

NO. 42352-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONALD A. BRADY,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his constitutional right to confront witnesses when it refused to allow him to cross-examine Joanna McKenzie about the falsehoods she told the police after the defendant shot her husband.

2. The trial court denied the defendant his constitutional right to present relevant exculpatory evidence when it refused to allow him to elicit evidence that Joanna McKenzie and her husband were attempting to burglarize the defendant's home when the defendant shot her husband and that they had burglarized the defendant's home earlier in the day.

3. The trial court denied the defendant his constitutional right to a fair trial when it refused to give the jury the defendant's proposed instruction on his right to resist the commission of a felony.

4. The prosecutor committed misconduct and denied the defendant a fair trial when he presented rebuttal argument urging the jury to convict the defendant based upon emotion and prejudice.

5. The trial court erred when it entered judgment against the defendant for second degree manslaughter because the jury's special interrogatory finding that the defendant had proven by a preponderance of the evidence that he had acted in self defense stands as an absolute bar to

criminal conviction.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to confront witnesses under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it refuses to allow that defendant to cross-examine a complaining witness about the falsehoods she told the police concerning the facts out of which the defendant was charged?

2. Does a trial court deny a defendant the right to present relevant, exculpatory evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow that defendant to present evidence that the complaining witness and her deceased husband were attempting to burglarize the defendant's home when the defendant shot the decedent?

3. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to give the jury a proposed instruction on the right to resist the commission of a felony when the evidence presented at trial supports that defendant's claim that he shot and killed the decedent to prevent the commission of a felony against the defendant and while the defendant was present in his dwelling or other place of abode?

4. Does a prosecutor commit misconduct and deny a defendant a fair

trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if he presents rebuttal argument urging the jury to convict the defendant based upon emotion and prejudice?

5. Does a trial court err if it enters judgment against a defendant for second degree manslaughter if the jury had previously returned a special interrogatory finding that the defendant had proven by a preponderance of the evidence that he had acted in self defense when he shot and killed the decedent?

STATEMENT OF THE CASE

Factual History

The defendant Ronald A. Brady is a 61-years-old retired computer analyst who owns a home in rural Lewis County at 2155 State Highway 508 (SR 508). RP 544-549; CP 2. A number of years ago, his home sustained significant damage in a fire. *Id.* Following the fire, the defendant rented the adjoining property and moved out of his house. *Id.* He thereafter began restoring his home. *Id.* By April of 2010, he had the majority of the walls in his house down to bare studs and was in the process of putting up sheet rock, which was stacked against the walls inside the home and in the attached garage. *Id.* He also had construction equipment and other items in the house and garage. *Id.* He also had very limited access to electricity during this period of time and could bring an extension cord into the house to run electrical equipment as needed. *Id.*

On April 19, 2010, the defendant worked on his house until about 11 in the morning and then drove into Chehalis to play bridge with friends. RP 544-549. He returned about 5:00 in the afternoon. *Id.* Upon returning, he saw that his house had been burglarized. *Id.* Specifically, he noted that someone had pulled a screen off a back window and broken it. *Id.* The intruder or intruders had then reached in and pulled out a dowel used to hold the window shut. *Id.* The defendant also believed that the intruder had

stolen one of his checkbooks and had disturbed items in the garage and house. *Id.* In fact, the defendant's home had been burglarized in the past. *Id.* Based upon what he discovered when he returned, the defendant called the Lewis County Sheriff's office and asked that an officer be sent to his house. RP 147-150. The defendant also saw tire tracks in the front of his house that he believed belonged to the burglar's vehicle. CP 68.

Based upon the defendant's call, Lewis County Deputy Duncan Adkisson responded to the defendant's home, arriving at 5:42 in the afternoon. RP 147-150. He initially met with the defendant, took a statement from him, and looked around the house. *Id.* During this review of the home, he noted that defendant had one area set up as an office with a table and computer, but that the rest of the home was in the progress of construction with building materials stacked up against the walls. RP 149-150. After looking at the damage to the window, looking at the items the defendant had said were disturbed, and finishing his investigation, Deputy Adkisson told the defendant that in his training and experience, it looked like the burglar or burglars had "staged" the property. RP 152-157. By "staged" he meant that the thieves were planning on returning later that evening to commit the burglary proper. *Id.* He told the defendant to take care and call if anything happened as he would be on duty until three in the morning. *Id.*

Based upon the officer's statements, the defendant went back to the

adjoining rental house, retrieved his .22 rifle and shotgun, and returned to spend the night in his home. RP 548-549. He also stopped by his nearest neighbor's house to tell her what had happened and that he would be spending the night in his house. RP 531-535. Once the defendant returned to his house, he spent a couple of hours on the computer, as he had internet access and was able to run an extension cord into the house to provide power. RP 548-549. However, there were no functioning interior or exterior lights at the house, and the only lighting available after dark was the glow from the computer screen. *Id.* It was very dark in and around the house. *Id.*

After a few hours, the defendant heard a truck pull into his driveway and saw its front lights. RP 551-552. The truck then stopped in front of his garage and turned out its lights. *Id.* At this point, the defendant saw two flashlights in the area near the truck and heard someone banging loudly on the front door. RP 553-557. Although not known to the defendant at the time, the person banging at the door was Thomas McKenzie and the person holding the other flashlight was his wife Joanna McKenzie. RP 194-198. During this time period Joanna McKenzie used methamphetamine on a daily basis. RP 4-6.

