

No. 42352-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONALD ALLEN BRADY,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court violate Brady's constitutional right to confront and cross-examine a critical witness?
- B. Did the trial court violate Brady's due process right by prohibiting him from eliciting testimony regarding the McKenzies's alleged involvement in the burglary attempt on the building?
- C. Did the trial court violate Brady's due process right by refusing to give Brady's proposed defense of a felony instruction?
- D. Did the deputy prosecutor commit misconduct during his closing argument?
- E. There was sufficient evidence presented to sustain the conviction for manslaughter in the second degree

II. STATEMENT OF THE CASE

On April 19, 2010 around 5:00 p.m. Ronald Brady returned to his property located at 2155 State Route 508 in Onalaska, Washington, and discovered that it had been burglarized. RP 148, 545.¹ Brady spoke with his neighbors, Jack Tipping and Elizabeth Nunes, to warn them about the burglaries. RP 401, 534, 545-56. Brady phoned Mr. Tipping expressing frustration that he had been burgled again. RP 403, 546. Brady went to Ms. Nunes's home to tell her about the burglary. RP 534, 546. Brady told Ms. Nunes

¹ The verbatim report of proceedings for the jury trial is five volumes, with the page numbering continuing in sequence throughout all five. They will be cited as RP. Any other hearings or proceedings will be cited by RP and the date of the hearing.

that he was very upset that people kept burglarizing his property and stealing and that he was “going to lay in wait for them.” RP 534. Brady also told Ms. Nunes “that he was going to shoot them if they got into his property.” RP 535.

After speaking to Ms. Nunes, at approximately 5:40 p.m. Ronald Brady called the police in regards to a burglary. RP 148-149, 546.² Lewis County Sheriff’s Deputy Adkisson arrived at 2155 SR 508 at 5:42 p.m. and spoke to Brady. 149-50. Deputy Adkisson described the building at 2155 SR 508 as appearing from the outside as a regular residence, but once you enter the building it was clearly unfinished. RP 150. Deputy Adkisson described the inside of the building as mostly framing, open wiring, lots of building

² Brady in his statement of the case asserts that the McKenzie’s had burglary tools in their truck, that the tires matched the tire marks left earlier and that they were at Brady’s house to burglarize it. See Brief of Appellant 7, first paragraph. Brady cites to RP 68. RP 68 is the middle of voir dire, which begins at RP 19 and goes to RP 126. The state also looked at RP 168, 268, 368, 468, 568 and 668, none of which support the statements. Brady’s failure to accurately cite to the record “places an unacceptable burden on opposing counsel and on this court.” *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

The State has not attempted to identify all of Brady’s misstatements. Instead, the State has prepared its own summary of the case, with proper citations to the record. The State respectfully requests that this Court disregard any "facts" in Brady’s brief that are unsupported by the portions of the record Brady cites. See generally *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252, 850 P.2d 1298 (1993) (“Cases on appeal are decided only on evidence in the record.”); *Wells v. Whatcom County Water Dist.*, 105 Wn. App. 143, 154, 19 P.3d 453 (2001) (a party on appeal may not cite to evidence not in the appellate record and may be sanctioned for doing so). Neither this Court nor the State is required to search the record to find support for Brady’s allegations.

materials and personal items. RP 150. Deputy Adkisson saw an area that had a small table for a computer, but there was no other furniture in the building. RP 150. Brady actually lived in a rental home owned by Mr. Tipping located at 2137 SR 508. RP 242, 401. 2137 and 2155 are immediately adjacent to each other. RP 149.

Brady explained to Deputy Adkisson that he believed someone had entered the building at 2155 without his permission. RP 150. Brady believed some of the windows may have been tampered with and items inside the building had been moved around. RP 151-55. Deputy Adkisson concluded during his investigation that the windows had not been a point of entry because they did not appear to be recently tampered with. RP 153. Deputy Adkisson expressed concern to Brady that whoever had been in the building staged items and it was possible they would be returning to the property for the items. RP 156, 548. Deputy Adkisson told Brady he would be on duty all night and would check on the property. RP 156-57. Deputy Adkisson explained he would also relay the information to the other deputies on duty. RP 156. Deputy Adkisson instructed Brady to secure his building and call 911 if he saw anything suspicious. RP 157.

