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COURT OF APPEALS DIVISION 11
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STATE OF WASHINGTON
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DEPUTY

State of Washington
Court of Appeals Division 11

State of Washington

vs

Colleen Mulvihill Edwards

The Honorable Anna Laurie
Superior Court of Kitsap County

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The state's main argument is that Colleen Edwards assignment of errors are without merit. This argument fails because 1) the facts of the case stated in the respondent's brief are not fully accurate as to the trial record, 2) the state fails to cite to the record and authority and 3) the cited law is flawed as to its application to this case.

II. REPLY ARGUMENT

A. REPLY TO STATE'S ARGUMENT THAT THE CHARGING DOCUMENT WAS SOMEHOW IMPROPER OR INCOMPLETE SHOULD BE DENIED AS IT IS CLEARLY WITHOUT MERIT.

Notice of Charging Document

The state's argument relies upon the fact that they claim they gave sufficient notice of the charges for trial with the first amended charging document at the hearing of August 9, 2006 CP 44-47. This argument fails because there is no notice of the amended charging hearing by the court. A first amended hearing (re-arraignment) was never held.

21 MR. ZAUG: And just for the record, the further
22 arraignments would be additional count of Assault 2 and
23 there are firearm enhancements on all of these -- on all
24 counts. RP 8/9/2011 page 2

The state contends that this exchange was sufficient to be a proper notice to the defendant. This argument is flawed. as the documents were filed only five days before the hearing. CP 44-47

In *State v Jennen*, 58 Wash 2d 171, 361 P 2d 73((1961) "It is conceded that that if there is a substantial amendment of an information it is necessary that the accused be rearraigned on the amended information." *State v Jennen*, 58 Wash 2d at 175.

In *State v Alferez*, 37 Wn App 508, 681 P 2d 859 (1984) “The harm occurs when the absence of arraignment results in failure to give the accused and his counsel sufficient notice and adequate opportunity to defend” *State v Alferez*, 37 Wn App at 516

Elements of the Crime Not Found in Charging Document

“The State did file a Second Amended information approximately 15 days before trial, but that information simply removed one count and thus changed the charges from two counts of Assault in the Second Degree with firearm enhancements down to one count of Assault in the Second Degree with firearm enhancement. See CP 44, 316” Respondent’s Brief page 15.

The state cites *State v. Kjorsvi* and *State v. Goodman*, to support their argument but Goodman supports a proper charging document.

In *State v Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004) “Under the first *Kjorsvik* prong we look solely to the face of the charging instrument. *Id* at 106. “Words in a charging instrument are read as a whole, constructed *accordingly to common sense*, and to include facts which are necessarily implied. *Id* at 109 (emphasis added); see also *State v Taylor*, 140 Wn 2d 229, 243, 996 P 2d 571 (2000). If the necessary elements are neither found nor fairly implied in the charging document , “we presume prejudice.”. *State v. Goodman*, 150 Wn.2d at 788

The state claims that the charging documents are sufficient and that they define each element of the crime, this argument is flawed because the state failed to cite every element of the charge *State v Davis*, 119 Wn 2d 657, 836 P 2d .1039 (1992) (exact statue, counts, victims, weapon, intent, method) In both *Davis* and *Goodman*, the court specifically stated that the charging document is only adequate only if all the essential elements of a crime, statutory and non non-statutory are included on the document, and gives actual notice to the defendant.

“Adequate notice of the specific crime charged is an absolute requirement of law. U.S. Const.. amend. VI,. Wash const. art 1 § 22: see also *State v Vangerpen*, 125 Wn 2d 762, 787, 88 P 2d 1127 (1995) (“a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory and are included in the document so as

to appraise the accused of the charges against him.’) I concur with the majority that the specific substance alleged must specifically charged.” *State v. Goodman*, 150 Wn.2d at 790-791

The state relies on *State v. Taylor*, and *State v. Chaten*, 84 Wn. App. 85, 925 P.2d 631 (1996) to argue their point.

In *State v Taylor*, 140 Wn.2d 229, 245, 996 P.2d 571 (2000):. “A common accepted definition of “assault” is that stated in Black’s Law Dictionary. An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward (the) person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt if not prevented.” *State v. Taylor*, 140 Wash.2d at 237

The element of the Kevlar vest and SAR pouch are missing from the first and second amended charging documents. In the first charging document there is are two counts, without any documentation by Mr. Peter Arthur as to his alleged status as a victim.

Amendment of Charging Document

“Edwards was initially charged with one count of assault in the second and the initial information did not contain a firearm enhancement. CP 623.” Respondent’s Brief, Page 14

Here the state admits its own error and hopes to correct it by its second amended charging document, however the delay caused the defendant’s counsel and the defendant prejudice due to lack of specificity and delay. The state claims that they have the right to amend the charging document before trial, however this argument is flawed because the delay of amendment is prejudicial.

“Amendment of information one day before trial to add counts and victims was untimely, a violation of speedy trial and forced defendant to choose between speedy trial and effective assistance of counsel, and was improper.”. WAPRAC 12 page 238

State v Calderon, 102 Wn 2d 348, 352, 684 P 2d 1293 (1984).

“Preaccusatorial delay in bringing charges may violate due process. *United State v Lovasco*, 431 US 783, 52 L Ed. 2d 752, 97 S Ct. 2044 (1977). *State v Calderon*, 102 Wn 2d at 352

The state relies on *State v. Penn*, 32 Wn. App. 911, 914, 650 P.2d 1111 (1982) to allow them to amend the charging document before the verdict in trial. This argument is flawed because the amendment is prejudicial because it does not give proper notice to defend the charge.

In *State v Penn*, 32 Wn. App. 911, 914, 650 P.2d 1111 (1982) The restrictions imposed upon the addition of further counts against the defendant during a criminal proceeding exist to protect the right to fully present the defenses and to relieve a defendant of the fear of retaliation because of the legal assertion of rights. *State v. Penn*, 32 Wn. App at 914

Prosecutorial Vindictiveness

The state relies on *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).to refute that prosecution vindictiveness had not occurred.

“Prosecutorial vindictiveness occurs when 'the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.'" *Korum*, 157 Wn.2d at 627”

The state then defends their actions by stating that it is only the “rough and tumble of legitimate plea bargaining”.but the filing of more serious charges is not certainly not the rough and tumble of bargaining down a plea.

State v McKenzie, 31 Wn App 450, 642 P 2d 760. (1981). “Prosecutorial vindictiveness is intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right.. “ *State v McKenzie*, 31 Wn App at 452

In *State v. Lee*, 69 Wn. App. 31, 35, 847 P.2d 25 (1993). “Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant’s lawful exercise of a procedural right. ” *State v Lee*, 69 Wn. App.at 35

In *State v Korum* 157 Wn.2d 614, 627, 141 P.3d 13 (2006) “However, neither Korum nor the Court of Appeals ever contended that the prosecutor lacked probable cause for the additional charges; or that the additional charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty.” *State v Korum*, 157 Wn.2d at 632-633

The addition of the firearm enhancement to the original deadly weapon charge is a more serious charge and filed after the defendant took over the case..`

Probable Cause Elements

The states argues that “Finally, Edwards claims that the charging document was improper because it was not supported by probable cause. App.'s Br. at 14. Edwards fails to explain how the probable cause was lacking. Furthermore, Edwards argument in this regard is moot, as a finding of probable cause is only required in order to support conditions of pre-trial release, and the conditions imposed in the present case have long since expired.” Respondent’s Brief at page 16

(DEPUTY STACY)

2 Q. Um, so that the four of you -- you came up with a plan.

3 What was that? Do you recall what that plan was?

4 A. Yes, we got our patrol rifles out. Uh, due to the fact

5 that she was down a road -- uh, sort of out of sight.

RP 11/3/2008 page 531

12 Q. So as you are approaching her, do you recall what you

13 saw? Do you kind of remember the scene at all?

14 A. Excuse me. From -- from the roadway, it was a driveway

15 that went north off the roadway and we saw, uh, I could

16 see her -- I couldn't see her gun, but I could see her

17 hand. It was quite a ways down the road or the driveway,

18 and we could see her. And like I said, we were already

19 told that she had a gun and she was pointing it at

20 someone. RP 11/3/2008 page 531

3 Q. Do you recall what you told her to do?

4 A. Yes. Uh, told her to -- we see you. Uh, you need to

5 drop the weapon.

6 And I saw her drop the gun at that point. And then I

7 just instructed her to walk backwards towards my voice,

8 and -- actually, there was another -- back up a little

9 bit. There was a male with her, also, who was armed,

19 Q. So did she comply with your commands?

(DEPUTY WALTHALL

13 Q. Okay. Deputy, how much visibility did you have of either
14 or both suspects at -- during that L-pattern?

15 A. Myself and the deputy in front of me had the greatest,
16 uh, view and the -- we just saw two subjects standing
17 down the road down below. They were some kind of
18 obscured, so we asked them to come out.

RP 11/4/2008 Page 666

Probable cause was lacking because there was no contraband or criminal activity that the arresting Deputy Stacy viewed and the weapon itself was not in plain view. There was no danger to deputies or anyone else involved. In discussing probable cause and warrantless search, detaining and arrest

In *State v Williams*, 102 Wn 2d 733, 689 P 2d 1065 (1984) “It is the intensity and scope of the of the intrusion that we find improper...Next, the amount of intrusion was significant, especially when considered in light of the alleged crime....The police did not articulate a reason for believing the petitioner was dangerous. He did not threaten the police, nor did the facts of the alleged crime justify the assumption that the suspect was armed or likely to harm the police, The facts simply do not support an inference that petitioner was dangerous. “ *State v Williams*, 102 Wn 2d at 739-740

The charging document failes to state the provide proper notice, fails to charge the elements of the alledged crime. The probable cause and charging document do not reflect the facts of the case. By delaying these amended charges the defendant was denied the opportunity to defend herself, thus creating prejudice and constitutional error.

B. REPLY TO THE STATE’S ARGUMENT THAT EDWARD’S CLAIMS REGARDING VARIOUS ALLEGED ERRORS AT TRIAL SHOULD BE DENIED BECAUSE THEY ARE CLEARLY WITHOUT MERIT

1. Reply to the State’s Argument regarding Alleged Discovery Error re: Defense Investigator Report

The state argues that they were not responsible for the trial error regarding the defense investigator's missing report and that there was no trial error, however this argument fails because the state is required to follow CrR 4.7. The state argument cites not argument for not complying with CrR 4.7.

