneck camp. 1RP at 74. Later, the rednecks returned to the area near the McCorkendale campsite and were yelling that Mr. Riley had “skimmed them on a sack of some sort,” and that they wanted their money back. 1RP at 62. She said that the rednecks came to the McCorkendale campsite and that they became intermingled with her group and that they were in and around the bonfire area. 1RP at 75-76. She stated that Mr. Riley came back and said that someone had stolen a flashlight from his tent and that she saw him with a hammer and a “fillet knife” that he was concealing in his sleeve. 1RP at 62, 63. She said that she did not hear Mr. Riley threaten anyone from her campsite. 1RP at 65. She stated that the rednecks were “still fighting with Mr. Riley in the corner when the police arrived.” 1RP at 69.

Andrew Spears was camped at the so-called “redneck” campsite with two of his cousins and “a couple other guys I don’t know.” 1RP at 89. Those men were friends of his cousin. 1RP at 97. He heard fighting and saw his cousin Jesse Goble and two other men arguing with Mr. Riley in Mr. Riley’s campsite. 1RP at 89-90, 98. He pulled his cousin back to calm him down, but the fight “kept going, escalating, [and] ended up over in the other people’s campsite.” 1RP at 90. The fight moved to the campfire next to Mr. Riley’s. 1RP at 99. The two men “took off” and the fight was “between Mr. Riley and [Mr. Spears’] cousin Jesse [Goble] at that time.” 1RP at 99. Mr. Spears that Mr. Goble was “being aggressive

at the time, and I calmed him down, got him away from there.” 1RP at 99. He put his arms around Mr. Goble and threw him to the ground. 1RP at 99. He was able to calm Mr. Goble down enough to push him back to their own campsite, and then “he got around me and back over and got in a big old fight.” 1RP at 100. He stated that it was at that point he saw Mr. Riley with a knife with about twenty people around him. 1RP at 90, 92, 93, 94, 100. He stated that Mr. Goble got past him and lunged at Mr. Riley, he saw Mr. Goble back off after Mr. Goble saw a knife. 1RP at 102. After that Mr. Spears walked back to the redneck campsite. 1RP at 94. Mr. Spears said that Mr. Goble was among the group around the McCorkendale bonfire and that “he threatened my cousin, he told him, [‘]I’ll stab you.[‘]” 1RP at 103. Some of the people around the bonfire were making moves toward Mr. Riley. 1RP at 104. Mr. Spears said that the two men who he first saw fighting with Mr. Riley were at the McCorkendale campsite when he went there. 1RP at 97.

Chelsea Norton testified that she saw the three men in Mr. Riley’s campsite, and that after about fifteen minutes, a fight started. 2RP at 57. She said that one of them “took off running” and that two men came into the McCorkendale campsite where Ms. Norton was standing, and that Mr. Riley then came “after them into the other campsite and that was when all the bad stuff started to happen.” 2RP at 57. Ms. Norton stated that she saw Mr. Riley hand something to three people, and that two guys came

running over to the campsite where she was and that Mr. Riley came behind him yelling and screaming, carrying a rusty hammer. 2RP at 42, 58. She stated that Mr. Riley threatened to bash their heads in. 2RP at 42. Ms. Norton said that when he came into the camp, the two guys “took off.” 2RP at 59. She stated that Mr. Riley also had a knife, and that he threatened her by holding the knife to her side and with the hammer “pulled back” as he was going to hit her with it. 2RP at 43. She stated that he said that his name was Ken Riley and the he “can kill you and get away with it.” 2RP at 43.

Mr. Riley was sitting in his camp by the fire when law enforcement arrived at approximately 3 a.m. 2RP at 74, 84.

Police found a framing hammer next to Mr. Riley’s camp chair. 2RP at 80. No knife or gun was located. 2 RP at 91.

Over defense objection, Lewis County Deputy Sheriff Chris Rubin stated that Mr. Riley was uncooperative with police, was using profanity, was raising his arms and throwing his arms around, and escalating in hostility. 1RP at 116-19.