Brady had dinner and then prepared himself for the burglar's return by arming himself with .22 rifle and a 12 gauge shotgun. RP 548-49. Brady went down to the property at 2155 around 7:00 p.m. and settled into the building. RP 549. Brady used his laptop computer using his wireless internet to read various websites, waiting for the burglars to return. RP 549, 572-73. Brady did not bring any lights down to 2155 because he did not want the burglars to know he was inside the building. RP 569-70. Brady, who had shut and secured the garage door earlier, decided to reopen the garage door, propping it open so it looked exactly the same as the building did when the burglars had been there earlier that day. RP 573. Brady wanted to be at the building when the burglars came back. RP 568

Around 9:30 p.m. Brady got up to stretch his legs and took his .22 rifle with him. RP 549. Brady took the rifle with him because he did not want to the burglars to return and not have a gun readily available. RP 544. Brady heard a truck pull up. RP 550. The truck shut off its lights. RP 550. The truck was occupied by Thomas McKenzie and Joanna McKenzie, a married couple.³ RP 194. Thomas got out of the truck and knocked on the front

³ Thomas and Joanna will be referred to by their first name due to the common last name. No disrespect is intended.

door. RP 194. Thomas returned to the truck, Joanna exited the truck and both Thomas and Joanna knocked on the garage. RP 195. Joanna did not hear any response from inside the building. RP 195. Brady saw flashlights from outside and started to move toward one of the windows to take a look outside. RP 550. Brady stumbled over something and made a noise which was heard by Joanna. RP 196, 551. Brady, who was wearing an earpiece for his cell phone, dialed 911 but forgot to hit send. RP 551-52, 564. Brady did not yell at Thomas and Joanna to get off his property or that they were not welcome. RP 200, 575. Brady did not ask Thomas and Joanna to identify themselves or tell them he was calling the police. RP 200, 575. Brady next opened his garage door to confront Joanna and Thomas and disable the truck by shooting it with his gun. RP 552, 575, 577.

Brady opened fire when he opened the garage door attempting to shoot out the tires on the truck. RP 196, 532, 578. According to Brady, Joanna and Thomas held their flashlights on him which caused Brady concern because it was strange that they would just stand there while he was shooting at the truck. RP 553. Joanna explained she ran to the back of the truck when the shooting started and was fearful that she was going to be injured.

RP 196. Joanna was screaming, saying “stop, what are you doing?” RP 200. Ms. Nunes described the screams as “blood curdling screams” saying, “No, no, stop.” RP 532. Brady fired his .22 rifle at Thomas, who was running away from Brady. RP 197, 553, 562. Joanna heard Thomas yell out that he had been shot. RP 196. Joanna went to where her husband collapsed and he felt cold to the touch. RP 203. Joanna flagged down a motorist to call for help. RP 203-04, 224-26. Brady was also calling 911 and was instructed to place his weapons inside the residence. RP 158-59, 555.

Deputy Adkisson arrived back at 2155 SR 508 and found Thomas dead. RP 159-60. Deputy Adkisson observed that Joanna was hysterical, crying and vomiting heavily. RP 164. Thomas was officially pronounced dead at 10:02 p.m. RP 161. Thomas died from a perforating gunshot wound to the chest. RP 379. The entrance and exit wounds were located at 54 inches above Thomas’s heel. RP 379-81.

Brady was charged in Lewis County Superior Court by first amended information with, Count I, Murder in the First Degree and Count II, Assault in the First Degree. CP 10-12. There were numerous pretrial motions in the case. CP 19-25, 38-44, 70-73.