"A prosecutor's discovery obligations are outlined in CrR 4.7"
Respondent's Brief page 19

(TESTIMONY OF MS. SANDY FRANCES)

8 Q. And Mr. Houser instructed you to do what interviews?

9 A. I interviewed, um -- let's see, this was 2006, so I
10 interviewed, um, some of the -- one of the State's
11 witnesses, um, I think his name is Paul Miller, and then
12 defense witness, Mr. Montfort.

13 Q. And Mr. Montfort is currently a prosecution witness?

14 A. Oh.

15 Q. But at that time he was a defense witness?

16 A. Yes. He was your witness I was instructed to interview
RP 11/10/2008 page 942

17 Q. [By Ms. Edwards] Ms. Francis, did you -- did you
18 corollate the recorded transcript with the actual
19 physical transcript there?

20 MR. ENRIGHT: Objection: Relevance.

21 THE COURT: Overruled.

22 A. Uh, no. Cathy Powell did.

23 Q. [By Ms. Edwards] So you did not compare what she
24 transcribed to what you had on tape?

25 A. No, that's what she does. RP 11/10/2008 page 949

20 Ms. Francis, did you do an interview with a

21 Mr. Michael Montfort -- Michael K. Montfort?

22 A. I did. RP 11/10/2008 page 951

In *State v DeWilde*, 12 Wn App 255, 529 P 2d 878, (1974) Prosecution is under an affirmative duty to disclose statements made by witness in regard to "unrelated" cases.

"It is clear that the prosecuting attorney's obligation under CrR 4.7(a)(4) extends to material and information within the knowledge, possession and control of members of his staff. The prosecutor must therefore, ensure that the flow of information with the prosecutors attorney's office is sufficient

so that the required disclosures may be made of *any* written or recorded statements of a person to be called as a witness.”

“The State argues that no error occurred. We disagree. This court has declared that “promptly” in CrR 4.7(h)(2) means at the moment of discovery or confirmation, even when that occurs during trial. ... The prosecuting attorney elected to keep this information from the counsel and from the trial judge until Terry Johnson revealed it on the stand. This tactic not only falls within the conduct barred by CrR 4.7(h)(2) it also runs contrary to the principles behind broad criminal discovery accepted in this state.” *State v Oughton*, 26 Wn App at 79

The state indicates that the burden of proof is on the defense to provide materials that are in the possession of the state. The issue here is not what defense counsel did not do, but what the state and the court failed to do. Ms. Francis testified that the interview took place and Mr. Montfort testified at trial. The state failed to provide the interview according to CrR 4.7. The state cites no legal authority that they are not responsible for providing documents under CrR 4.7.

2. Reply to the State’s Argument regarding Alleged Discovery Error re: “unedited” 911 call

The state relies on the argument that they did not offer the original unedited 911 tape at trial. This is a trial error.

“The State did not offer the 911 tape at trial.”
Brief of Respondent, page 22

The state argues that it is the defendant’s responsibility to acquire discovery evidence in their possession. Since the prosecution admitted they edited the 911 call, they had the original 911 call. The trial court ruling the defendant could listen RP 9/8/2008 to the tape does negate the fact that they did not provide the original unedited 911 call (tape).

State v Bryd, 24 Wash App 584, 629 P 2d 930 (1961) Tape of defendant erased denied defendant due process. Specific request made for tape.

State v Oughton, 26 Wn App 74, 612 P 2d 812 (1980) “The State argues that no error occurred. We disagree. This court has declared that “promptly” in CrR 4.7(h)(2) means at the moment of discovery or confirmation, even when that occurs during trial. . . . The prosecuting attorney elected to keep this information from the counsel and from the trial judge until Terry Johnson revealed it on the stand. This tactic not only falls within the conduct barred by CrR 4.7(h)(2) it also runs contrary to the principles behind broad criminal discovery accepted in this state.” *State v Oughton*, 26 Wn App at 79

Failure of prosecutor to disclose and preserve evidence that is material and favorable to the defendant will generally be held to violate the accused's constitutional right to a fair trial. *Limstrom v. Ladenburg*, 110 Wash.App. 133, 39 P.3d 351 (2002)

The state non disclosure of evidence caused prejudice because she did not have the same evidence as the state had access to and this evidence as the state and prevents a fair trial due to a violation of a constitutional right.¹

3. Reply to the State’s Argument regarding Alleged Trial Error re: Witness Reference to 911 Call

The prosecutor relies upon the argument that they did not enter the 911 call so there is no trial error in the fact that their witnesses referred to the call. This argument fails because if a witness refers to an event or an object that is limited by a pre trial court order or in this case motion in limine with a court order then error has occurred.

The state relies upon *State v. Foxhoven*, 161 Wn.2d 168,- 174, 163 P.3d 786 (2007) “Interpretation of an evidentiary rule is a question of law, which we review de novo. *State v. DeVincentis*, 1; Wn.2d 11, 17, 74 P.3d 119 (2003). When the trial court correctly interpreted the rule, we review the trial court decision to admit evidence under ER 404(b) for abuse discretion. *Id.*; *State v. Thang*, 145 Wn.2d 630, 642, 41P.3 1159 (2002). “Discretion is abused if it is exercised on untenable grounds or for

¹ Colleen Edwards filed a second request for discovery document in this case on 9/2/2008 CP 282-284 under CrR 4.7 to provide discovery evidence prior to trial.

untenable reasons." *Thang*, 1 Wn.2d at 642.... Failure to adhere toll requirements of an evidentiary rule can be considered a abuse of discretion." *State v. Foxhoven*, 161 Wn.2d at 174.

State v Sullivan, 69 Wn App 169, 847 P 2d 953 (1993) Police officer mentioned prohibited subject.

The state's argument fails because the 911 call was limited by pretrial motion in limine² and order, and the state repeatedly referred to the 911 call during witness testimony, opening and closing statements. The record shows these errors and the error has merit for the purposes of review.

4. Reply to the State's Argument regarding Alleged Trial Error re: Testimony Regarding Various Items

The state argues that because the exhibits are not entered there is no error in referring to them. The state failed to follow the court rules regarding evidence and exhibits be admitted correctly. The state cites *State v. McFarland*, 127 Wash.2d 322,332-33, 899 P.2d 1251 (1995).however McFarland does not indicate any reference to illustrative exhibits.

"Edwards is correct that the DVD was played for the jury and it does appear that the DVD was not actually entered as an exhibit. "
Respondent's Brief, page 24

The state admits that they played the DVD for the jury and that the DVD was not entered as an exhibit. The state states that there was no objection to the ruling by the court on the DVD being shown to the jury however this is incorrect

"Demonstrative Evidence, Is evidence that can be exhibited or shown to the court. It must be relevant and is marked as a exhibit for the party who

² "A typical in limine order excludes the challenged evidence. *Hyjek v. Anthony Industries*, 133 Wash. 2d 414, 416-17, 944 P.2d 1036 (1997) (court granted motion in limine to exclude evidence of subsequent remedial measures). WAPRAC 30, page 3-4.

produces it. " Paralegal Practice and Procedure, Practical Guide for the Legal Assistant

24 What we're going to do now, then --

25 MS. EDWARDS: Just for the record, Your Honor,

1 I'll just formally object. RP 11/4/2008 page 650-651

State v Cunningham, 93 Wash 2d 823, 613 P 2d 1139 (1980) "Since the transcripts were not admitted in evidence and were not used for illustrative purposes as exhibits, the primary issue of whether the trial court committed error by permitting their use solely as listening aids. A second issue is, assuming error is whether the error was prejudicial, thus requiring a new trial." *State v. Cunningham*, 93 Wash.2d at 834

State v. Stockmyer, 83 Wash. App. 77, 83-85, 920 P:2d 1201 (Dv. 2 1996) trial court properly excluded videotaped reenactment of crime as prejudicial.

The states claim that the trial errors are not without merit is incorrect. The jury heard and saw the DVD videotape and the error was objected to. The state does not address the spoilage of evidence issue raised by the appellant (bullets in evidence bullet fired on range by expert witness). RP 11/4/2008, see DVD)

"Courts hold that a prosecutor's duty under *Brady v. Maryland* to disclose exculpatory evidence includes an obligation to preserve such evidence from loss or destruction. Otherwise, the disclosure duty would be an empty formality which could be easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. Accordingly, a prosecutor's failure to preserve exculpatory evidence, even though the result of inadvertence, may constitute a violation of due process" Prosecutorial Misconduct Second Edition, Page 260

5. Reply to the State's Argument regarding Alleged Trial Error re: "Citizen' Arrest."

The state argues that the property was not an ancient burial ground and thus no felony occurred or probable cause existed. However this argument fails on several points.

"Edwards next raises several arguments relating to her claim that the property where the assault took place was an ancient Indian burial ground

and that she was making a citizen's arrest of Mr. Miller. Specifically, Edwards argues that the trial court erred in failing to instruct the jury that force is lawful when necessarily used by a person arresting another who has committed a felony and by limiting her ability to present evidence on a "citizen's arrest" and her claim that the property was an ancient Indian burial ground. App.'s Br. at 34-36, 55, 90"

Disturbance of Human Remains and Disturbance of Soil

The state fails to disprove the disturbance of any human remains. In fact the record includes numerous observations of disturbance of the property using heavy equipment. Disturbance of the human remains, soil and gravesite is a felony under both RCW 27.44, 27.53³ and 68.60.⁴

³ 27.53.060. Disturbing archaeological resource or site—Permit required—Conditions—Exceptions—Penalty (1) On the private and public lands of this state it shall be unlawful for any person, firm, corporation, or any agency or institution of the state or a political subdivision thereof to knowingly remove, alter, dig into, or excavate by use of any mechanical, hydraulic, or other means, or to damage, deface, or destroy any historic or prehistoric archaeological resource or site, or remove any archaeological object from such site, except for Indian graves, cairns, or any glyptic or painted record of any tribe or peoples, historic graves as defined in chapter 68.05 RCW, disturbances which shall be a class C felony punishable under chapter 9A.20 RCW, without having obtained a written permit from the director in such activities.

³ 68.60.040. Protection of cemeteries—Penalties (3) Every person who in a cemetery unlawfully or without right willfully opens a grave; removes personal effects of the decedent; removes all or portions of human remains; removes or damages caskets, surrounds, outer burial containers, or any other devices used in making the original burial; transports unlawfully removed human remains from the cemetery; or knowingly receives unlawfully removed human remains from the cemetery is guilty of a class C felony punishable under chapter 9A.20 RCW

68.60.050 Protection of historic graves—Penalty (1) Any person who knowingly removes, mutilates, defaces, injures, or destroys any historic grave shall be guilty of a class C felony punishable under chapter 9A.20 RCW. Persons disturbing historic graves through inadvertence, including disturbance through construction, shall reimburse the human remains under the supervision of the *office of archaeology and historic preservation. Expenses to reimburse such human remains are to be provided by the *office of archaeology and historic preservation to the extent the funds for this purpose are appropriated by the legislature.