When the defendant saw the flashlights held by Thomas and Joanna McKenzie, he believed that they were the burglars who had been in his home earlier and that they had returned to rob his house just as Deputy Adkisson

had predicted. RP 551-557. In fact, he was correct. RP 68-69. The McKenzie's had burglary tools in their truck, the tires on their truck matched the tire marks left earlier that day, and they had a number of items at their home they had stolen in other recent burglaries. *Id.* They were at the defendant's house to burglarize it. *Id.* Indeed, Joanna McKenzie later pled guilty in Lewis County Superior Court to the attempted residential burglary of the defendant's home at 2155 SR 508 on April 19, 2010. *Id.*

After the defendant heard the banging on his door, he retrieved his .22 rifle and made his way out into his attached garage. RP 553-557. However, it was so dark in the house that he tripped over something and believed he alerted the burglars. *Id.* He was also worried and frightened that they had weapons and would kill or harm him once they entered and found him inside. *Id.* After making his way into the garage and hearing someone outside say something about the police, the defendant tried to call "911" but was so nervous that he could not press the "send" button. *Id.* At this point, he opened the garage door to confront the burglars. *Id.* When he did, both Thomas and Joanna McKenzie flashed their lights directly into the defendant's eyes. *Id.* Believing that he was in danger for his life, the defendant shot a number of rounds from his .22 rifle at the truck in an attempt to disable it, and shot at Thomas McKenzie. *Id.*

One of the bullets the defendant shot at Thomas McKenzie hit him,

entering his chest, passing through his lung and aorta, and then out his back. RP 376-400. After being hit, Thomas McKenzie took a couple of steps and then fell to the ground, where he died from blood loss after yelling that he had been shot. *Id.*; RP 199-200. When the defendant shot his rifle, Mr. McKenzie started screaming, ran to her husband, then ran out of the yard and down the road. RP 203-205. Within a short distance, she came across a woman who stopped to let her in her vehicle. RP 224-227. Although the woman described Ms. McKenzie has hysterical and not making much sense, she did understand that she wanted the use of a cell phone. *Id.* She then gave Ms McKenzie a cell phone, who used it to call "911." *Id.* At the same time, the defendant was in his garage calling "911." RP 556-557.

As it turned out, Deputy Adkisson was very near the area and was able to get to the defendant's house within a couple of minutes. RP 158-162. As he entered the driveway, the passerby who had picked Joanna McKenzie pulled her vehicle into the defendant's driveway also. *Id.* Seeing this Deputy Adkisson pulled out his service revolver and ordered the two women to the ground. *Id.* At this point the defendant came out to meet the deputy and other law enforcement and emergency personel began arriving. RP 163-165. Along with Deputy Admission, they verified that Thomas McKenzie was dead. RP 167-170. The officers then began interviewing the defendant, Joanna McKenzie, and the passerby who had picked up Joanna McKenzie.

RP 233-237. The defendant gave a long statement to the police that evening.
RP 240-243.

The next day, the defendant gave the officers a second lengthy statement at their request, and still later did a video-taped recreation of everything that had happened that night. RP 460, 471-472. The defendant also consented to the officers repeated entry and search of his home and the surrounding property. *Id.* According to the officers, the defendant was completely cooperative and forthcoming on each occasion they had contact with them. RP 292-293. By contrast, during an interview with the officers that evening Joanna McKenzie lied about what she and her husband were doing at the defendant's house, falsely claiming that they had not come to burglarize the defendant's home. RP 6/15/11 5. While Joanne McKenzie was giving these false statements, one of the officers noted that the pupils of her eyes were "fixed" and "pinpoint," and that in his training and experience this, along with her demeanor, were indicators that she was then under the influence of drugs. RP 4-6.

Procedural History

By information filed September 23, 2010, and amended November 18, 2010, the Lewis County Prosecutor charged the defendant Ronald Allen Brady with the First Degree Murder of Thomas McKenzie, and the First Degree Assault of Joanna Darlene McKenzie. CP 1-3, 10-12. The defendant

responded with a claim of self-defense. CP 13. Prior to trial, the state moved in limine to preclude the defense from eliciting the following evidence:

8. . . . No mention, inquiry, or evidence at trial regarding the movements or activities of [Thomas and Joanna McKenzie] at any point earlier on the day of the shooting. Specifically, no mention, inquiry, or evidence that either [Thomas and Joanna McKenzie] entered onto the property of the defendant prior to the time of the shooting or had any involvement in the suspected burglary of the defendant's building earlier that day. . . .

9. . . . no inquiry on cross examination of Joanna McKenzie about why she traveled to the Defendant's property at the time of the shooting or what she intended to do there.

10. No evidence pertaining to or inquiry about the fact that Joanna McKenzie removed a stocking cap and gloves and threw them in the bushes after she fled the Defendant's property after the shooting. . . .

11. No mention that law enforcement officer recovered suspected stolen property at the residence of Joanna and Tom McKenzie during the investigation of the current case. . . .

12. No evidence pertaining to or inquiry about the fact that Joanna McKenzie was convicted of Attempted Residential Burglary in Lewis County Superior Court case number 10-1-00398-9, which stems from the vents of this case. . . .

CP 19-25; RP 12/6/10 1-31.