The trial court issued written rulings on most of the State's pretrial motions in limine. CP 66-69. The trial court ruled that Brady's trial counsel was not to mention or argue that Joanna or Thomas was involved in the burglary at 2155 SR 508 earlier in the day. CP 67. The trial court also ruled that Brady's trial counsel could impeach Joanna with the fact that she had been convicted of Burglary in the Second Degree⁴ but could not mention the date of the offense, April 19, 2010, or the underlying facts of the conviction. CP 68-69. There was further argument regarding impeachment of Joanna regarding alleged drug impairment, which the trial court ultimately ruled that Brady's trial counsel could ask Joanna if she was using drugs but he could not ask Detective Riordan about his observations that Joanna's pupils were fixed and pinpoint. RP 5.

Brady elected to have his case decided by a jury. RP 1.

The trial took place over five days and Brady was the sole witness to testify for the defense. RP 1, 135, 303, 483, 541, 594. The State and Brady's trial counsel proposed jury instructions. CP 74-130, 164-67. The trial court refused to give Brady's proposed jury instruction that it was a defense of a charge of murder or manslaughter that the homicide was justified when committed in

⁴ This must have been a typographical error because Joanna was convicted of Attempted Residential Burglary.

actual resistance of an attempt to commit a felony upon the slayer, in the slayer's presence or upon a dwelling or other place of abode in which the slayer is present. RP 596-598; CP 167. The jury was instructed on self defense. See CP 211-54. The jury acquitted Brady of Murder in the First Degree and the lesser included offenses of Murder in the Second Degree and Manslaughter in the First Degree. CP 257-59. Brady was also found not guilty of Assault in the First Degree and the lesser included offense of Assault in the Second Degree. CP 261-62. Brady was found guilty of Manslaughter in the Second Degree with a firearm enhancement. CP 260, 266. The jury was instructed that because it had found Brady not guilty of the Assault in the First Degree against Joanna it would now have to decide, by special verdict, if the use of force was lawful. RP 757-59; CP 269-70. The jury returned the special verdict finding that Brady's use of force in regards to Count II was justified. CP 269-70. Brady was sentenced to 63 months including the firearm enhancement. CP 291-99. Brady timely appeals his conviction. CP 302-11.

Other facts will be supplemented as necessary throughout the argument portion of this response.

III. ARGUMENT

A. BRADY WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE JOANNA MCKENZIE.

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. There is no absolute right to cross-examine an adverse witness. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A trial court's ruling regarding the scope of cross-examination will not be reversed absent a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996) (citation omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This court reviews alleged violations of the confrontation clause de novo.

State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

When attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608(b). A witness may, at the discretion of the trial court, be impeached using specific instances of conduct on cross-examination if the trial court finds the conduct is probative of the truthfulness of the witness. ER 608(b). "The cross-examiner must have a good faith basis for the inquiry, and the court, in its discretion, may require that the basis be revealed in the absence of the jury before the cross-examination is allowed." 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, § 608.10 at 329 (2010-2011). Questions asked on cross-examination must be in good faith and with proper foundation. *State v. Briscoe*, 78 Wn.2d 338, 341, 474 P.2d 267 (1970).

In *Darden* the trial court denied the defendant the ability to cross-examine the officer who conducted the surveillance of Darden regarding the officer's exact location during the surveillance. *State v. Darden*, 145 Wn.2d at 617-18. Darden was charged with possession of a controlled substance with the intent to deliver. *Id.* at 616. During the direct examination of the officer the

State elicited testimony regarding what the officer could see and generalized information regarding the officer's location. *Id.* at 616-17. The officer was the only person who saw Darden exchange drugs for money and his testimony was crucial in proving possession with intent rather than mere possession of a controlled substance. *Id.* at 624. The Supreme Court ruled that the limitation regarding the exact location was an abuse of discretion because the information was relevant to Darden's case and the State could not provide justification that the evidence should be excluded under the exceptions laid out in ER 403.⁵ *Id.* at 625-28.