68.56.060. Police authority—Who may exercise The sexton, superintendent or other person in charge of a cemetery, and such other persons as the cemetery authority designates have the authority of a police officer for the purpose of maintaining order, enforcing the rules and regulations of the cemetery association, the laws of the state, and

TESTIMONY OF PAUL MILLER

19 Q. [By Ms. Edwards] Mr. Miller, did you demolition a mobile
20 home on that site?

21 A. I just stated we -- that was part of cleaning the site.

22 Yes, we tore down an old manufactured home that was
23 mildew, rotten, ceiling was falling in. Yes, we did demo
24 it.

20 Q. [By Ms. Edwards] So, Mr. Miller, did you remove those
21 footers or footings?

22 A. Yes.

23 Q. Would that require disturbance of soil?

24 A. Yes. RP 11/3/2008 page 450-451

TESTIMONY OF MICHAEL MONTFORT

20 Q. [By Ms. Edwards] And can you tell the Court what you
21 observed?

22 A. Have you -- heavy machinery. Two pieces of heavy
23 machinery, an excavator, and a bulldozer, um, clearing
24 ground, digging trenches, that sort of thing.

25 Q. Digging trenches?

1 A. Uh-huh.

4 Q. Can you -- could you see how deep?

5 A. Approximately, 12 inches.

6 Q. Was there soil disturbed?

7 A. Dig a trench, it usually is.

10 Q. Mr. Montfort, did I ask you questions while talking to
11 the state archeologist about the condition of the
12 property?

13 A. Yes, ma'am.

14 Q. And do you recall what your general answers were?

15 A. Uh, the property had been cleared, um, of growth if -- if
16 the ground -- there was ground disturbance or -- um, any
17 shaving away of the ground surface due to bulldozer
18 activity to level the property, things like that.

RP 11/4/2008 page 622

TESTIMONY OF PAUL MILLER

2 Q. What permits were posted on that site?

3 A. Permits, I don't know. I seen a no trespassing sign.

4 Q. I'm asking you, were there any licenses, permits issued
5 by the County or the State at that site?

the ordinances of the city or county, within the cemetery over which he has charge, and within such radius as may be necessary to protect the cemetery property.

6 A. Not as I recall, no. I don't remember seeing anything
7 other than no trespassing sign.
17 Q. What I'm asking you is did you see any permits?
18 A. I just told you no. RP 11/3/2008 page 472

TESTIMONY OF MICHAEL MONTFORT

2 Q. And did you see any permits posted on that property in
3 those, say, from March 2006 to April 24 -- well, we'll
4 get to that one, say, April 23, 2006?
5 A. No, ma'am.
6 Q. Mr. Montfort, you have some experience in construction,
7 do you normally see a permit posted?
8 A. Yes, ma'am.
9 Q. And you saw no permits, correct?
10 A. Correct, no permits. RP 11/4/2008 page 612-614

Probable Cause to Arrest on Felony

The state then argues there was no probable cause to arrest, however this argument fails because of the case law.

State v Williams, 27 Wn. App. 848, 621 P.2d 176 (1980)“The probable cause standard for felonies applicable to police officers has been applied when the arrest is made by; a citizen. *State v. Darst*, 65 Wn.2d 808, 811-12, 399 P.2d 618 (1965); *State v. Jack*, 63 Wn.2d 632, 637, 388 P.2d 566 (1964). The Gluck standard applies when the arrest is made by a private citizen.” “A private person who has probable cause to believe that a felony has been committed by another may lawfully arrest that person. Probable cause exists where ti facts and circumstances within the private person’s knowledge and of which he has reasonably trustwortl information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed. *State v Williams*, 27 Wn App at 852-853

State v Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975). “Violation of the statue is a gross misdemeanor , but the statue also provides for the provides that the otherwise prohibited action does not apply when the person displaying the weapon is in the action of making or assisting of making a lawful arrest for the commission of a felony. RCW 9.41.270 (3) (d).” *State v Kerr*, 14 Wn App at 590

Probable Cause to Arrest by a Citizen on a Misdemeanor

TESTIMONY OF PAUL MILLER

2 Q. Okay. So tell me what happened that day?

10 And, uh, everything is fine, and I guess it was about
11 close to lunch, that's when Ms. Colleen Edwards came on
12 the site and proceeded to tell me that, um, I was
13 trespassing, you know. And I was like, uh --

RP 11/3/2008 page 410

1 So I seen Ms. Colleen Edwards come on site, and then
2 I proceeded to go up to her, and she told me that I was
3 trespassing and I needed to get off the property.

RP 11/3/2008 page 411

Wash. 2005. A "trespass" is an intrusion onto the property of another that interferes with the other's right to exclusive possession.—*Hosleder v. City of Renlon*, 117 P.3d 316, 155 Wash.2d 18 Wash. 1909. "Trespass" at The common law was the breaking of a close by force, and it was presumed that damages would accrue from the breaking into or penetrating such close, even if it was no more than the trampling of the herbage therein.—*Welch v. Seattle & M. R. Co.*, 105 P. 166, 56 Wash. 97 Washington Digest 2d, page 463

State v Henderickson, 98 Wash App 238, 244, 989 P 2d 1210 (1999)“A (private) citizen may arrest for misdemeanor only if it is committed in his presence.” *State v Henderickson*, 98 Wash App at 244

Lawful Use of Force in a Citizen's Arrest

The state argument relies on *State v Kerr* to determine the use of force issue in this case, however in *State v Kerr* the use of force was lethal and the initial property offense a misdemeanor. In *State v Kerr*, the defense claimed self defense with accidental excusable homicide.

TESTIMONY OF MICHAEL MONTFORT

8 Q. Okay. So what happened when he was coming towards you?

9 A. Um, Ms. Edwards, um, ordered him off the property.

10 Q. And how -- what was his reaction?

11 A. He says, well, I've got to call my boss, was his basic
12 reaction.

13 Q. Um, and what -- how did Ms. Edwards reply to that?

14 A. Um, initially she did not reply, I mean, forcefully at
15 all. However, um, when the second individual drove up in
16 a bulldozer, she held it in a low, ready position, which
17 is at about a 45-degree angle pointed towards the ground.

18 Q. Now, at any time did she raise the gun above that, that
19 you can recall?

“Excusable homicide, on the other hand, is defined by RCW 9A.48.150 as one "committed by accident or misfortune in doing any *lawful act by lawful means*, with ordinary caution and without any unlawful intent." (Italics ours.) A citizen may use deadly force in attempting to effect an arrest for a felony committed in his presence, just as an officer is so privileged, and the unintended death of the felon is excusable. *State v. Clarke, supra.*” *State v Kerr* 14 Wn. App at 588.

“One's right to use force to defend property or person is dependent upon what reasonably cautious and prudent person in similar circumstance would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff* (1980) 95 Wash.2d 385, 622 P.2d 1240”

State v Smith, 111 Wn.2d 1, 759 P.2d 372 (1988) “We do not have to look hard or far to find examples of the "lawful authority" of which RCW 9A.46.020 speaks. A casual perusal of our state's written laws reveals several instances in which an individual lawfully may threaten injury to another. The Court of Appeals notes the most obvious—a police officer apprehending a dangerous criminal. *State v. Smith*, 48 Wn. App. 33, 36, 737 P.2d 723 (1987). The officer's authority to shout "stop, or I'll shoot" derives from his power to "use all necessary means to effect [an] arrest", including force. RCW 10.31.050; *see also* RCW 9A.16.020(1); 9A.16.040.

Threats of bodily injury also lawfully may be made when circumstances justify violent action in self-defense. The use of force against another, including causing injury, is privileged when necessary to protect persons or property. RCW 9.01.200; 9A.16.020(3); 9A.16.050. An individual who is privileged to cause injury undeniably is privileged to threaten to do so. There may be other situations, ascertainable from statutes, the common law, or perhaps other "legal process", *see Gunwall*, at 69, in which a person lawfully may engage in the conduct that RCW 9A.46.020 criminalizes. We need not—and indeed should not—attempt to delineate such situations here, however. *See Landry v. Daley, supra* at 954, 960-67 (upholding various criminal provisions employing concept of "lawful authority" without identifying precisely the relevant sources of law)” *State v Smith*, 111 Wn.2d at 9

In *State v Miller*, 103 Wn.2d 792, 698 P.2d 554 (1985) The State contends that the common law gives store owners the right as private citizens to detain shoplifters.... While no statute grants store personnel the authority to arrest shoplifters, criminal and civil statutes provide a defense for store owners who reasonably detain a person to investigate shoplifting where they have probable cause. RCW 9A.16.080;¹ RCW 4.24.220. In

addition, RCW 9A.04-.060 provides that the common law is applicable where not repugnant to the state constitution or statutes. The affirmative right to detain shoplifters derives from the common law right of citizen arrest.).*State v Miller*, 103 Wn.2d at 795

United States v White, 648 F 2d 29, (D.C. Circuit) (1981). officer can draw and point weapon during investigatory stop and search on vehicle.

Review of Trial Court's Rulings

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court need not submit a possible defense to the trier of fact in a criminal case when it is not supported by the evidence. *State v. Kerr*, 14 Wn. App. 584, 587, 544 P.2d 38 (1975).” Respondent’s Brief page 26

A trial courts relevancy determinations are reviewed for manifest abuse of discretion.

Instruction of the Jury

15 MS. EDWARDS: Right. Okay. Just so we're on
16 the same page.
17 I'd want to advocate for this instruction because,
18 one, my testimony related that the cadaver search dogs,
19 they were certified, had noticed remains and indicated
20 remains; and, also, the second team of cadaver search
21 dogs who had no knowledge indicated remains. And also
22 Dr. Irish's testimony was that she had information from
23 her aunt that there were remains there.
RP11/12/2008 page 1096⁵

⁵ Canine Probable Cause & Evidence of Human Remains
State v Brockman, 37 Wash App 474, 682 P 2d 925 (1984) Arrest upheld. “The police officer were lead to the residence by a tracking dog.” *State v Brockman* 37 Wash App at 480=481

23 Q. [As read] Did your dogs detect indicate detect human
24 remains on that property?

25 A. Yes, they did. They detected 18 remains.

1 Q. Did a second team of dogs whose handler knew nothing
2 about that property indicate or detect human remains on
3 that property?