Over strenuous defense objection, the court granted each of these motions by the state and later entered the following written order:

9. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding the activities or geographic movements of Joanna and Thomas McKenzie prior to their arrival immediately preceding the shooting. Any evidence that Joanna and Thomas McKenzie entered onto the property of the

defendant or had any involvement in the burglary of the defendant's building prior to the time of the shooting is inadmissible. In opening and closing arguments, the defense may not argue that Joanna and Thomas McKenzie had any involvement in the burglary earlier on the day of the shooting. . . .

10. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding the fact that the tires on the victim's vehicle matched the tire marks on the defendant's property during the burglary committed earlier on the day of the shooting.

. . . .

12. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding why Joanna and Thomas McKenzie traveled to the Defendant's property immediately preceding the shooting or what they intended to do there. In opening and closing arguments, the defense may not argue about why Joanna and Thomas McKenzie traveled to the Defendant's property immediately preceding the shooting. . . .

13. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence that Joanna McKenzie removed a stocking cap and gloves and threw them in the bushes while she fled the Defendant's property after the shooting.

14. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding stolen property at the residence of Joanna and Tom McKenzie during any criminal investigation.

15. Under ER 609, Joanna McKenzie may be impeached with evidence of her prior conviction . . . for Attempted Burglary in the Second Degree in Lewis County Superior Court. . . . The defense shall not mention or elicit evidence that the Attempted Burglary in the Second Degree conviction relates to the current case in any way. The specific date of the commission of the conviction for the Attempted Burglary in the Second Degree is not admissible; Testimony and evidence is limited to the mere fact that the crime and conviction occurred in 2010. In opening and closing statements, the

defense shall not mention or suggest that Joanna McKenzie's conviction in 2010 for Attempted Burglary in the Second Degree relates to the current case in any way.

CP 66-69; RP 1/28/11 1-21.

Apparently, paragraph 15 of this order contained an error, since the crime to which Joanna McKenzie pled guilty in Lewis County Superior Court prior to the defendant's trial was the attempted residential burglary of the defendant's house on April 14th, not attempted second degree burglary. RP 219.

The state also moved in limine to preclude any evidence that Joanna McKenzie was under the influence of drugs on the evening in question, that she had lied to the police officers when they interviewed her that evening, and that she and her husband had burglary tools in their truck. CP 70-73, RP 1-14. Once again, the court granted these motions over defense objection. *Id.*

Following three separate hearings on pretrial motions, the court called this case for trial before a jury. RP 1. During its case-in-chief, the state called 15 witnesses, including Deputy Adkisson and Joanna McKenzie. RP 147-537. The defendant then took the stand as the only witness for the defense. RP 543-591. All of these witnesses testified to the facts contained in the preceding statement of facts, with the exception of the evidence the court had precluded the defense from eliciting pursuant to the state's pretrial

motions *in limine*. See Statement of Facts, *supra*. In addition, during Deputy Adkisson's evidence, the state asked him to comment on his review of the back window that the defendant claimed the burglars had broken that day. RP 152-157. Deputy Adkisson told the jury that the break in the window did not look "recent" to him. RP 152-157.

As just mentioned, the state called Joanna McKenzie as one of its witnesses. RP 193-223. During her evidence, she claimed that she and her husband pulled into the defendant's driveway at about 10:00 at night and parked, that her husband got out and knocked on the front door, that she then got out and they both knocked on the garage door, that she then started walking back to the truck as her husband started walking back to the side of the house, and that at that moment the defendant started shooting at her and her husband in a single series of multiple shots. RP 194-198, 220. According to Joanna McKenzie, after the shots rang out, her husband tried to run back to the truck, but he fell, yelling that he had been hit. RP 198-202. She claimed that she simultaneously started and repeated yelling "Stop, what are you doing?" as loud as she could. RP 201. She further claimed that she then ran over to her husband, took off her gloves, and touched him, noting that he was "cold." RP 203-205. At this point she ran out of the front yard and down the road, where a woman stopped and loaned her a cell phone with which to call for help. *Id.* She told the jury that she did not know whether

or not she or her husband ever had their flashlights on during this event. RP 211-219.

Following the reception of evidence in this case, the court gave the state's proposed instructions on the crimes of second degree murder, first degree manslaughter, and second degree manslaughter as lesser included offenses to the original charge of first degree murder of Thomas McKenzie. CP 211-254. The court also gave the state's proposed instructions on the crime second degree assault as a lesser included offense to the original charge of first degree assault against Joanna McKenzie. *Id.* However, while the court did also give the defendant's proposed instructions on self-defense, the court refused to give the defendant's following proposed instruction on the right to use force to resist the commission of a felony:

It is a defense to the charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer or in the presence of the slayer or upon or in a dwelling or other place of abode in which the slayer is present.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it

will be your duty to return a verdict of not guilty.

CP 167, 231, 242.

Following instruction, the state and the defense presented their closing arguments. RP 624-701, 705-735. The state then presented rebuttal argument, during which the defense twice unsuccessfully objected. RP 735-746. The following gives the substance of the state's argument to which the defense objected.

MR. HAYES: . . . You and I may never have met Thomas Stanley McKenzie. *but I do know a few things about him.* We know he had siblings, we know –

MR. BLAIR: Objection.

THE COURT: Basis for your objection?

MR. BLAIR: Facts not in evidence.