Deputy Tim English stated that Mr. Riley was using profanity and ignoring their commands, and he was placed in handcuffs because the police were concerned about their safety. 2RP at 76-77.

In admitting the testimony regarding Mr. Riley's demeanor, Judge Hunt stated:

I think it's relevant to his state of mind, also to some extent to the self-defense argument. But really I think there is a close enough connection here in time to make it relevant.

1RP at 116.

At the conclusion of the State's case-in-chief, Judge Hunt dismissed Count 3, which pertained to Mr. McCorkendale. 2RP at 99-100.

The defense rested without calling witnesses. 2RP at 100, 104.

D. ARGUMENT

1. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE DENIED MR. RILEY DUE PROCESS OF LAW.

- a. Due process requires the State to disprove a claim of self-defense by proof beyond a reasonable doubt.**

Due process requires the State to prove every element of a charged crime beyond a reasonable doubt. U.S. Const. amend. 5; U.S. Const. amend. 14; Wash. Const. art. 1, § 3; *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct.2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Beeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). In Washington, it is well-established that where the issue of self-defense is raised, the absence of self-defense

becomes another element of the offense, which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

Once a defendant produces some evidence of self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *See, Acosta*, 101 Wn.2d at 615-16 (self-defense rebuts the "unlawful" element of assault).

The defendant has the initial burden to produce *some* evidence of self defense or defense of another to be entitled to a corresponding jury instruction. The burden then shifts to the State to prove the absence of self defense or defense of another beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Marquez*, 131 Wn.App. 566, 127 P.3d 786 (2006).

Here, the jury instructions failed to accurately state the law of self-defense, denying Mr. Riley of due process by relieving the State of proving the absence of self-defense beyond a reasonable doubt.

b. Where the accused presents some evidence of self-defense, the jury instructions given must more than adequately apprise jurors of the applicable law.

Before a jury can be instructed on self-defense, the accused must produce "some" evidence which supports the claim. *Walden*, 131Wn.App.

at 473. Once the accused produces some evidence of self-defense at trial, the burden of proof returns to the State. *Id.* Therefore, where a defendant presents evidence of self-defense, “the jury ‘should be instructed that the State bears the burden of proving the absence of self-defense beyond a reasonable doubt.’” *Acosta*, 101 Wn.2d at 619, (*quoting State v. McCullum*, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983)). Where evidence of self-defense is presented, the jury instructions provided “must more than adequately convey the law.” *Walden*, 131 Wn.2d at 473. As a whole, the instructions “must make the relevant legal standard manifestly apparent to the average juror.” *Id.*

To raise a self-defense claim, the accused “must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.” *State v. Dyson*, 90 Wn.App. 433, 438-39, 952 P.2d 1097 (1998); *see also State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Here, defense counsel requested a self-defense instruction, which was denied by the trial court. 2RP at 102. Judge Hunt refused to grant the requested self-defense instructions, stating that “I believe all the evidence shows that, for lack of a better name since we don’t have any names, the rednecks had withdrawn.” 1RP 102. Judge Hunt stated that the evidence showed that Mr. Riley “then went back to his tent area, maybe into his

tent, armed himself, and then went to the bonfire a ways away.” 1RP at 102. This, however, is not an accurate recitation of the testimony.

Andrew Spears testified that Mr. Riley was in a fight with three men, and that two of them “took off.” 1RP at 99. The fight continued, however, between Mr. Spears’ cousin Jesse Goble and Mr. Riley. 1RP at 99. The fight moved from Mr. Riley’s campsite to an area near the bonfire at the McCorkendale camp. 1RP at 99. Mr. Goble was so angry that Mr. Spears had to throw him to the ground and restrain him. 1RP at 100. Mr. Goble got around Mr. Spears and ran to fight Mr. Riley again. 1RP at 100. Mr. Spears then saw Mr. Riley with a knife, which he had had up his sleeve. 1RP at 91-92, 100, 101.