4 A. Yes. I brought in a second team from Canada. They knew
5 nothing about the remains. They knew nothing about what
6 they were looking for. They were certified cadaver
7 search dogs and handlers and I had them do -- look over

“A jury instruction which improperly shifts the burden of proof to the defendant violates due process and is a constitutional question which may be raised for the first time on appeal. *State v McCullum*, 98 Wn 2d 484, 488, 656 P 2d 1064 (1964).” *State v. Redwine*, 72 Wash App at 629

“The due process clause of the fourteenth amendment to the United States Constitution requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *Sandstrom v Montana*, 442 US 510, 520, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); *In Re Winship*, 387 U S 358, 364, 25 L Ed. 2d 368, 90 S. Ct. 1068 (1970), *State v. Redwine*, 72 Wash App at 629

“The trial judge attempted to instruct on the use of force by the appellant, but did not include the essential elements of reasonable belief of danger. The Appellants excepted to this to this omission. ...“We are of the opinion that the trial court’s instruction was incomplete and that the failure to instruct as urged by appellant constitutes reversible error/”. *State v. Redwine*, 62 Wn 2d at 277

In *State v Miller*, 141 Wash. 104, 105, 250 Pac. 645 (1926), “This instruction left it for the jury whether it was necessary for the appellants to use force in defending themselves, and as to the amount of force necessary for that purpose. This is not a correct statement of the law, for the jury might well have believed that the appellants were not justified in fact in using any force, or that they used more force than actually necessary. The true test, was what was the condition at the time of the assault was made; and the appellant right to resist force with force is dependable upon what a reasonably cautious and prudent man, situated as the appellants, would have done under the condition then existing. If the appellants at the time of the alleged assault upon them, as reasonably and ordinary cautious and prudent men, honestly believed they were in danger of great bodily harm,

8 the whole property and report what they found. They
9 found the identical things that my team had found.
RP 11/10/2008 page 1041-1042

State v Flories-Moreno, 72 Wn App 733 (1994) “Flores-Moreno claims that the dog's positive reaction cannot contribute to probable cause because the record inadequately demonstrates the dog's training and certification. Probable cause to search can be established by the positive reaction of a drug sniffing dog whose reliability has been shown. *State v Flories-Moreno*, 72 Wn App at 741s

State v Wolohan, 23 Wn App 813, 598 P 2d 421 (1979) “The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation or even inconvenience to the innocent citizen.” *State v Wolohan*, 23 Wn App at 820 “

they would have the right to resort to self defense, and their conduct is to be judged by their condition appearing to them at the time, not by the condition as it might appear to the jury in the light of of testimony before it.”

Since the evidence of a probable cause to arrest Mr. Miller and Mr. Arthur was present and had occurred in the presence of Colleen Edwards, she was authorized to arrest under RCW 27.44, 68.60, and 9A.20. The use of lawful force in an arrest is legal under 9A.16.020 and urse the use of self defense is also legal under the same statue. Because there was evidence, the jury should be been instructed properly in the use of force in self defense and citizen’s arrest and the jury instructions do not reflect that. CP 469-503, CP 504-528, CP 529-530.

6. Reply to the State’s Argument regarding Alleged Trial Error re: Defense Witness Kramer

The state claims that witnesses Stephanie Kramer and Charlie Sigo are defense witnesses and that service was defective but this avoids the issue raised of why the prosecutors office told the witnesses not to appear. The state does not address the fact that they contacted Stephanie Kramer and told her that she was under no obligation to testify, this is a serious move by the prosecutor office to do without the court’s knowledge and consent and certainly not the defenses knowledge and consent. Obviously if the prosecutor’s office had already told both witnesses NOT to appear. The state does not cite any legal authority for their argument or their actions.

10 THE COURT: All right. Ms. Edwards, let me ask
11 you, before we bring in the jury, what the situation is
12 with Ms. Kramer.
13 MS. EDWARDS: I sent Ms. Kramer an e-mail last

14 night and early this morning. I did check my e-mail this
15 morning and faxes, no response yet. Same with Mr. Sigo.
16 I sent them both e-mail and faxes last night and left
17 them messages and e-mails. If you would like me -- I
18 have my e-mails printed out.

19 THE COURT: All right. I take it you've not
20 spoken personally with Ms. Kramer.

21 MS. EDWARDS: I got home after five last night,
22 so I didn't get home until 6:30. So her answering -- I
23 don't have her home phone number, but I left her a
24 message on the state's, um -- her regular work number.

25 Same with Mr. Sigo. And I did leave a message with
1 the tribal attorney and will do my best. Of course, we
2 adjourn at noon, but I will keep trying to contact both
3 of them.

RP 11/6/2008 page 830-831

Additionally, the state testimony is that Ms. Kramer intended to testify at the trial, if this is so the court should have demanded her presence or at the least contacted her to remind her of her obligations to the court. The court did issue the subpoena and the court did not enforce their subpoenas, thus the defendant was not able to provide the needed testimony from Mr. Sigo or Ms. Kramer. This testimony was necessary and its exclusion was damaging to the defense's case.

State v Eller, 84 Wn 2d 90, 95 524 P 2d 242 (1974) "The Court of Appeals, in reversing the instant judgment and sentence relied upon *State v Edwards*, 68 Wn 2d 246, 412 P 2d 747 (1966). In that case, a motion for a continuance over the noon recess to permit defense counsel to ascertain why three defense witnesses had failed to respond to subpoenas was denied. We held this to be an error of a constitutional magnitude." *State v Eller*, 84 Wn 2d at 99.

State v Edwards, 68 Wn 2d 258, 412 P 2d 747 (1966)" "No rule of criminal procedure can or ought to be construed or applied so as to abridge a fundamental constitutional right. The unexpected refusal of the three subpoenaed witnesses to honor the subpoenas give defendant reasonable grounds to claim surprise at their failure to attend. Colluqoy between court and counsel considered in connection with the testimony showing that the absent witnesses possessed testimony and material knowledge of the facts in issue supplied an adequate predicate for granting the short recess and the issuance of process." *State v Edwards*, 68 Wn 2d 258

7. Reply to the State's Argument regarding Alleged Trial Error re: Defense Witness Hayes

The state argues that the testimony of defense witness Marty Hayes was properly denied based upon *State v. Clausing*, 147 Wn.2d 620,628-29,56 P.3d 550 (2002). However the court in *State v Clausing* did not say the jury should not hear the evidence, and receive testimony on the legalities of certain defense theories. In fact in *State v Clausing* stated that:

State v. Clausing, 147 Wn.2d 620,628-29,56 P.3d 550 (2002). “Dr. Clausing’s defense was that he delivered legend drugs only upon a physicians prescription—including prescriptions issued by him before his license was revoked. The legal validity of those prescriptions are, therefore, critical to his defense. The jury should, therefore, have received instructions on this point, rather than being asked to decide this question as a matter of fact.” ...“Legal questions are decided by the court, not the jury, for good reason. By arguing to the court, the lawyers have the opportunity to argue cannons of construction, applicable law, including case precedent; and all the other traditional elements that make up legal argument. A judge trained in law then decides whether or not the proposition is legally correct. And he or she can then craft an instruction for the jury. To allow a lay person to answer a legal question puts the lawyers in the impossible position of making these legal arguments to a lay jury. “ *State v Clausing*, 147 Wn.2d at 629 630

The states argues that Mr. Hayes testimony was properly denied by the court. However this argument fails when the evidence or the expert is properly qualified.

State v Ortis, 119 Wn 2d 294, 310, 831 P 2d 1060 (1992) “Hardin was clearly qualified to testify. Practical experience is sufficient to qualify a witness as an expert. *State v Smith*, 88 Wn 2d 639, 647, 564 P 2d 1154 (1977). Hardin has extensive training and experience as a tracker. For 23 years, he has worked as a special agent with the United States Border Patrol as an expert tracker and as a trainer and instructor in his field. For 8 of those 23 years, he was stationed on the Mexican border. He has been qualified as an expert By National Search and Rescue, which requires 8,000 to 10,000 hours of experience, as well as the United States Border Patrol, the United State’s Marshall’s Service and the Federal Bureau of

Investigation. Courts in California and Washington have previously recognized his expert status.” *State v Ortis*, 119 Wn 2d at 310.

The state next argues that any of her witnesses should not be allowed to testify as to the law and the right to bear arms, however this argument is in direct conflict with allowing the jury to her defense theories. The testimony of the expert on self defense and the right to keep and bear arms was denied and this prejudice the defendant in presenting her theories. .The evidence in this case shows the defendant was legally armed with a concealed weapons permit. The facts are she was assisting both law enforcement and the state archeologist (a state officer) and found two suspects committing crimes in her presence. RP 11/10/2008; 11/12/2008, CP 164-173

In *State v Sieyes*, 168 Wn.2d 276 (2010) our Supreme Court states:
“Article I, section 24 plainly guarantees an individual right to bear arms. “[T]here is quite explicit language about the ‘right of the individual citizen to bear arms in defense of himself.’ This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were not interested in being disarmed.”

“We have noted the individual right to bear arms under article I, section 24 may be broader than the Second Amendment but had not yet determined our provision's distant reaches when the Court decided *Heller*. See *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996) (plurality); *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984).

“RIGHT TO BEAR ARMS. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. /// In *Rupe* we suggested article I, section 24 “is facially broader than the Second Amendment, which restricts its reference to ‘a well regulated militia.’ ” *Rupe*, 101 Wn.2d at 706” *State v Sieyes*, 168 Wn.2d at 291-292

8. Reply to the State’s Argument regarding Alleged Trial Error re: “Intent.”

The state argues that the evidence is sufficient in the light most favorable

to the state to prove intent. The state cites *State v. Pirtle* 127 Wn.2d 628, 643, 904 P.2d 245 (1995) for their argument that the evidence in this case shows premeditation. This argument fails for two reasons, first assault is not murder, second there is evidence on from both the state and the defendant regarding lack of intent and lack of harm.

TESTIMONY OF PAUL MILLER

7 Q. You don't like me asking questions, but you are not
8 afraid of me, correct?

9 A. I'm not afraid of you, no. Why would I be afraid of you?
RP 11/3/08, Page 482

TESTIMONY OF MICHAEL MONTFORT

2 Q. Mr. Montfort, on the afternoon -- approximately,
3 afternoon, after I talked to the archeologist and/or law
4 enforcement, whichever one came first, what occurred
5 next?

6 A. The, um -- we discussed what would go on next, and you
7 said we need to go to the property and -- and, um -- um,
8 remove those construction workers from their -- from
9 their duties -- from what they were doing.