THE COURT: The jury will again determine what the facts are in this case. I'm not going to make a ruling on that. Go ahead, Mr. Hayes.

MR. HAYES: There were mention of some siblings. We know he had siblings, we know he had kids, we know he had a wife. We know he didn't deserve to die in the manner that he did.

You could see it all over the defendant's face when he was testifying, he had no remorse for what he did. If it really happened the way he said it did, why wouldn't his explanation have been more like, "Yeah, I feel awful about what happened but in that second I just couldn't be sure." That's not at all what he was giving out when he was on that stand. He had no remorse. And as defense counsel said in opening, it very much seemed if he had to do it over again he would.

We don't have the technology to go back in time and stop bad things from happening. Tom McKenzie's family, friends, they have to deal with this loss for the rest of their lives.

MR. BLAIR: Objection.

THE COURT: Overruled.

MR. HAYES: The defendant out of anger and frustration took Thomas McKenzie away and they have to deal with that and now it's time for the defendant to deal with the consequences of his actions. Thank you.

RP 745-746 (emphasis added).

Following deliberation, the jury returned verdicts of "not guilty" on the charges of first degree murder, second degree murder, first degree manslaughter, first degree assault, and second degree assault. CP 259-259, 261-262. However, the jury did return a verdict of "guilty" to the lesser included charge of second degree manslaughter, along with a special verdict that the defendant had been armed with firearm during the commission of the offense. CP 260, 268.

After receiving these verdicts, the court instructed the jury concerning the defendant's claim of self-defense, and sent them back for further deliberation following brief additional argument by counsel. RP 757-759, 76-767. Following further deliberation, the jury returned the following special verdict:

SPECIAL VERDICT FORM AA

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WHEN IT REFUSED TO ALLOW HIM TO CROSS-EXAMINE JOANNA MCKENZIE ABOUT THE FALSEHOODS SHE TOLD THE POLICE AFTER THE DEFENDANT SHOT HER HUSBAND.

The confrontation clause of the United States Constitution, Sixth Amendment, and under Washington Constitution, Article 1, § 22, guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). This includes the right to impeach a witness with prior inconsistent statements. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *State v. Dickenson*, 48 Wn.App. 457, 469, 740 P.2d 312 (1987). Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless no rational person could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis*, 415 U.S. at 318; *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893, 18 A.L.R.4th 690 (1980); *Dickenson*, 48 Wn.App. at 470.

Although the right to confront witnesses is constitutional, it is subject to two limitations: (1) the offered evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the

State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *State v. McDaniel*, 83 Wn.App. 179, 184-85, 920 P.2d 1218 (1996). However, any attempt to limit meaningful cross-examination, however, must be justified by a compelling state interest. *State v. Hudlow*, 99 Wn.2d at 15-16.

For example, in *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002), the defendant was charged with possession of a controlled substance with intent to deliver. During trial, the state called a police officer who testified that he had stationed himself in a specific surveillance location and that from this position he saw the defendant participate in a number of suspected drug transactions on the street. He then identified the defendant to other officers who made the arrest. After the arrest, the police strip searched the defendant and uncovered a bundle of cocaine on the defendant's person. At trial the surveillance officer testified that he had observed the defendant for over an hour and had seen him give people bundles similar to the one uncovered during his arrest.

On cross-examination the defense asked the officer to identify his exact position in order to show that the officer could not have seen what he said he did. However, the state objected that this information was "secret." Based upon this claim, the trial court refused to order the officer to answer the defendant's questions concerning the officer's exact position. Following

conviction the defendant appealed, arguing that the trial court's ruling had violated his right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In addressing these arguments the court first noted the threshold for what is or is not relevant is very low. The court observed:

The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.

State v. Darden, 145 Wn.2d at 621 (footnotes and citations omitted).

In addressing the issue of relevance, the court noted that the defendant's mere possession of a small amount of cocaine was not sufficient to support a conviction for possession with intent. Thus, the officer's claimed observations were critical in either sustaining or refuting a charge of possession with intent. As such, what the officer could or could not see from his particular vantage point was relevant in determining the credibility of the officer's claimed observations. The court held:

Here the fact of consequence was Sgt. Vandergiessen's ability to observe and identify Darden as the person who allegedly conducted three transactions. Since he was the only one of the three prosecution witnesses who saw the alleged transactions, he was a crucial witness. It was Sgt. Vandergiessen's observations that gave law enforcement probable cause to arrest Darden. It was his description of Darden that enabled the arrest team to separate Darden from the other person wearing the identical jacket at the bus shelter. Lastly, it was his testimony that enabled the prosecution to convict Darden of possession with the intent to deliver rather than the lesser

offense of possession.

State v. Darden, 145 Wn.2d at 624.

Finding the evidence relevant, the court then addressed the issue of prejudice. Based upon the fact that the one officer's observation was the only evidence of intent to deliver, the court found that the confrontation violation was not harmless. The court stated:

Nor was this error harmless or otherwise within the trial court's discretion. The State's entire case for possession with intent to deliver hinged on Sgt. Vandergiesse's testimony.

State v. Darden, 145 Wn.2d at 626.