In the present case Brady's trial counsel sought to cross-examine Joanna her about alleged prior inconsistent statements and lies she told law enforcement during the course of the investigation. RP (12/6/10) 16-23; RP (6/15/11) 16-18. Brady's trial counsel, however, never made an offer of proof of exactly what prior statements were false or inconsistent or what evidence existed to demonstrate their falsity or inconsistency. *Id.*

THE COURT: [W]hat are the inconsistent statements that you're talking about, Mr. Blair?

⁵ ER 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MR. BLAIR: She told law enforcement that she and her husband were there for nothing having to do with any crime or a criminal act or attempted criminal act or even the thought of committing a crime. They were there for innocent purposes is what she told law enforcement.

THE COURT: She said she was there for innocent purposes or - -

MR. BLAIR: She didn't use that word in particular

THE COURT: Wait. What did she say that she was there for?

MR. BLAIR: To get some car parts that they had gotten permission to go to that residence to pick up some vehicle parts.

THE COURT: All right. And so then did that change or was the proved to be not true?

MR. BLAIR: Well, my client never gave anybody permission to stop by and get any vehicle parts, and the fact that she pled guilty to the residential burglary that she was charged with having to do with that particular occasion.

THE COURT: But that's a separate issue that we haven't dealt with yet. So she made a statement to law enforcement saying she was there to pick up car parts.

MR. BLAIR: Right, and that they had permission to do that.

MR. HAYES: She actually said that her husband told her that he was there to get car parts. She was riding along with her husband. He - - she told law enforcement that her husband told her that he had permission and they were looking for car parts. So it

was once removed from the way Mr. Blair explained it.

THE COURT: Do you agree with that?

MR. BLAIR: Yes.

RP (12/6/10) 21-22. Brady's trial counsel was never able to explain to the court what the inconsistent statements were and the matter was set over to another hearing. RP (12/6/10) 22-24. At the later hearing trial counsel again asserted that Joanna lied about why she and Thomas were at Brady's property and alluded to inconsistent statements. RP (6/15/11) 16. Trial counsel could never give the trial court an example or offer of proof regarding the alleged inconsistent statements and the State rebutted stating that during Joanna's statements to law enforcement her version of the events never changed. *Id.* Brady's trial counsel's inability to articulate any inconsistent statements Joanna made provides a basis for denying the defendant's requested relief. See ER 103(a)(2); *Estate of Bordon ex. Re. Anderson v. Dept. of Corrections*, 122 Wn. App. 227, 244-47, 95 P.3d 764 (2004).

In this case, the jury had significant other evidence available to it with respect to Joanna's credibility. The jury knew that Joanna was at Brady's property at the time of the shooting without his permission. RP 565-66, 577. The jury knew that Joanna had been

convicted of Theft in the Third Degree and Attempted Residential Burglary in 2010. RP 198-99, 220. Brady was not denied his constitutional right to confront and cross-examine Joanna and his conviction should be affirmed.

B. THE TRIAL RULING PROHIBITING BRADY FROM ELICITING TESTIMONY REGARDING THE MCKENZIES'S ALLEGED INVOLVEMENT IN THE BURGLARY EARLIER IN THE DAY OR THE POSSIBLE BURGLARY ATTEMPT THAT NIGHT DID NOT VIOLATE BRADY'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied*, 172 Wn.2d 1002 (2011), *citing State v. Davis*, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). “[T]he right to due process provides heightened protection against government interference with certain fundamental rights.” *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend himself or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d at 720. A defendant does not have an absolute right to present evidence. *Id.* Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Id.* If a defendant can show that the evidence is relevant than the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will "disrupt the fairness of the fact-finding process at trial." *Id.*

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly

unreasonable. *State v. C.J.*, 148 Wn.2d at 686. A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