10 Q. Mr. Montfort, did I ask you questions while talking to
11 the state archeologist about the condition of the
12 property?

13 A. Yes, ma'am.

14 Q. And do you recall what your general answers were?

15 A. Uh, the property had been cleared, um, of growth if -- if
16 the ground -- there was ground disturbance or -- um, any
17 shaving away of the ground surface due to bulldozer
18 activity to level the property, things like that.

RP 11/4/2008 page 622

(CROSS EXAMINATION OF MONTFORT [By Ms. Edwards])

4 Mr. Montfort, were you worried when I drew my weapon?

5 Were you worried that I would harm you?

6 A. No, ma'am.

7 Q. Were you worried that I would harm someone else without
8 cause?

9 A. No, ma'am.

RP 11/6/2008, page 869

TESTIMONY OF COLLEEN EDWARDS

19 Q. On April 24, 2006, did you harm anyone?

20 A. Absolutely not. RP 11/10/2008 page 1027

Colleen Edwards testified as to her objective was to document and photograph for the state and tribal authorities the damage to the human remains.

RP 11/10/2008 page 1023-1024, EX 16.

State v. Brown, 94 Wash.App. 327, 972 P.2d 112 (1999) “In some instances, legislature intent with respect to the type of mental capability that must accompany a particular mental element of a given degree of a crime is clear from the wording from the wording of the statute. In defining the various degrees of assault, the Legislature, has provided,If the person intentionally assaults another and thereby recklessly inflicts substantial bodily harm, he or she is guilty of second degree assault. RCW 9A.36.021(1)(a)..... *State v Brown*, 94 Wash.App at 338

The state relies on *State v. Pirtle* to support their argument that the that evidence was sufficient regarding premeditation of the intent to kill.

“Premeditation must involve “more than a moment of time” RCW 9A.32.020(1), but mere opportunity to deliberate is not sufficient in support of a finding of premeditation. Rather, premeditation is “the deliberate formation of and reduction upon the intent to take a human life.” and involves “the mental processes of thinking beforehand, deliberation, reflection, weighting, or reasoning for a period of time, however short.... Four characteristics of the crime are particularly relevant to establish premeditation, motive, procurement of a weapon, stealth, and the method of killing” *State v. Pirtle*, 127 Wn.2d at 644

Contrast this testimony of the defendant in *Pirtle* (where the defendant plead guilty and admitted planned his attack and cut the victims throats.

14 Q. Did Mr. Miller appear to be afraid of you on April 24, .
15 2006?

16 A. No, he did not. He -- he laughed. He thought it was
17 funny. What he did -- what he and his associate did. He
18 thought it was funny. And I -- I did not think it was
19 funny. I was horrified at the amount of damage that had
20 happened to things, so he was not afraid of me at any
21 time. RP 11/10/2008 page 1038- 1039

The intent of a crime must be connected to the action of an illegal act, but in this case the defendant had not performed an illegal act nor was there any intention of one. Thus the jury required instruction on intent and did not receive it. CP 469-503, CP 504-528, CP 529-530

State v Acosta, 101 Wash 2d 612, 683 P 2d 1089, (1984) “We reached a similar result in *McCullum*. The issue in *McCullum* was whether the State in a first degree murder case must disprove self defense when the issue is properly raised. There we noted that the statutory definition of intent requires that the defendant act, “with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a), that is, that the defendant act “unlawfully”. See *McCullum*, at 495. Since a person acting in self defense acts lawfully, we held that self defense negates intent, and that the State must therefore disprove self defense when the issue is properly raised.” *State v Acosta*, 101 Wash 2d at 617

State v Austin, 59 Wash App 186, 796 P 2d, (1990) (Handed gun to trooper) “Austin’s testimony that he did not intend to cause apprehension and fear was revelant. It was directly relevant to the intent element, and also tended to show that the trooper’s apprehension was not reasonable. See ER 401. The trial court determined, based upon an erroneous interrutation of *Krup*, that Austin’s subjective state of mind was irrelevant. Thus the trial court erred in ruling that the evidence was not admissible. Since the evidence was material to Austin’s defense, it was a denial of due process to exclude it..” *State v. Austin*, 59 Wash App at 194

State v Bryd, 24 Wash App 584, 629 P 2d 930 (1961) “It is not enough to instruct a jury that an assault requires an intentional unlawful act, because given the circumstances, Bryd’s act of drawing the gun could be found to be an unlawful intention act. Even where an act is done unlawfully, and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told. ... Instructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is. *State v Davis*, 27 Wn App 498, 506, 618 P 2d 1034 (1980).” *State v Bryd*, 24 Wash App at 782

When the jury is not properly instructed the defendant is prejudiced.

9. Reply to the State’s Argument regarding Alleged Trial Error re: Defense of Property

The state argues that because the interest in the property is not claimed by Colleen Edwards, the defense of property is not available. However not is not a correct statement of the facts. The state cites no authority for their arguments. The facts are that Colleen Edwards never denied her claim or interest in the property.

TESTIMONY OF MICHAEL MONTFORT

6 Q. [By Ms. Edwards] Mr. Montfort, in your duties in 2004,
7 in the civil case, in the post divorce case, where you
8 were guarding or protecting me and a property; is that
9 correct?

10 A. Oh, yes, ma'am; that's correct.

11 Q. Why were you guarding that property?

12 MR. ENRIGHT: Objection: Relevance.

RP 11/4/2008 page 591

15 THE DEFENDANT: Okay. That -- that property, as
16 we well know is -- has been in dispute. Um, I don't
17 know -- I don't -- I still claim an interest in it. That
18 property is the property on Anatevka. RP 2/13/2009 page 9

TESTIMONY OF PATRICK HALL

4 Q. [By Ms. Edwards] Mr. Hall, did you research, or any
5 person you hired to research, including an attorney or a
6 title company back to the statutory warranty deed on that
7 property?

8 MR. ENRIGHT: Objection: Relevance.

9 THE COURT: Sustained.

10 Q. [By Ms. Edwards] Mr. Hall, did you contact anyone from
11 the Suquamish Tribe?

12 MR. ENRIGHT: Objection: Relevance.

13 THE COURT: Overruled.

14 A. No, I did not. RP 11/3/2008 page 512

Coffel v Callaham County, 58 Wash App 517, 794 P 2d 512 (1990)
“What is more, Coffel and Knodel would have been within their rights to use reasonable force to resist Caldwell’s invasion and destruction of property. RCW 9A.16.020(3); *Coffel v Callaham County*, 58 Wash App at 524

State v Fischer, 23 Wn App 756, 761, 598 P 2d 742 (1979). “The reasonableness of that force is measured by the common law of this state, limitations imposed by RCW 9A.16.020 and the judicial interpretations of that statute. If defense of property becomes an issue on retrial, instructions should be drawn from the appropriate sources. *State v Murphy*, 7 Wn App 505, 514, 500 P 2d 742 (1972),” *State v Fischer* 23 Wn App at 761

10. Reply to the State’s Argument regarding Alleged Trial Error re: Defense Exhibits

The state argues that the relevance of the defense exhibits is unclear and the court rulings are correct. They give the example of the Washington State Criminal Justice (WSCJC) Handbook as being hearsay. However this argument fails because the handbook is the standard for the training Ms. Edwards received. It is the standard for armed private investigators and armed security guards. The manual is also used for law enforcement training. It illustrates the use of force and deadly force. The jury was not allowed to see the Washington Criminal Justice Training Commission Handbook.

14 Q. And my certification, given the state standards no matter
15 who I took with, would be the same, correct, as what you
16 would teach? Maybe not exact words but the same
17 curriculum, correct?
18 A. When I went through the Washington State Criminal Justice
19 Training Commissions, security guard, private
20 investigator certification course as an instructor we
21 were, for the most part, mandated to teach the same exact
22 curriculum regardless of who signed the certificate. So
23 it would be the same instruction, yes. RP 11/10/2008 page 1010

15 Q. And, Ms. Edwards, we talked a little bit about your
16 training with firearms. You are, in fact, trained --
17 you had your manual here. You're, in fact, taught that
18 you don't draw your weapon unless you are prepared to
19 kill someone?
20 A. That is not what the manual says. Would you like to
21 enter the manual into evidence?
22 Q. I am not offering the manual into evidence.
23 A. That is not what the manual says. RP 11/12/2008 page 1060

The state cites no legal authority for their argument. Colleen Edwards cites the following authority:

State v Gonzales, 24 Wn App 437, 604 P 2d 168 (1979) “At common law in general, a private person may [rest for a misdemeanor only if it constitutes a breach of the peace and is committed in his presence. 5 Am. Jur. 2d *kests* § 35 (1962). Numerous states, however, have statutes which permit the owner of a mercantile establishment or his employee to arrest for shoplifting committed in his presence.). While Washington has no statute concerning citizen (arrests, the common law is applicable where not repugnant to the provisions of the state constitution or statutes.The arrest was lawful and therefore the trial court properly denied Gonzales' motion to suppress evidence of his possession of the leather coat.” *State V Gonzales*, 24 Wn App at 439-440

The relationship is the standard for citizen’s arrest and use of force can be found in the Washington State Criminal Justice Training Comiissson Handbook. It does cite the law 9A.16.020 but why should it not, it is a training manual for armed security guards and private investigators. Colleen Edwards submitted documents and certificates that she was certified under the Washington State Criminal Justice Training Commisison. EX

11. Reply to the State’s Argument regarding Alleged Trial Error re: State's Exhibits

“With respect to the Kevlar vest, the State explained below that the vest was evidence that Ms. Edwards went to the property with the intent to enter into a confrontation and that the vest was evidence of that intent. RP (10/10/08) 30.” Respondent’s Brief page 37

CROSS EXAMINATION OF DEPUTY MALLOQUE

7 Q. Deputy Malloque, do you wear ballistic body armor,

8 Kevlar, any of those names?

9 A. I wear -- wear a vest, yes.

10 Q. Good.

11 Um, do you -- why do you wear Kevlar?

12 A. To -- to help protect myself from possible gunshots.

RP 11/5/2008 Page 710

25 Mr. Montfort, the Kevlar vest, Exhibit No. 1, it's
1 blue and black, or -- the prosecution has named it a
2 ballistic vest. Did I ever wear that prior to April 24,
3 2006?
4 A. Yes, ma'am.
5 Q. Approximately, on how many occasions do you personally
6 know about?
7 A. Approximately 12 to 15. I can't be exactly sure, but
8 those things I usually just miss, I look at, make sure
9 you are protected and I pass on to other things.
10 Q. Mr. Montfort, did you purchase that Kevlar vest on my
11 behalf?
12 A. Yes, ma'am, I did.
13 Q. And why -- not getting into any -- who or what any
14 threats came from, but why did you do that?
15 MR. ENRIGHT: Objection: Asked and answered.
16 THE COURT: Sustained.
17 Q. [By Ms. Edwards] Mr. Montfort, generally, why do you put
18 a protectee -- and perhaps you can explain to the jury
19 what a protectee is -- why do you put a protectee in a
20 Kevlar vest?
21 A. Um, the protectee -- you place them in a Kevlar vest to
22 stop handgun rounds primarily from, um, injuring --
23 injuring the protectee. That was the greatest threat at
24 the time and I felt that was the best way to protect her,
25 um, should someone come by and take a shot at her. It
1 leaves you protected from the neck to the groin area.
RP 11/4/2008 page 602-604