In other words, contrary to Judge Hunt’s statement,⁴ the rednecks had **not** withdrawn; Mr. Goble broke free from Mr. Spears and went after Mr. Riley for a second time. Moreover, according to Mr. Spears’ testimony, Mr. Riley did not retreat to his camp or his tent to arm himself; he was carrying the knife in his sleeve during the entire fight. 1RP at 91-92. This testimony directly contradicts Judge Hunt’s belief that (1) the rednecks had withdrawn, and (2) that Mr. Riley retreated to his tent to arm himself. 1RP at 102. The testimony constitutes “some evidence of self-defense,” and the burden therefore shifts to the prosecution to prove the

⁴2RP at 102.

absence of self-defense beyond a reasonable doubt. *See Acosta*, 101 Wn.2d at 615-16.

Moreover, it is not clear that there was a break between the fight between Mr. Riley and the two unidentified rednecks in the area near Mr. Riley's camp and the bonfire. Mr. McCorkendale testified that the two rednecks were among the people at the bonfire. 1RP at 38. Mr. McCorkendale stated that when he was holding the knife and hammer it appeared that he was [t]rying to defend himself, against those other two guys." 1RP at 39-40. Christina Sledg stated that it did not seem to her that the fight ever stopped after the attack by the two rednecks. 1RP at 64.

Mr. McCorkendale's testimony makes it reasonable to conclude that Mr. Riley may not have known who specifically had attacked him; Mr. McCorkendale stated that Mr. Riley may not have initially recognized him at the bonfire when he was pointing the knife. 1RP at 40. He stated that the were "so many people around, I mean, he did not know." 1RP at 40, 49. He stated that after he recognized Mr. McCorkendale, there were no more threats or posturing made toward him. 1RP at 49. In addition, the danger to Mr. Riley was not limited to the two unidentified rednecks and Mr. Goble; about 25 other men from the redneck camp came over and were intermingled with the group around the McCorkendale bonfire. 1RP at 74, 75, 77. Ms. Sledg stated that she "saw them swing on him a couple

of times because of an argument they had had, and he had a hammer on them, the fight had actually broken out into a full fight.” 1RP at 74, 75. She said that they were all against Mr. Riley, and that he had no one on his side to help him. 1RP at 85. Because several witnesses testified that the fight was ongoing, that at least one assailant—Mr. Goble—and possibly all three assailants, as well as others from the redneck campsite, came into the McCorkendale camp, and that at least one witness saw “them swing on him a couple times” while in the McCorkendale campsite area, the evidence plainly supported giving a self-defense instruction.

Jury instructions must provide the jury with an accurate statement of the law pertaining to the issues presented at trial. *See e.g., State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001), *cert. denied*, 534 U.S. 964 (2001). Because there was considerable evidence that the fight continued, that at least one of them men pursued Mr. Riley to the McCorkendale campsite as he retreated, that Mr. Riley acted in self-defense, the jury instructions should have clearly informed the jury of the law on self-defense and placed the burden on the State to prove the absence of self-defense beyond a reasonable doubt. *See e.g., State v. Corn*, 95 Wn.App. 41, 52-54, 975 P.2d 520 (1999) (jury instructions that failed to inform jury of relevant legal standards regarding self-defense required new trial). Because the instructions given here made no attempt to clarify

the law of self-defense, including the State's burden of proof, reversal of Mr. Riley's assault conviction is required.

c. The court erred by failing to provide a self-defense instruction, including its attendant burden of proof

Jury instructions, as a whole, must accurately inform jurors of the applicable law. *See e.g., State v. Rodriguez*, 121 Wn.App. 180, 184-85, 87 P.3d 1201 (2004).

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.

Id. On appeal, jury instructions regarding self-defense are subject to particularly close scrutiny. *Id.* at 185.

Here, none of the jury instructions, whether considered separately or as a whole, made mention of Mr. Riley's self-defense claim or the State's burden of proof if the claim was considered. CP at 25-49. As such, the State was relieved of its burden of proof thereby denying Mr. Riley due process of law.

i. The trial judge erred in failing to give a self-defense instruction where the record clearly supported it.