In *Jones* the defendant was on trial for rape in the second degree and was seeking to introduce evidence that the night of the alleged rape he and his niece (the victim) met a woman and two men at a truck stop and then proceeded to have a nine hour cocaine and alcohol fueled sex party. *State v. Jones*, 168 Wn.2d at 717. Jones wanted to testify that he engaged in consensual sex with the victim as did the other two men at the party. *Id.* The trial court found that the evidence was barred by the rape shield statute as it was offered for the purpose of attacking the victim's credibility. *Id.* The Supreme Court held that the evidence Jones sought to admit through his own testimony was highly probative as it was his

entire defense, which if believed by the finder of fact would prove consent which was a defense to the crime charged. *Id.* at 721.

Brady is claiming that the trial court erred by excluding evidence that Joanna and Thomas broke a window at Brady's house sometime prior to the shooting. Brief of Appellant 25-28. Brady cites to nothing in the record that supports this contention, simply referring to Joanna's alleged prior inconsistent statements to police, which, as argued above, Brady did not provide the trial court an offer of proof regarding the existence of any such statements. Neither this Court nor the State is required to comb the record looking for support for Brady's arguments. *See State v. Brousseau*, 172 Wn.2d 331, 353, 259 P.3d 209 (2011).

Brady argues to this Court that he should have been allowed to elicit the true state of affairs that Joanna and Thomas were burglars who had previously broken into Brady's home. Brief of Appellant 27-28. Brady's argument is not persuasive for two reasons. First, there was no evidence that Joanna or Thomas were at Brady's home earlier the day of the shooting, nor was there an offer of proof from Brady that any such evidence existed. *See* RP (12/6/10); RP (1/28/11); RP (6/15/11). Second, none of the rulings regarding the motions in limine prohibited Brady from presenting

evidence that his home had been burglarized earlier the day of the shooting. See CP 66-69. Who broke the window was irrelevant to Brady's mental state. The lawfulness of Brady's actions did not depend upon whether the person he shot was the one who broke the window. See *State v. Hughes*, 106 Wn.2d 176, 189, 721 P.2d 902 (1986).

Brady also argues to this Court that the trial court erroneously precluded him from "eliciting evidence from Joanne [sic] McKenzie or any other source that she was using methamphetamine during the burglary." Brief of Appellant 28. This is not a true statement. The trial court did rule that Brady could not elicit an opinion from Detective Riordan that Joanna was under the influence the night of the shooting. RP 5. The trial court agreed with the State that Detective Riordan did not have the requisite training to proffer an opinion regarding whether Joanna was under the influence of drugs the night of the shooting. RP 5. The trial court did however rule that Detective Riordan's observations that Joanna's pupils were fixed and pinpoint gave Brady a good faith basis to ask Joanna whether or not she was under the influence of drugs on the night of the shooting. RP 4-5. Brady was not precluded from eliciting from Joanna if she was under the influence

of methamphetamine the night of the shooting, he was only limited to accepting whatever answer she gave. See RP 5. The trial court did not violate Brady's constitutional right to due process and his conviction should be affirmed.

C. THE TRIAL COURT'S REFUSAL TO GIVE BRADY'S PROPOSED JURY INSTRUCTION REGARDING HIS RIGHT TO RESIST THE COMMISSION OF A FELONY DID NOT VIOLATE BRADY'S DUE PROCESS RIGHTS.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), citing *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *State v. Webb*, 162 Wn. App. at

2008, citing *State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.* Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

A defendant is entitled to a jury instruction on self-defense if the defendant produces some evidence that demonstrates self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citation omitted). Once the defendant is entitled to the self-defense instruction, it then becomes the State's burden to prove beyond a reasonable doubt the absence of self-defense. *Id.*

Evidence of self-defense is evaluated from the standpoint of reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. This standard incorporates objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id. at 474. A person is only entitled to use the degree of force necessary that a reasonable prudent person would find necessary

under similar conditions as they appeared to the defendant. *Id.*

“The refusal to give instruction on a party’s theory of the case when there is supporting evidence is reversible error when it prejudices the party.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citation omitted).