“Merely carrying an item, does not usually involve identifiable conduct: it is not an overt movement. Thus, “furtively carry” is an awkward term, difficult to visualize as a movement. The following phrase, “with intent to conceal”, helps to a degree. The drafters of the statute must have had in mind a movement to conceal a weapon, done furtively, in a way meant to escape notice. Otherwise there are all too many easily imagined instances of innocent conduct involving the carrying of pocket knives, kitchen knives, letter openers, pepper sprays, scissors, common tools and other dangerous objects with intent to conceal them in, for example, a pocket, handbag, shopping bag or boot.” *State v Myles*, 75 Wn App 643, 879 P 2d 968 (1984) *State v Myles*, 75 Wn App at 647

The state did not produce any evidence that the Kevlar vest, the SAR pouch were used to in the commission of a crime nor were these items connected to intent. Nor was the Kevlar vest specified as an illegal

weapon on the charging or amended charging documents. The state failed to present evidence of any nexus of an alleged crime.

"Evidence may be unfairly prejudicial under Wash. R. Evid. 403 if it is evidence 'dragged in' for the sake of its prejudicial effect or is likely to trigger an emotional response rather than a rational decision among the jurors."; evidence not unfairly prejudicial in this case). WAPRAC 30 page 18

State v Eckenrode, 159 Wn 2d 488, 150 P 3d 1116 (2007) But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. *State v Eckenrode*, 159 Wn 2d at 493

Courts are especially careful in this area because of the constitutional right to bear arms. U.S. Const, amend. II; Const. art. I, § 24; *see also State v. Rupe*, 101 Wn.2d 664, [703-08, 683 P.2d 571 (1984) ("constitutionally protected behavior cannot be the basis of criminal punishment"; thus, courts must be protective of the right to bear arms during criminal trials implicating gun possession); *State v. Johnson*, 94 Wn. App. 882, 892-97, 974 P.2d 855 (1999) inappropriate to send deadly weapon enhancement to the jury without some showing of both accessibility and nexus). but we are also mindful of the legislative purpose in treating the deadly weapons enhancement: to recognize that armed crime, including having weapons available to protect contraband, imposes particular risks of danger on society.. *State v Eckenrode*, 159 Wn 2d at 493

However, I write separately to express concern over the state of the law regarding the meaning of "armed" and the nexus requirement connecting a firearm with a crime. Our cases fail to establish clear standards, and many of the opinions from this court on these issues may overlook a basic Washington constitutional right. Since the right of the individual citizen to bear arms is constitutionally guaranteed in article I, section 24, any regulation or penalty where a firearm is a factor must be carefully crafted. Because our case law regarding what it means to be "armed" is confusing, our juries (and trial courts) are often left to struggle with potentially incomplete jury instructions. This vagueness is unacceptable when dealing with such a constitutionally protected area. *State v Eckenrode*, 159 Wn 2d at 499

State v Rupe, 101 Wn 2d 664, 683 P 2d 571 (1984) The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed

body of men. This constitutional provision is facially broader than the Second Amendment, which restricts its reference to "a well regulated militia."

Although we do not decide the parameters of this right, here, defendant's behavior—possession of legal weapons— falls squarely within the confines of the right guaranteed by Const, art. 1, § 24. Defendant was thus entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use. Our conclusion follows from the clear language of Washington's constitution. In addition, it coincides with the interpretation placed on a similar provision contained in the Oregon constitution. Oregon Const, art. 1, § 27 states:

The people shall have the right to bear arms for the defence (sic) of themselves, and the State, but the Military shall be kept in strict subordination to the civil power....In *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980), the Oregon Supreme Court held that this language protects the right of an individual to possess weapons. This ruling was reaffirmed in *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981). In *Blocker*, the court noted that their constitution also protects the citizen's right to possess weapons outside the home. *See also* Comment, *The Impact of State Constitutional Right To Bear Arms Provisions of State Gun Control Legislation*, 38 U. Chi. L. Rev. 185 (1970). *State v Rupe*, 101 Wn 2d at 707

State v Sabala, 44 Wn App 444, 723 P 2d 5 (1986) "Armed" and "displayed" do not mean the same. Under *Webster's Third New International Dictionary* (1976) "armed" means "furnished with weapons of offense or defense: fortified, equipped . . . furnished with something that provides security, strength, or efficacy ; whereas, at page 654, "display" means "to spread before the view: exhibit to the sight or mind", "an exhibiting or showing of something". *State v Sabala*, 44 Wn App at 447-448

The state contends the items were used in the commission of a crime but there is no crime to attach them to. There is no evidence to show that Kevlar, the SAR vest were instruments used in a crime. There is no evidence that the firearm was used in connection with a crime, there must be a nexus and there is none.

12. Reply to the State's Argument regarding Alleged Trial Error re: Self Defense Instructions

The state argues that the trial court provided the proper jury instructions as specified in the clerk's papers. CP 469-503, CP 504-528, CP 529-530. They do not cite any further to the record nor do they cite any authority. The state argument fails because the instructions on relating to self defense, defense of other, instruction on use of force and the instructions on any other defense related to property, human remains or historic graves is missing.

PROPOSED JURY INSTRUCTIONS

23 THE COURT: I will not be giving proposed
24 Instructions 17, 18 and 19, which are interrelated.
25 These deal with the citizen's arrest offense that
1 Ms. Edwards has been promoting throughout this trial and
2 I drafted these in response to that promotion. However,
3 there has been no evidence whatsoever that there was a
4 knowing disturbance of an Indian -- a Native Indian
5 grave. There was certainly testimony that the dogs had
6 found human remains, but there was nothing presented to
7 the jury that indicated these were Indian remains or
8 that this is an Indian burial site.

9 Further, there has been no testimony that Mr. Miller
10 or Mr. Arthur were detained by Ms. Edwards, and the
11 elements of this defense are clearly set out in the
12 statute, and she has failed in her burden of production
13 on those points, and, consequently, is not entitled to
14 an instruction. And I will remove those from the packet
15 before the jury gets them.

16 Turning now to --

17 MS. EDWARDS: And for the record, I would like
18 to make a formal objection, of course, to the removal of
19 those instructions. And also the fact that Mr. Arthur
20 was not here to testify, uh, in person. And -- also, I
21 would just like to state for the record that detention
22 is not mandatory. In fact, there are case laws that say
23 that excessive detention by a civilian is -- excessively
24 long detention is illegal. RP 11/12/2008 Page 1099-1100

State v. Redwine, 72 Wash App 625, 865 P 2d 552, (1984)
Property owner pointed shotgun at process server who refused to
leave.

“To be entitled to an instruction on self-defense, the defendant need only prove “any evidence” of self defense. *Gogolin* at 643. When some evidence of self defense is presented, the jury should be instructed that the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. *McCullum* at 500. the jury must be informed in an unambiguous way that the State must prove the absence of self defense beyond a reasonable doubt. *Acosta* at 621. ...In this case, the trial court concluded that the testimony of the presented by Mr. Redwine did not was sufficient to support a self-defense instruction, instruction 7. As to the fourth degree assault, Mr. Redwine produced evidence Mr. Hines remained on the property, refusing to leave after service of the papers. As to the second degree assault, Mr. Redwine presented evidence that he believed that Mr. Hines was reaching for a pistol. We agree this evidence is sufficient to require an instruction on lawful use of force on both charges.” ...“Mr. Redwine presented sufficient evidence to present the issue of self defense to the jury, A reasonable juror could have mistakenly imputed upon Mr. Redwine the burden of proving self defense. Because the jury instructions in the present case may well have affected the final outcome of the case, the error is not harmless beyond a reasonable doubt. *McCullen* at 498.” *State v. Redwine*, 72 Wash App at 630-631⁶

In *State v Miller*, 141 Wash. 104, 105, 250 Pac. 645 (1926), “This instruction left it for the jury whether it was necessary for the appellants to use force in defending themselves, and as to the amount of force necessary for that purpose. This is not a correct statement of the law, for the jury might well have believed that the appellants were not justified in fact in using any force, or that they used more force than actually necessary. The true test, was what was the condition at the time of the assault was made; and the appellant right to resist force with force is dependable upon what a reasonably cautious and prudent man, situated as the appellants, would have done under the condition then existing. If the appellants at the time of the alledged assault upon them, as reasonably and ordinary cautious and prudent men, honestly believed they were in danger of great bodily harm, they would have the right to resort to self defense, and their conduct is to be judged by their condition appearing to them at the time, not by the

⁶ “A jury instruction which improperly shifts the burden of proof to the defendant violates due process and is a constitutional question which may be raised for the first time on appeal. *State v McCullum*, 98 Wn 2d 484, 488, 656 P 2d 1064 (1964).” “The due process clause of the fourteenth amendment to the United States Constitution requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged.” *State v. Redwine*, 72 Wash App at 629 “The trial judge attempted to instruct on the use of force by the appellant, but did not include the essential elements of reasonable belief of danger. The Appellants excepted to this to this omission.” “We are of the opinion that the trial court’s instruction was incomplete and that the failure to instruct as urged by appellant constitutes reversible error.” *State v. Redwine*, 62 Wn 2d at 277

condition as it might appear to the jury in the light of of testimony before it.” *State v Miller*, 141 Wash at 795

5 THE COURT: And that will be used.
6 The next is the special verdict form Instruction 23;
7 11 was crossed out. And that goes together with
8 proposed Instruction No. 24, which is 12 crossed out.
9 Any objection to either of those two proposed
10 instructions, Ms. Edwards?

11 MS. EDWARDS: I would oppose on the facts that
12 the firearms enhancement charge -- if I'm on the correct
13 one, which I think I am -- that the firearms enhancement
14 charge was not initially charged until late in the case.
15 If I'm on the correct set of instructions.