Counsel for Riley submitted proposed jury instructions for self-defense and he noted his exception to the court's refusal to give the

instructions. 2RP at 102.

Three of the witnesses presented testimony that permitted the jury to conclude that Mr. Riley acted in self-defense. 1RP at 40, 49, 64, 74, 75, 77, 99, 100. The court should have provided the jury with instructions correctly advising them of the laws applicable to a self-defense claim, including a specific reference to the State's burden of proof. *Rodriguez*, 121 Wn.App. at 184-85. Because there was substantial evidence to support Mr. Riley's self-defense claim, the trial court had an obligation to accurately instruct the jury on the law governing self-defense.

Nothing in the jury instructions told jurors that the State had the burden of disproving Mr. Riley's claim of self-defense beyond a reasonable doubt. CP at 24-49; *Walden*, 131 Wn.2d at 473.

Because the jury was never told that the State had to prove the absence of self-defense, the instructions failed to convey an accurate statement of the applicable law, thus they were insufficient, denied Mr. Riley due process of law, and require reversal of his assault conviction.

d. The instructional error requires reversal of Mr. Riley's assault conviction.

Jury instructions are only sufficient where they "properly inform the jury of the applicable law." *Rodriguez*, 121 Wn.App. at 185. where, as here, a defendant produces "some" evidence that he acted in self-defense,

the jury must not only be instructed on the law regarding self-defense, but also regarding the State's burden or proving the absence of self-defense beyond a reasonable doubt. *Marquez*, 131 Wn.App. at 578.

As in *Marquez*, Mr. Riley presented sufficient evidence to support providing the jury with a self-defense instruction. *Id.* Here, not only did the jury fail to receive a legal definition of self-defense, they were never instructed as to the State's burden in such a case. The jury instructions permitted the State to abdicate its burden of proof and failed to accurately and adequately inform the jury of the law applicable in Mr. Riley's case, requiring reversal of Riley's assault conviction.

2. **THE TRIAL COURT ERRED UNDER ER 404(B) WHEN IT ADMITTED EVIDENCE OF MR. RILEY'S DEMEANOR AT THE TIME OF ARREST.**

It is well established that a defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other bad acts must be excluded unless shown to be relevant to a material issue and more probative than prejudicial. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d (1952), *overruled on other grounds*, *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The term "bad act" includes "acts that are merely unpopular or

disgraceful.” *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, Wash. Prac., Evidence § 114, at 383-84 (3d ed. 1989)). The prosecution’s attempts to use evidence of bad acts must be evaluated under ER 404(b), which reads:

(b) Other crimes, Wrongs, or Act. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is “whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.” *Saltarelli*, 98 Wn.2d at 362 (quoting *Goebel*, 40 Wn.2d at 21). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice. *Saltarelli*, 98 Wn.2d at 362-63. In a doubtful case, “[t]he scale

must tip in favor of the defendant and the exclusion of the evidence.” *State v. Myers*, 49 Wn. App. 2443, 247, 742 P.2d 180 (1987); *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). Admission of evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Tharp*, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981).

During the testimony of Dep. Sheriff Chris Rubin, defense counsel moved to exclude testimony regarding Mr. Riley’s lack of cooperation, his combativeness, and verbal abuse when the officers contacted him. 1RP at 115. Defense counsel argued the evidence was irrelevant because the evidence showed that there had been a half hour lapse between the end of the fighting and the arrival of the police, and the behavior constituted bad acts rather than ‘state of mind’ evidence. 1RP at 115. Deputy Tim English testified that Mr. Riley was “extremely agitated, he wasn’t following commands.” 2RP at 76. He stated that Mr. Riley was “flailing his arms, still screaming, using vulgarities directed at Deputy Rubin and I.” 2RP at 77. He stated that the deputies were “concerned for our safety” and so they placed Mr. Riley in handcuffs. 2RP at 77. Dep. English stated that Mr. Riley eventually became physically cooperative, but still continued to yell and scream at them and when he was in the police car “was screaming at me from the back of the car for the first 25 minutes of

our trip at the top of his lungs. . . .” 2RP at 77,82-83. He stated that Mr. Riley accused him of arresting him “specifically because of race.” 2RP at 83.