In the present case the trial court gave a self-defense instruction to the jury. CP 231, 242. The jury instruction for self-defense regarding the homicide charge read:

It is a defense to a charge of Murder in the First Degree, Murder in the Second Degree, Manslaughter in the First Degree, and Manslaughter in the Second Degree that the homicide was justifiable as defined in this instruction.

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide to be justifiable.

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

- 1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to inflict death or great personal injury;
 - 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished;
- and

3) the slayer employed 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 of 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 231; WPIC 16.02; WPIC 16.07. This instruction allowed Brady to argue his theory of the case, that he acted in self-defense, and his actions were reasonable given the circumstances as it appeared to him at the time of the shooting.

Brady states that he had two theories regarding self-defense, one that Brady was in danger of serious bodily harm, and two that Brady was justified because he was attempting to resist the commission of a felony. Brief of Appellant 35. Brady argues to this Court that the trial court erred by failing to give a second self-defense instruction, which he proposed, regarding self-defense in an attempt to resist a felony. Brief of Appellant 35. Brady proposed the following instruction:

It is a defense to a 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; WPIC 16.03.

The courts in Washington State have consistently held that homicide in resistance to a felony or an attempted felony is “not justified unless the attack on the defendant’s person threatens life or great bodily harm.” *State v. Nyland*, 47 Wn.2d 240, 243, 287 P.2d 345 (1955).⁶ Division III of the Court of Appeals has held it is only in cases where during a felony “the attack on the defendant’s person threatens life or great bodily harm” that homicide may be justified. *State v. Brenner*, 53 Wn. App. 367, 377, 768 P.2d 509 (1989). This interpretation was confirmed by the Supreme Court in

⁶ Citing, *State v. Spear*, 173 Wn. 57, 33 P.2d 905 (1934); *State v. Bezemer*, 169 Wn. 559, 14 P.3d 460 (1932); *State v. Radar*, 118 Wn. 198, 203 P. 68 (1922); *State v. Blain*, 64 Wn. 122, 116 P. 660 (1911).

Brightman, holding that homicide is justified in response to a felony if the felony imperils the defendant's life or great bodily harm. *State v. Brightman*, 155 Wn.2d 506, 521-23, 122 P.3d 150 (2005). The Supreme Court also held that "an individualized determination of necessity [by the trial court] is required, contradicting the notion that deadly force is per se reasonable whenever a robbery or other violent felony is attempted." *State v. Brightman*, 155 Wn.2d at 523.

In the present case Brady argues that, in the light most favorable to the defendant, there was significant evidence to support the conclusion that he fired his gun while Thomas and Joanna were in the process of attempting to burglarize his residence. Brief of Appellant 37. It is this evidence, according to Brady, that requires the trial court to give his proposed self-defense jury instruction. Brief of Appellant 37. Yet, Brady does not state what this significant evidence is or cite to record in support of this statement. See Brief of Appellant 37. The cases Brady cites to in his briefing are equally unpersuasive. *Adams* and *Wanrow* both deal with circumstances where no self-defense instruction was given, while in Brady's case the trial court did instruct on self-defense. See *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548

(1977); *State v. Adams*, 31 Wn. App. 393, 641 P.2d 1207(1982); CP 231.

The evidence admitted at trial viewed in the light most favorable to the defense does not show that Thomas and Joanna were attempting to burglarize Brady's residence. Even if Joanna and Thomas were attempting to burgle the building Brady owned, such an act, as evidenced by the testimony, does not rise to the level of a felony in which a person is justified in using deadly force. See *State v. Brightman*, 155 Wn.2d 506; *State v. Nyland*, 47 Wn.2d 240; *State v. Brenner*, 53 Wn. App. 367.