16 THE COURT: Any other objection to those two
17 instructions?

18 MS. EDWARDS: Yes, I would object to the
19 circumstances under which the firearm was found. And
20 the objection would be that the evidence of the firearm
21 and ammunition seem to have some problematic -- and was
22 not -- and the State has failed to enter as evidence the
23 ammunition and magazines.

24 THE COURT: Mr. Enright, any response?

25 MR. ENRIGHT: These instructions are correct
1 statements of the law, and I think the Court should give
2 these instructions.

3 THE COURT: We've already talked a bit about the
4 idea whether the gun was loaded or not. And based on
5 those earlier rulings, as well as my understanding of
6 the law, both of these are proper instructions and they
7 will be given. RP 11/12/2008 Page 1112-1113

State v Swenson, 62 Wn 2d 259, 382 P 2d 614. (1963) “The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, although it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinary cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.” *State v Swenson*, 62 Wn 2d at 277

Self-defense instruction concerning burden on prosecution of proving each element of crime beyond reasonable doubt and permitting defendant to argue his theory of defense were sufficient under then-existing law, which did not require instruction as to state's burden of proving absence of self-

defense beyond reasonable doubt. *State v. Mines* (1983) 35 Wash.App. 932, 671 P.2d 273, West RCWA 9A.16.020, page 136

Where defense was self-defense in trial for assault and battery, instruction to find for defendant if jury "believed from the evidence, beyond a reasonable doubt," that prosecuting witness was first aggressor, and that defendant used only such force as was necessary, is erroneous, as, if jury had reasonable doubt as to who was aggressor, and also as to matter of unnecessary force, it should acquit.

State v. Dunn (1900) West RCWA 9A.16.020, page 136

State v. Byrd, 72 Wash App 774 (1994) The reason for the rule that juries must be instructed on the elements is identical to the technical term rule: juries must be informed what the applicable law is before they can make a meaningful decision as to guilty or innocence. We cannot presume that jurors already know and understand the law; therefore courts carefully instruct jurors on the law, and presume they then understand and follow these instructions, *E.g. Bordinoski v Bergner*, 97 Wn 2d 335, 342, 644 P 2d 1173 (1982). No possible purpose is served by allowing juries to deliberate in ignorance of the law." *State v. Byrd*, 72 Wash App at 778-779

"It is not enough to instruct a jury that an assault requires an intentional unlawful act, because given the circumstances, Byrd's act of drawing the gun could be found to be an unlawful intention act. Even where an act is done unlawfully, and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told.

Instructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is. *State v. Davis*, 27 Wn App 498, 506, 618 P 2d 1034 (1980)"

"There is a clear deference between an intentional act which results in creating in another a reasonable apprehension and fear of bodily injury and an intentional act which is done for the purposes and with the intent of creating in another a reasonable apprehension and fear of bodily injury. Because an essential requirement was not clearly stated in the instructions given in this case, we are compelled to conclude that Byrd did not receive a fair trial."

"An instruction which prejudicially relieves the State of its burden of proof or prejudicially deprives the defendant of the benefit of having the jury pass upon a significant and disputed issue impacts a defendant's right to a fair trial. *State v. Van Pilon*, 32 Wn App 944, 948, 651 P 2d 234 (1982)." *State v. Byrd*, 72 Wash App at 782

13. Reply to the State's Argument regarding Alleged Trial Error re: Denial of Continuance Requested on First Day

The state relies on *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).to support their argument that the continuance was properly denied and should not be reviewed except under an abuse of discretion standard by this court. The state's argument fails because the abuse of discretion standard involves the rights of the defendant to present the defense. The court set a standard that was higher for the defendant pro se than their own defense counsel. This kind of treatment is prejudicial.

Colleen Edwards was not allowed a continuance based upon the fact that the court was exhibiting prejudice and discriminatory practices. Prejudicial and discriminatory practices are court errors. The court had the power to grant the continuance and the need.

.State v Colbert, 17 Wn App 658, 564 P 2d 1182 (1977) “.the court has the discretion, both inherent and assistive in the rule to grant continuances and delays under theses circumstances.” Page 664

In *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)“Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the case more or less probable than without the evidence. “ER 401, *Thomas*, 150 Wn 2d at 858.....Trial courts generally have the discretion to grant or deny continuances, *State v Adamski*, 111 Wn 2d 574, 577, 761 P 2d 621 (1988) ...But such discretion is abused when the trial court's decision “is manifestly unreasonably, or is exercised on untenable grounds, or for untenable reasons. “*State v. Downing*, 151 Wn.2d at 277-278

The state argues that enough time had gone on with this case and that the defendant now pro se had adequate GR 33 accomodatons, but here the state argues that a GR 33 accommodation is the same as a medical opinion and need for treatment. They are not the same thing. GR 33 accommodations do not

compensate for a medical emergency, they only compensate for disability conditions that can be compensated for. The emergency room doctor had stated his medical recommendations to Ms. Edwards and to her friend, Mr. Nichols who contacted the court regarding Ms. Edwards medical needs. The continuance should have been granted and the error was prejudicial to Colleen Edwards physical and mental abilities during trial.

14. Reply to the State's Argument regarding Alleged Trial Error re: Cumulative Error

The state relies on *State v. Hodges*, 118 Wn. App. 668,673-74,77 P.3d 375 (2003), *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004), and *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by 123 Wn.2d 737, 870 P.2d 964 (1994) to claim the there were no prejudicial and cumulative errors. In *State v. Hodges* "The cumulative error doctrine applies only when several trial error occurred which standing alone, may not be sufficient to justify a reversal but when combined together, may deny a defendant a fair trial." *State v. Hodges*, 118 Wn. App. at ,673-674

In *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). "A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *State v. Saunders* 120 Wn. App.at 626

In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, (1994) "...the cumulative error was so prejudicial as to require a new trial. See *Walker v Eagle*, 703 P 2d 959, 963 (6th Cir.) (errors may cumulatively produce a trial that is fundamentally unfair.)" *In re Pers. Restraint of Lord*, 123 Wn.2d at 332

However the State's arguments fail because prejudicial error did occur and this error was cumulative. When there is prejudicial error and it is cumulative, the trial becomes fundamentally unfair. The record indicated the following errors: Colleen Edwards shows the errors are present, prejudicial and cumulative. When prejudicial errors are present, they accumulate having a negative effect on a fair

trial, justice and indicate the need for a new trial.

C. REPLY TO THE STATE'S ARGUMENT THAT EDWARDS' VARIOUS CLAIMS REGARDING HER SENTENCING SHOULD BE DENIED AS THEY ARE CLEARLY WITHOUT MERIT

The state argues that Colleen Edwards claims regarding her sentencing should be denied as they are without merit.

Denial of Continuance for Preparation & Counsel

The state argues that the trial court properly denied counsel at the sentencing hearing. The state relies on *State v. DeWeese*, 117 Wn.2d 369,376-77, 816 P.2d 1 (1991). however this argument fails because *State v DeWeese* does not even address a pro se right to counsel during sentencing. The case addresses only a pro se waiver of counsel during trial. ⁷

15 MS. EDWARDS: Your Honor, I have an oral motion
16 for a continuance. I met with legal counsel -- privately
17 funded legal counsel on Saturday and that's the firm of
18 David C. Smith. If you would like, I can hand you your
19 card up. Mr. Enright has handed the card --
20 THE COURT: Who was it?
21 MS. EDWARDS: David C. Smith out of Tacoma.

⁷ CrR 3.1 states: (2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings, unless unless a new appointment is made by the court following the withdrawal of the original lawyer pursuant to section (e) because geographical considerations or other factors make it necessary.

⁷ The presentence report should contain information about the victim, any prior criminal record of the defendant, and such information about his characteristics, his financial condition, and the circumstances affecting his behavior, as may helpful in considering the sentence of the defendant. *State v Russell*, A sentencing judge must possess the fullest information possible concerning the defendant's past life A sentencing judge should impose sentence based upon reliable facts which have some basis in the record and a defendant should be given some opportunity to demonstrate that the information relied upon is inaccurate or incomplete. *State v Russell*, 31 Wn App 646, 644 P 2d 704 (1982). WAPRAC 13 page 392 .

22 THE COURT: Mr. Enright is giving me the card.

23 MS. EDWARDS: Oh, then I'll give him the other
24 one. So I'm looking to have a one- to two-week
25 continuance regarding sentencing, and that's about it.

7 THE COURT: Ms. Edwards, without getting into
8 confidential matters, what is it that you think your
9 counsel can do for you at this point?

10 MS. EDWARDS: I -- I had a brief meeting with
11 counsel Saturday. I don't -- I really can't answer that,
12 Your Honor. Uh, he did ask for a continuance, of course.
13 He had very few legal materials to look at on Saturday in
14 the jail facility.

15 THE COURT: Did your conference with him deal
16 with appeal issues or with sentencing issues?

17 MS. EDWARDS: I think, what I'm asking you for
18 right now is sentencing issues. RP 11/17/2008 page 1200-1202

19 THE COURT: I understand that that's what you
20 are asking me for. I'm trying to get a sense of what
21 this attorney could add to the sentencing procedure.

22 MS. EDWARDS: I don't think I'm qualified to
23 answer his -- what he feels he might be able to add at
24 this point. We discussed several other matters and not
25 related to this case and so our time was short

1 THE COURT: I understand. I would like to
2 encourage the use of counsel, however, I have been unable
3 to ascertain whether that would add anything to this
4 process. So I'm going to deny the request for a
5 continuance of sentencing, and we will proceed

6 Mr. Enright. RP 11/17/2008 Page 1202

15 For the record, I would like to place an objection to
16 your not continuing time at hearing, and that's just for
17 the record, Your Honor. Thank you very much.

RP 11/17/2008 page 1219

“A defendant who requests counsel at the time of sentencing may seek the protection of the Sixth Amendment right guaranteed the assistance of counsel. CrR 3.1 (lawyer shall be provided at sentence).” WAPRAC 13 page 358

“The constitutional right to assistance of counsel, Const art. 1 § 22 (amend 10) carries with it a reasonable time for consultation and preparation. “The constitutional right to have the assistance of counsel, Const art. 1 § 22 (amend 10) carries with it a reasonable time for consultation and preparation. Consultation not only includes assistance in trial preparation,

but opportunity for private and contential discussions between defendant and his attorney during the trial. See *State v Hartwig*, 36 Wn 2d 598, 601, 219 P 2d 564 (1950)” *State v Hartzog*, 96 Wn 2d 383, 402, 635 P 2d 694 (1981 *State v Hartzog*, 96 Wn 2d at 402

TESTIMONY OF PATRICK MULVIHILL

3 I know this is probably not particularly on point,
4 but I would reiterate that it would be advisable, if
5 possible, to have a continuance in this matter. I don't
6 think Colleen clearly enunciated to the Court what
7 Mr. Smith was going to do for her. He wanted to
8 represent her at the sentencing phase only.