In the case at bar, the defense argued that it should be allowed to cross-examine Joanne McKenzie about the falsehoods she told the police on the night she and her husband attempted to burglarize the defendant's home. This evidence was critical to the defense because the state called her as a witness in its case-in-chief and used her to present what the defense argues was a highly "sanitized" version of the events that evening. Thru this version of events, the state was able to imply to the jury that Thomas and Joanna McKenzie might well just have been travelers who happened to stop at the defendant's home seeking aide of some kind, who were then beset upon by the defendant who assumed that they were the returning burglars.

For example, Joanna McKenzie claimed that she and her husband pounded on the garage door after her husband knocked on the front door.

This evidence was consistent with an implicit claim that they were present for a lawful purpose and were really trying to find someone to help them. Not only did this paint a false picture to the jury, but it directly contradicted the defendant's testimony that the only knocking that occurred was at his front door. In addition, Joanne McKenzie's claim that she repeatedly screamed "What are you doing?" when the defendant shot his rifle also carried in it the implicit claim that she and her husband were simply good people without bad intentions who were beset upon by the defendant. In another instance in her testimony, she claimed that she was walking back towards her truck, away from the location where the defendant was, when he shot his rifle. Thus, she implicitly denied that she had shown her flashlight in the defendant's face, contrary to the defendant's assertion before the jury.

The trial court's refusal to allow the defense to cross-examine Joanne McKenzie with her prior inconsistent statements was at least, if not more prejudicial, than the trial court's similar actions in *Darden*. As was previously mentioned, in *Darden*, it was critical to the defense to show the jury that the police officer who claimed he saw the defendant deliver bindles to other people had not been in a position to see such actions. The trial court excluded this highly relevant evidence on the basis that the officer position was "secret." In the case at bar, the trial court excluded any mention of Joanne McKenzie's prior inconsistent statements on the basis that it was

irrelevant because the issue before the jury was the defendant's state of mind at the time of the shooting. This reasoning was even more dubious than that in *Darden* because it ignored the fact that Joanne McKenzie's testimony at trial contradicted the defendant's claims about how the events unfolded.

Thus, in the case at bar, the trial court's refusal to allow the defense to confront Joanne McKenzie with the false statements she made to the police, false statements which were also inconsistent with her testimony at trial, prevented the defense from effectively confronting Joanne McKenzie and had the effect of increasing her credibility while decreasing the defendant's credibility. Since the defendant's credibility was critical to his case, the trial court's refusal to allow the defense to properly confront Joanne McKenzie caused him significant prejudice. As a result, he is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO PRESENT RELEVANT EXCULPATORY EVIDENCE WHEN IT REFUSED TO ALLOW HIM TO ELICIT EVIDENCE THAT JOANNA MCKENZIE AND HER HUSBAND WERE ATTEMPTING TO BURGLARIZE THE DEFENDANT'S HOME WHEN THE DEFENDANT SHOT HER HUSBAND AND THAT THEY HAD BURGLARIZED THE DEFENDANT'S HOME EARLIER IN THE DAY.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution,

Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and

that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, Joanne McKenzie's prior inconsistent statements to the police was not the only relevant, exculpatory evidence that the trial court excluded. The trial court's order prevented the defense from eliciting any evidence that Thomas and Joanne McKenzie were the persons who had burglarized the defendant's residence earlier in the day, and that they were at the defendant's home to burglarize it again. This order stated as follows:

9. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding the activities or geographic movements of Joanna and Thomas McKenzie prior to their arrival immediately preceding the shooting. Any evidence that Joanna and Thomas McKenzie entered onto the property of the defendant or had any involvement in the burglary of the defendant's building prior to the time of the shooting is inadmissible. In opening and closing arguments, the defense may not argue that Joanna and Thomas McKenzie had any involvement in the burglary earlier on the day of the shooting. . . .

10. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding the fact that the

tires on the victim's vehicle matched the tire marks on the defendant's property during the burglary committed earlier on the day of the shooting.

. . . .

12. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding why Joanna and Thomas McKenzie traveled to the Defendant's property immediately preceding the shooting or what they intended to do there. In opening and closing arguments, the defense may not argue about why Joanna and Thomas McKenzie traveled to the Defendant's property immediately preceding the shooting. . . .

13. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence that Joanna McKenzie removed a stocking cap and gloves and threw them in the bushes while she fled the Defendant's property after the shooting.

14. In all portions of the trial proceedings, the defense shall not comment on, mention, or elicit evidence regarding stolen property at the residence of Joanna and Tom McKenzie during any criminal investigation.

15. Under ER 609, Joanna McKenzie may be impeached with evidence of her prior conviction . . . for Attempted Burglary in the Second Degree in Lewis County Superior Court. . . . The defense shall not mention or elicit evidence that the Attempted Burglary in the Second Degree conviction relates to the current case in any way. The specific date of the commission of the conviction for the Attempted Burglary in the Second Degree is not admissible; Testimony and evidence is limited to the mere fact that the crime and conviction occurred in 2010. In opening and closing statements, the defense shall not mention or suggest that Joanna McKenzie's conviction in 2010 for Attempted Burglary in the Second Degree relates to the current case in any way.

CP 66-69; RP 1/28/11 1-21.

The trial court's logic in excluding this evidence was that a

defendant's claim of self-defense is viewed from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. Thus, the trial court believed that only the defendant's beliefs at the time he shot his rifle were relevant, not the actual facts as they existed. As the following explains, this ruling ignored the myriad other reasons that evidence can be relevant in a particular trial.