As urged by the prosecutor, however, the court found the evidence relevant to show Mr. Riley’s state of mind. 1RP at 116.

Following the court’s ruling, Dep. Rubin testified that Mr. Riley was uncooperative, was using profanity, refused to show the officers his hands, and continued to escalate in hostility. 1RP at 117-118. Dep. English also testified about Mr. Riley’s behavior while transporting him in the police car. 2RP at 82-83. The trial court erred in allowing this testimony.

A defendant’s demeanor on arrest is inadmissible unless relevant to an element of the charged offense. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997). In *Perrett*, the state elicited evidence that the defendant had refused to turn over a gun and told a deputy “the last time the sheriffs took his guns, he didn’t get them back.” *Perrett*, 86 Wn. App. at 315, 319. The court rejected the state’s claim on appeal that the evidence was properly admitted to show Perrett’s uncooperative attitude, reasoning that his lack of cooperation was not relevant to any element of the crime. *Perrett*, 86 Wn. App. at 319.

Similarly, Mr. Riley’s demeanor toward police before and after his

arrest was not relevant to any element of the charges. Contrary to the trial court's reasoning, Mr. Riley's attitude toward the deputies at that time was not relevant as evidence of state of mind.

Should this Court disagree, however, and find that Mr. Riley's conduct was relevant as pertaining to his state of mind, this Court should nevertheless find that the evidence should have been excluded pursuant to ER 404(b)'s mandatory balancing test, which the trial court did not perform. 1RP 116.

The danger of unfair prejudice was great. The evidence suggested Mr. Riley was a combative individual and therefore more likely to have committed the acts alleged by the prosecution. *See, e.g., State v. Perrett*, 86 Wn. App. at 320 ("Introduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference . . .") (quoting *State v. Bowen*, 48 Wn. App. 187, 196, 738 P.2d 316 (1987), *rev. denied*, 133 Wn.2d 1019 (1997)). Therefore, the trial court should have struck the balance in favor of exclusion. *See e.g., Myers*, 49 Wn. App. at 247 ("In a doubtful case, [t]he scale must tip in favor of the defendant and the exclusion of the evidence."). This Court should find that the trial court abused its discretion in admitting the evidence.

3. **THE TRIAL COURT'S DETERMINATION BY A PREPONDERANCE OF THE EVIDENCE THAT MR. RILEY HAD SUFFERED TWO QUALIFYING PRIOR CONVICTIONS AND WAS THUS A PERSISTENT OFFENDER VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL.**

- a. **A defendant has a constitutionally protected right to a jury determination of every element of the charged crime.**

The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83, *see also id.*, at 501 (Thomas J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing punishment of that crime upon a finding of some aggravating fact[,],...the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”) *See also Blakely*, 542 U.S. at 303-04; *Ring v.*

Arizona, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2003) (“A defendant may not be ‘expose[d]...to a penalty *exceeding* the maximum he would receive if punished according to the facts as reflected in the jury verdict alone.”, *quoting Apprendi*, 530 U. S. at 482-83 (emphasis in original).

Whether the State calls the fact which increases the sentence a “sentencing factor” and not an element is of no moment:

Our decision in *Apprendi* makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435.

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2552, 165 L.Ed.2d 466 (2006).

Here, the two prior convictions found by the court which elevated Mr. Riley to the status of a persistent offender were elements of the offense which were required to be proved beyond a reasonable doubt and found by a jury.

- c. **Whether Mr. Riley had two prior convictions they constituted qualifying or “strike” crimes was required to be determined by the jury beyond a reasonable doubt.**

RCW 9.94A.570 states: “Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole[.]” Without the persistent offender provision of the SRA, Mr. Riley would have been sentenced on second degree assault with an offender score of 7, and his standard range would have been 43 to 57 months, with the possibility of a twelve month enhancement. RCW 9A.36.021.