11 The benefits probably would be that he would be able
12 to meet with her and prepare her for the sentencing phase
13 and to organize what -- what she presented to the Court.

RP 11/17/2008 page 1209

State v Russell, 31 Wn App 646, 644 P 2d 704 (1982) “the activities of a defendant subsequent to his arrest are relevant to determining the appropriate sentence for his crime.” “sentencing judge must possess the fullest information possible concerning the defendant's past life and personal characteristics. . . . A sentencing judge should impose sentence based upon "reliable facts which have some basis in the record," and a defendant should be given "an opportunity to demonstrate that the information relied upon is inaccurate or incomplete.” . . . In determining the proper sentence, a trial court is vested with broad discretion and "can make whatever investigation [it] deems necessary or desirable.””*State v Russell*, 31 Wn. App at 648

State v Dinard, 85 Wn 2d 624, 537 P 2d 760 (1975). The report shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as maybe helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.” *State v Dinard*, 85 Wn 2d at 625-626⁸

“It is also suggested that the defendant obtain letters of recommendation, character reference, and in appropriate cases prepare a written statement to the court at the time of sentencing.defense counsel might nevertheless wish to consider preparing and presenting a defense presentence report prior to the court prior to sentencing.” WAPRAC 13 page 393.

The state's argument fails because the trial court did not allow preparation and denied counsel to prepare sentencing. The state's argument relies on a pro se trial waiver of right to counsel, not a waiver of counsel at the sentencing phase. The loss of preparation time was denied to the defendant.⁹

Restitution / Victim Assessment Fee

The state argues that the \$500 victim restitution is actually a / victim assessment fee.

"Edwards next argues that the trial court erred in ordering restitution to Mr. Miller in the amount of \$500. App.'s Br, at 95. This claim is without merit as there was no restitution ordered in the present case. CP 579. The trial court did, however, order a "\$500 victim assessment" pursuant to RCW 7.68.035. CP 579. As the statute requires the assessment, Edwards claim of error is without merit." Respondent's Brief at page 43.

3 Financial obligation, the State is asking for \$500
4 victim assessment. Although Ms. Edwards was represented
5 by court-appointed counsel for quite some time, the State
6 is not asking for the court-appointed attorneys fees. We
7 are asking for the \$200 filing fee, \$100 DNA biological
8 sample fee, and \$100 contribution to the county expert
9 witness fund. And the State has no objection of minimum
10 payments of \$25 a month. RP 11/17/2008 Page 1203

The state cites RCW 7.68.035.however this statute is governed by RCW 7.68.020

7.68.020. Definitions (3) "Victim" means a person who suffers **bodily injury** or death as a proximate result of a criminal act of another person, the victim's own good faith and reasonable effort to prevent a criminal act, or his or her good faith effort to apprehend a person reasonably suspected of engaging in a criminal act. For the purposes of receiving benefits pursuant to this chapter, "victim" is interchangeable with "employee" or "worker" as defined in chapter 51.08 RCW as now or hereafter amended.

⁹ Colleen Edwards GR 33 accommodations were not provided by the Kitsap County Jail on 11/13/2008 to 11/17/2008. GR 33 accommodations resumed at the appellate level at Court of Appeals Division 11 in March 2009 and October 2009.

The state argues that the restitution or crime victim fee is automatic, however the statute indicates there must be bodily harm. Mr. Miller testified that he had not received any bodily harm. Mr. Patrick Hall testified that he was not at the scene of the alleged crime. The state's argument fails because the Mr. Miller was not a victim as defined under RCW 7.68. They do not cite any authority for their argument. Imposition of an excessive sentence occurs when the victim did not commit a crime nor cause any harm to another.

Excessive 18 probation trial error

The imposition of the 18 month community custody is excessive over the mandatory 39 months of incarceration.

1 The period of community custody will be 18 months.
2 I'll impose the standard legal financial obligations, and
3 the costs. RP 11/17/2008 Page 1220-1221

Trial Court Error: No-contact order

The judgment and sentence alleges that Patrick Hall is a victim and is entitled to restitution, CP 574-583. The state provided no evidence at sentencing for any no contact order.

1 the State is asking the Court order Ms. Edwards have no
2 contact with Paul William Miller and Patrick Dean Hall.
RP 11/17/2008 Page 1203

Mr. Hall was never present at the scene. (RAP 11/3/2008). He is not a victim. nor was he at the alleged crime scene. He describes where he was after the alleged crime. .

TESTIMONY OF PATRICK HALL

16 Q. [By Ms. Edwards] Mr. Hall, on the day of the alleged
17 crime that we're here in court today for, April 24, 2006,

18 were you -- can you describe after you testified that you
19 went to lunch -- you were on the property in the morning
20 and you went to lunch early, and then after that, can you
21 describe what happened after that? That you came back on
22 the property. Is that clear?

23 A. I came back from lunch. Um, while I was on the phone
24 with the police, and I stopped approximately 500 feet
25 short of Nelson and Anatevka Road -- of Peacock Road and
1 Anatevka on Nelson, and I waited there, uh, for the
2 police to arrive. Um, I didn't leave my vehicle. Uh, my
3 two employees did come out. RP 11/3/2008 Page 507

REGARDING A CONVERSATION PRIOR TO APRIL 24, 2006

2 Q. [By Ms. Edwards] Mr. Hall, did I threaten you in those
3 conversations?

4 A. No. RP 11/3/2008 Page 506

11 MR. ENRIGHT: Your Honor, and as I think I
12 addressed at a previous hearing with the Court, I've
13 listened to the 911 call, and, quite frankly, in terms of
14 assisting the State's case, it has precious little value.
15 Mr. Hall -- Mr. Hall wasn't even at the scene.

RP 10/10/2008 page 21

Mr. Miller also testified that he was not afraid of me. No testimony of the
state indicates his future fear or apprehension. RP 11/3/2008

TESTIMONY OF PAUL MILLER

7 Q. You don't like me asking questions, but you are not
8 afraid of me, correct?

9 A. I'm not afraid of you, no. Why would I be afraid of you?

10 Q. You just don't -- I don't want to put words in your
11 mouth. You are not afraid of me, correct?

12 A. Yeah, I'm not afraid of you. RP 11/3/2008 Page 482

The facts presented in the trial court do not match the facts imposed at
sentencing nor do they justify the imposition of a no contact order.

State v Russell, 31 Wn App 646, 644 P 2d 704 (1982) . A sentencing judge
should impose sentence based upon "reliable facts which have some basis
in the record

Trial Court Error in calculating the offense?

The count indicated on the judgment and sentence is in error, it states two counts, there is only one count. assault with a deadly weapon, the second count marked rest is actually an enhanced of that sentence, not a second actual count. CP 574-583, RAP 11/17/2008 ¹⁰

State v Gurrola, 69 Wn App 152, 848 P 2d 199 (11993) Calculation of offender score incorrect remanded for resentencing:

Trial Court Error: mental health evaluation

The imposition of a required mental health evaluation is not supported by the record, including the evaluation of the Western State Hospital (see sealed records) and the lack of any mental health issues or history.

BY THE COURT

6 I adopt the observations of the deputy prosecuting
7 attorney who was her opponent. This woman was not
8 incompetent. On the contrary, however, I am going to
9 order the mental health evaluation requested by the
10 State. I doubt that there will be anything of note, but
11 if there is, then Ms. Edwards will be required to follow
12 those recommended treatments.

13 She has expressed all along that she has brain
14 damage. She suffers from epilepsy and these things
15 aren't necessarily mental health, but they certainly were
16 present in the courtroom. RP 11/17/2008 Page 1223

The court received no testimony from any mental health doctor, licensed mental health professional that any evaluation was needed as a result of any

¹⁰ **Analysis of Judgment and Sentence** Page One, line 22-23 indicates there are two counts when there is one. The Assault with a second degree has a date range of 4/24/2006-4/26/2006. Line 29 indicates only an assault charge without a deadly weapon or firearm enhancement. (Special allegations not marked) Page Two, line 28 Multiple counts with firearms served consecutively, remaining concurrently. Page Three, line 7 Credit for Time Served is blank. Line 8 No contact order box is checked. Page Five Mental Health Evaluation box is checked No contact with Paul William Miller with DOB, Patrick Dean Hal with no date of birth. Page Six, line 27 Property is forfeited box is checked.. Exoneration box is checked. Line 29-30, not a joint plea agreement CP 574-583,

convicted crime.. Colleen Edwards has no history of mental illness. (See sealed report) A mental health evaluation is not appropriate for a person with physical disabilities.

State v Holland, 80 Wn App 1, 905 P 2d 920 (1995) sentence requirement that a defendant submit to a polygraph test is not a crime-related prohibition; polygraph is not a condition of of community custody authorized by statue.

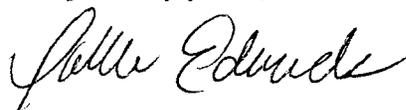
III. CONCLUSION

The state argues that each of the issues presented by the appellant lack merit and should be denied review. A majority of these arguments lack proper argument and citation to authority and to the record. They do not include an exact factual recitation of the record, evidence and exhibits presented.

Colleen Edwards replies that her trial errors raise a meritorious argument and thus should not be denied. Colleen Edwards replies with full argument and citation to the record and authority on each claim. The arguments have merit and should be reviewed for the reasons stated in each reply.

Thank you for your time and consideration.

Respectfully yours,



Colleen Edwards

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION 11**

STATE OF WASHINGTON)	NO. 38707-7-11
Respondent)	
)	DECLARATION OF
Vs.)	MAILING
COLLEEN EDWARDS)	
Appellant)	APPELLANT'S REPLY
)	BRIEF revised 45 page

I, Colleen Edwards have served the following documents

DECLARATION

I, Colleen Edwards, declare that on May 12, 2010, I deposited the foregoing **APPELLANT'S REPLY BRIEF (Revised 45 page)** or a copy thereof, into the internal mail system of Washington Correction Center for Women and made arrangements for postage addressed to:

TO: The Court of Appeals, Division 11 (2 COPIES)
TO: Kitsap County Prosecutor Office

I, declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: August 10, 2011 at Gig Harbor, Washington

Respectfully Yours,



Colleen Edwards
325035
WCCW
9601 Baijaich Road NW
Gig Harbor, WA 98332-8300