First, the trial court's refusal to allow the defense to elicit this evidence prevented the defendant from effectively rebutting Joanne McKenzie's sanitized version of what happened when she and her husband came to the defendant's home. As was mentioned in the previous argument, her version of the events left the jury to believe that she and her husband might well have been honest travelers stopping for aid, not acting in any type of suspicious manner. Had the defense been allowed to elicit the true state of affairs and present the evidence that Joanne McKenzie and her husband were burglars, this evidence would have completely destroyed her implicit claims that she and her husband were innocent victims.

Another example of how the court's ruling on this evidence precluded the defense from effectively presenting its case came from the testimony of Deputy Adkisson. During his testimony, he told the jury that he did not believe that the breakage in the defendant's back window was recent as the defendant's told him. This evidence undercut the defendant's claim that his

fear was reasonable. The excluded evidence that Joanne and Thomas McKenzie had previously been present and had broken the window would have undercut Deputy Adkisson's testimony on this point and would have strengthened the defendant's claims.

In addition, the trial court also precluded the defense from eliciting evidence from Joanne McKenzie or any other source that she was using methamphetamine during the burglary. Indeed, the defense had the evidence from one of the deputies, who was prepared to testify that her eyes were fixed and pinpoint, and that in his training and experience this was evidence of current drug use. This evidence was critical to the defense in order to undercut Joanne McKenzie's testimony where she implicitly portrayed herself and her husband as unfortunate, innocent people who were attacked by the defendant. In addition, it was critical to the defense in order to undercut Joanne McKenzie's testimony where she explicitly denied that she and her husband had shone their flashlights in the defendant's face when he opened the garage door. This evidence on the use of the flashlights was important to the defense to show how fearful the defendant was at that point and how reasonable that fear was. Thus, by excluding this evidence of drug use, the court artificially strengthened Joanne McKenzie's credibility while undercutting the defendant's credibility. In so doing, the trial court prevented the defense from presenting some of its best evidence to support

the defendant's claims at trial. Thus, the trial court's exclusion of this relevant, exculpatory evidence denied the defendant a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO GIVE THE JURY THE DEFENDANT'S PROPOSED INSTRUCTION ON HIS RIGHT TO RESIST THE COMMISSION OF A FELONY.

As was mentioned in Argument II, while due process does not guarantee every person a perfect trial, under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment due process does guarantee every person charged with a crime a fair trial. *State v. Swenson, supra; Bruton v. United States, supra*. This right to a fair trial includes the right to raise any defense supported by the law and facts, such as self-defense or justified use of force. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

In order to properly raise the issue of self-defense or justified use of force in the State of Washington, a defendant need only produce "any evidence" supporting the claim that the defendant's conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). This evidence need not even raise to the level of sufficient evidence "necessary to

create a reasonable doubt in the jurors' minds as to the existence of self-defense." *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* A defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

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, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

State v. Tyree, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

State v. Tyree, 143 Wash. at 316.

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *State v. Adams, supra*, also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense beyond a reasonable doubt as part of the elements of the offense. The following examines these cases.

In *State v. Wanrow, supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and shot the decedent, whom the other woman believed had molested one of her children. The Supreme Court gave the following outline for the facts as they followed this point.

It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5'4" woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that

she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

State v. Wanrow, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She then appealed, arguing, among other things, that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, and *has reasonable grounds* to believe, that *he* is in imminent danger of death or great bodily harm.

State v. Wanrow, 88 Wn.2d at 239 (italics in original).

In *Wanrow*, the court reversed, based in part upon this erroneous instruction. The court's comments were as follows.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

State v. Wanrow, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *State v. Adams, supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbors unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my life...." Adams knew there were other guns in the trailer. He didn't know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn't intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox's death.

Considering these circumstances and Adams' testimony-he thought Chard and Cox had come to do him harm because Goard fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a

loaded gun-a jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing “any evidence.” Accordingly, the trial judge should have given a self-defense jury instruction.

State v. Adams, at 397-98.

In *Wanrow*, the Supreme Court reversed on the basis that the court erroneously failed to allow the jury to consider the defendant’s particular vulnerability under all the facts as they existed, even though the defendant had only been threatened with a simple assault if even that. Similarly, in *Adams*, the court reversed upon the trial court’s failure to give a self-defense instruction in a situation in which the defendant had not even been threatened directly. Both of these cases stand for the proposition that under circumstances of particular vulnerability, a defendant using deadly force may be entitled to a self-defense instruction even if only faced with a simple assault, or no assault at all.

In *Wanrow*, the defendant was particularly vulnerable because of her small stature relative to the decedent, the decedent’s intoxication, and the fact that she had a cast on her foot. In *Adams*, the defendant was particularly vulnerable because of his isolation, the potential that the burglars knew he was present, and the fact that they might have been armed with deadly weapons. In this case, the evidence seen in the light most favorable to the defendant shows that defendant and his friends, including Mr. Childreth,

were crossing the road when an adult drove by, yelled at them, and then specifically pulled over in order to confront them. This person then twice started a physical confrontation with Mr. Childreth. As the prior cases clarify, this evidence is sufficient to trigger the defendant's right to force the state to prove the absence of self-defense beyond a reasonable doubt.