The persistent offender allegation, based upon Mr. Riley having two qualifying prior convictions, elevated his punishment to life imprisonment without the possibility of parole. RCW 9.94A.570 recognizes that the statutory maximum no longer applies for persistent offenders and they must be sentenced to life imprisonment once the two qualifying prior convictions are found.

Thus, Mr. Riley’s two qualifying prior convictions were facts that increased the maximum penalty for the crime charged. As such, the jury was required to find the existence of the prior convictions beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83.

It may be argued the “fact” that increased Mr. Riley’s sentence from a standard range to a persistent offender was the fact of a prior conviction, which was excluded in *Apprendi*. *Apprendi*, 530 U.S. at 489.

This argument overlooks two important factors:

First, the “exception” for prior convictions in *Apprendi* was taken from the Court’s decision in *Almendarez-Torrez v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Yet, the Court has retrenched from this position. In *Apprendi*, the Court criticized the “exception” for prior convictions, noting that it was arguable that *Almendarez-Torres* was incorrectly decided. *Apprendi*, 530 U.S. at 489.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for the purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. *Id.*

The Court also noted that *Almendarez-Torres* represented “at best an exceptional departure from the historic practice we have described.” *Id.* at 487. Further, the Court noted one of the reasons for the decision in *Almendarez-Torres* was the fact the defendant had pleaded guilty and admitted the prior convictions, thus mitigating “the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” *Id.* at 488. Finally, in *Ring*, the Court expanded *Apprendi*

so that it applied to *any* fact which increases the punishment beyond that authorized by the jury verdict, thus seemingly overruling *Almendarez-Torres sub silentio*. *Ring*, 536 U.S. at 607-09.

But more importantly in this case, it is not the simple “fact” of the two prior convictions that increases the punishment, but it extends beyond that to specific “types” of prior convictions. In order to qualify as a persistent offender it is not enough to simply have suffered two prior convictions, but the defendant must have suffered two prior convictions for felonies defined as “most serious offenses.” RCW 9.94A.030 (29), (31). Thus it is not simply the fact of the prior conviction. As a consequence, the “exception” for the fact of prior convictions enumerated in *Almendarez-Torres* does not apply.

d. Mr. Riley’s sentence as a persistent offender must be reversed and remanded for resentencing within the standard range.

The remedy for a court’s imposition of a sentence which exceeds the jury verdict is reversal of the sentence and remand for resentencing to a term authorized by the jury’s verdict. *Blakely*, 542 U.S. at 303-04; *Apprendi*, 530 U.S. at 482-83.

Here, the jury’s verdict following trial authorized a sentence for second degree assault. Since the jury was not required to find beyond a

reasonable doubt that Mr. Riley had suffered two prior convictions which constituted “most serious offenses,” the court could only sentence him to a maximum term of 57 months. This Court must reverse Mr. Riley’s sentence and remand for resentencing to a term authorized by the jury’s verdict.

E. CONCLUSION

For the foregoing reasons, Ken Riley respectfully requests that this Court reverse his conviction and remand this matter for a new, fair trial. IN the alternative, Mr. Riley requests that this court remand this matter for resentencing within the standard range. In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: August 29, 2008.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line. The signature is stylized and cursive.

PETER B. TILLER - WSBA 20835
Of Attorneys for Kenneth L. Riley

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. KENNETH L. RILEY, Appellant.	COURT OF APPEALS NO. 37407-2-II SUPERIOR COURT NO. 07-1-00368-6 CERTIFICATE OF HAND DELIVERY AND MAILING
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were hand delivered by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Kenneth L. Riley, Appellant, and Michael Golden, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on August 29, 2008, at the Centralia, Washington post office addressed as follows:

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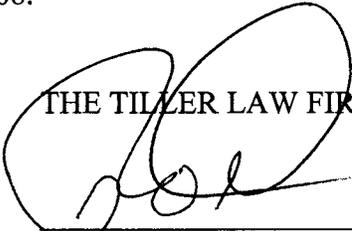
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