As is apparent from the cases previously cited, claims of self-defense require the court as trier of fact to make two separate determinations, each with a different standard of proof. The first question is: "Does the evidence presented at trial constitute some evidence of self defense when seen in the light most favorable to the defendant?" If this question is answered in the affirmative, then the second question is: "Has the evidence presented at trial proved the absence of self-defense beyond a reasonable doubt."

In this case, the defense made two arguments before the court as part of his claim of self-defense. The first was that the defendant shot his rifle because he believed that he was in danger of serious bodily injury. The second was that he was justified in shooting his rifle because he was attempting to resist the commission of a felony. The defense proposed the following instruction on the latter claim:

It is a defense to the charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer or in the presence

of the slayer or upon or in a dwelling or other place of abode in which the slayer is present.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 167, 231, 242.

This instruction is taken directly from WPIC 16.03, which is entitled “Justifiable Homicide - Resistance to Felony.” The court did not reject the use of this instruction as an incorrect statement of law. Rather, it did so upon the following basis:

First, in my view, the facts here show as a matter of law that no crime – the only crime that was committed at the time of the use of the force here was a criminal trespass as there was no entry as required for a burglary. But more to the point, even if the burglary was about to be committed or even had been committed, there is no evidence that the actions of the decedent threatened the defendant’s life of great bodily harm under the circumstances that would allow the defendant to use that claim.

And it isn’t just any felony. The defendant here went directly to successful use of deadly force as he stated he was going to do without taking any of the steps that a reasonably prudent person would take under the circumstances.

The second issue is defense of a dwelling. And here I’m finding as a matter of law that the home as described or the building I guess I should say is not a residence. It hasn’t been used as a residence

since it was destroyed by fire 15 years previously. And while the exterior shell may show some signs of being a dwelling, the interior was uninhabited, uninhabitable and hadn't been for the 15-year period preceding the offense here. And as such, there's no evidence to show that it meets the definition of a dwelling and deserves the special protection that that designation allows.

RP 597-598.

The trial court's ruling was clearly erroneous. First, as the decisions in *Wanrow* and *Adams* illustrate, the court should have looked at the evidence from the light most favorable to the defense and then asked itself if there was any evidence to support the facts necessary to justify the use of this type of self-defense instruction. The answer to this question was that there was significant evidence to support the conclusion that at the time the defendant shot his rifle, the McKenzie's were in the process of committing an attempted residential burglary at the least. Indeed, it is hard to understand the court's ruling on this factual issue in the face of its knowledge that the state had charged Joanne McKenzie with attempted residential burglary and that she had pled guilty to it.

In addition, by finding the defendant's house did not qualify as a "residence" for the purposes of the right to defend himself against the commission of a felony, the trial court (1) failed to look at the facts in the light most favorable to the defendant's claim, and (2) substituted the word "residence" for the word "dwelling" and the phrase "place of abode" in the

instruction. The court's ruling also ignored the definition for the word dwelling, which is found in WPIC 2.08 and is as follows:

Dwelling means any building or structure [, though movable or temporary,] [, or a portion thereof,] that is used or ordinarily used by a person for lodging.

WPIC 2.08.

In the case at bar, the evidence presented at trial by both the state and the defense showed that the defendant owned the home, that he was working on restoring it, and that he had decided to spend the night in the house in order to protect his property from harm. Thus, his home was a "dwelling" because it was a "building or structure" that he was using for lodging, even though temporary. It was every bit as much a dwelling as would have been a motel room or a cabin in the woods that he chose to use as shelter for a night. As a result, the trial court erred when it refused the defendant's request to give the jury the defendant's proposed instruction on resistance to a felony.

IV. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL WHEN HE PRESENTED REBUTTAL ARGUMENT URGING THE JURY TO CONVICT THE DEFENDANT BASED UPON EMOTION AND PREJUDICE.

As was mentioned in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution,

Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *Bruton v. United States, supra; State v. Swenson, supra*. The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this claim by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct

here. First, the violation of the trial court's order is blatant and the original motion *in limine* was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the prosecutor committed misconduct when he made rebuttal argument that the jury should convict the defendant in order to appease the feelings of the decedent's family members, and that based upon facts known to the prosecutor and not presented at trial. This argument was made as follows:

MR. HAYES: . . . You and I may never have met Thomas Stanley McKenzie, ***but I do know a few things about him***. We know he had siblings, we know –

MR. BLAIR: Objection.

THE COURT: Basis for your objection?

MR. BLAIR: Facts not in evidence.

THE COURT: The jury will again determine what the facts are

in this case. I'm not going to make a ruling on that. Go ahead, Mr. Hayes.

MR. HAYES: There were mention of some siblings. We know he had siblings, we know he had kids, we know he had a wife. We know he didn't deserve to die in the manner that he did.

You could see it all over the defendant's face when he was testifying, he had no remorse for what he did. If it really happened the way he said it did, why wouldn't his explanation have been more like, "Yeah, I feel awful about what happened but in that second I just couldn't be sure." That's not at all what he was giving out when he was on that stand. He had no remorse. And as defense counsel said in opening, it very much seemed if he had to do it over again he would.

We don't have the technology to go back in time and stop bad things from happening. Tom McKenzie's family, friends, they have to deal with this loss for the rest of their lives.

MR. BLAIR: Objection.

THE COURT: Overruled.

MR. HAYES: The defendant out of anger and frustration took Thomas McKenzie away and they have to deal with that and now it's time for the defendant to deal with the consequences of his actions. Thank you.

RP 745-746 (emphasis added).

As the emphasized portion of the quote sets out, the prosecutor specifically asked the jury to rely upon evidence known to him, which was that the decedent has children and siblings. This evidence was not presented at trial and for good reason: it was both irrelevant and prejudicial. Whether or not the decedent was a good man with many close family members or a

terrible person with no family ties at all had nothing to do with the question before the jury, which was the objective and subjective reasonableness of the defendant's action shooting the decedent. This argument, the last that the jury heard, constituted misconduct and denied the defendant a fair trial.

V. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT FOR SECOND DEGREE MANSLAUGHTER BECAUSE THE JURY'S SPECIAL INTERROGATORY FINDING THAT THE DEFENDANT HAD PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAD ACTED IN SELF DEFENSE STANDS AS AN ABSOLUTE BAR TO CRIMINAL CONVICTION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16

(1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the record does not contain substantial evidence to support the conviction for second degree manslaughter. This argument does not come from the lack of evidence that the defendant shot the decedent. Rather, it comes from the jury’s special finding that the defendant proved by a preponderance of the evidence that he acted in self-defense. The jury rendered this finding as part of special verdict form AA, which states as follows:

We, the jury, return a special verdict by answering the following question:

QUESTION 1: Did the defendant, Ronald Brady, prove by a preponderance of the evidence that the use of force was justified?

Answer: Yes (Write “yes “ or “no”)

CP 269.

In the case at bar, the trial court ruled that the defendant did present sufficient evidence to entitle him to have the jury instructed on self-defense. In so ruling, the trial court effectively added an element to each crime charged. That element, which the state had the burden of proving beyond a reasonable doubt, was that the defendant did not act in self-defense. Thus, when the jury returned this special verdict, it conclusively found that the state had not proven the lack of self-defense beyond a reasonable doubt.

In this case, the state may argue that this claim is not apropos because the special verdict the jury returned only related to the issue of self-defense as to the assault charges involving Joanne McKenzie. While this is correct on its face, it is not correct on the facts presented to the jury. These facts, as presented through the testimony of Joanne McKenzie and argued by the state, was that the defendant shot one continuous stream of bullets at two people who were simultaneously shining lights at him. Under these facts, there was no way to distinguish between the crime he allegedly committed against

Thomas McKenzie and the crime he allegedly committed against Joanne McKenzie. Indeed, it was the state's theory that the defendant could not even see the two people at whom he shot in a short stream of bullets.

Under these facts, either the defendant was justified in shooting his rifle or he was not. There is no logical way to distinguish between the two sets of charges. Thus, under these facts, the jury's special verdict that the defendant proved by a preponderance that his use of force was justified stands as a special finding by the jury that the state failed to prove one of the essential elements of the crime for which he was convicted. As a result, this court should implement the jury's finding and vacate the defendant's conviction for second degree manslaughter.

CONCLUSION

This court should vacate the defendant's conviction and remand with instructions to dismiss based upon the jury's special verdict that the defendant proved that he acted in self defense. In the alternative, this court should grant the defendant a new trial because the trial court's exclusion of relevant, exculpatory evidence denied the defendant his right to confront witnesses. The exclusion of this evidence also denied the defendant the right to due process, as did the trial court's refusal to instruct the jury on an available defense and the prosecutor's use of improper closing argument.

DATED this 17th day of February, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

It is a defense to the charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer or in the presence of the slayer or upon or in a dwelling or other place of abode in which the slayer is present.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

SPECIAL VERDICT FORM AA

We, the jury, return a special verdict by answering the following question:

QUESTION 1: Did the defendant, Ronald Brady, prove by a preponderance of the evidence that the use of force was justified?

Answer: Yes (Write "yes " or "no")

[(DIRECTION: If you answer "no" to Question 1, sign theis verdict. If you answered "yes" to Question 1, answer Question 2.)]

QUESTION 2: Was the defendant engage in criminal conduct substantially related to the events giving rise to the crime with which the defendant was charged?

Answer: Yes (Write "yes " or "no")

Date : 6/24/11 Laurie Doyle
Presiding Juror

WPIC 2.08
Dwelling - Definition

Dwelling means any building or structure [, though movable or temporary,] [, or a portion thereof,] that is used or ordinarily used by a person for lodging.

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

STATE OF WASHINGTON,
Respondent,

APPEAL NO: 42352-9-II

vs.

AFFIRMATION OF SERVICE

RONALD ALLEN BRADY,
Appellant.

STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **February 17th, 2012**, I personally placed in the e-filed and/or mailed the following documents

1. BRIEF OF APPELLANT
- 2.. AFFIRMATION OF SERVICE

to the following:

JONATHAN MEYER
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532

RONALD A. BRADY - DOC # 350645
WASH STATE CORRECTION CTR.
P.O. BOX 900
SHELTON, WA 98584

Dated this 17TH day of FEBRUARY, 2012 at LONGVIEW, Washington.

/s/

Cathy Russell

Legal Assistant to John A. Hays

HAYS LAW OFFICE

February 21, 2012 - 9:16 AM

Transmittal Letter

Document Uploaded: 423529-Appellant's Brief.pdf

Case Name: State v. Ronald Brady

Court of Appeals Case Number: 42352-9

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

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Response to Personal Restraint Petition

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Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

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