In addition to not meeting the requisite type of felony, the provision in Brady's proposed jury instruction that homicide is justifiable when committed in a dwelling or other place of abode in which the slayer is present similarly does not apply in this case. See CP 167; WPIC 16.03. The notes on the use of Brady's proposed jury instruction state that the court should use WPIC 2.08 for the definition of dwelling. See WPIC 16.03, Notes on Use. "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. The building located at 2155 SR 508 no longer met that definition of dwelling. At one time the

building had been a dwelling and still appeared as one from the outside. RP 150. But the building as it currently stood was not used nor was it the type of building that would ordinarily be used by a person for lodging. RP 150. The inside of the building was mostly framing and open wiring. RP 150. This is because in 1996, what was once a residence at 2155 burned down and as of April 2010 the building was still under construction. RP 544, 565. Brady would not under normal circumstances stay the night in the building. RP 567. This was not a building or structure that was used or ordinarily used for lodging, therefore it did not meet the required definition of dwelling for WPIC 16.03, Brady's proposed jury instruction.

The trial court properly analyzed these issues and came to the same conclusions as the State has in its brief to this Court. In explaining its ruling denying the inclusion of Brady's proposed jury instruction the trial court stated:

I'm going to take a moment here to explain why I'm not doing that. First - - there's actually two issues here. One's a defense of property and the other is to wit a dwelling and the other's resistance of a felony.

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 force here was a criminal trespass as there was no entry as required for burglary. But more to the point, even if the

burglary was about to be committed, there is no evidence that the actions of the decedent threatened the defendant's life or 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 designation allows.

RP 596-98. The trial court conducted an individualized determination of necessity as required by the Washington State Supreme Court when a defendant is asserting a justifiable homicide defense in response to a felony or attempted felony. See *State v. Brightman*, 155 Wn.2d at 523.

The trial court properly refused to give Brady's proposed jury instruction for self-defense in defense of a felony. Brady's instruction was not supported by the facts of this case or the law. Brady was entitled to the self-defense instruction the trial court

gave. Because the trial court did not err in refusing to give Brady's proposed jury instruction his conviction should be affirmed.

D. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING ARGUMENTS.

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prove prosecutorial misconduct, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*,

118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing State v. Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

1. The Deputy Prosecutor Did Not Improperly Appeal To The Passion And Prejudice Of The Jury.

It is prosecutorial misconduct for a prosecutor to appeal to the passion and prejudice of the jury or reference to evidence outside the record. *State v. Fisher*, 165 Wn. 2d 727, 747, 202 P.3d

937 (2009) (citation omitted). The reviewing court is not required to reverse for such misconduct when the defendant's trial counsel failed to request a curative instruction. *Id.*, citing *State v. Russell*, 125 Wn.2d at 85. A prosecutor may reference the impact a crime has on the victim and his or her family. *State v. Gentry*, 125 Wn.2d 570, 644, 888 P.2d 1105 (1995).

In the present case Brady argues to this court that the deputy prosecutor improperly appealed to the passion and prejudice of the jury by arguing the jury should convict Brady to appease Thomas's family members. Brief of Appellant 40. The portion of the deputy prosecutor's closing argument Brady is referring to is 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 what he was giving out when he was on the 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 745-46.

To further support his argument that the deputy prosecutor committed misconduct Brady argues that the deputy prosecutor used facts that the deputy prosecutor knew had not been presented at trial. Brief of Appellant 40. Brady states, "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..." Brief of Appellant 41. This is an incorrect statement as there was testimony produced at trial that Thomas had a family, a brother and children. RP 495, 508, 525-26.

The deputy prosecutor asked Detective Kimsey if Thomas had any kids and Detective Kimsey stated Thomas did. RP 495. The deputy prosecutor followed up that question by asking Detective Kimsey if Thomas had siblings. RP 495. Brady's trial counsel objected to that question for relevance and the trial court sustained the objection. RP 495. Later, Brady's trial counsel asked Detective Kimsey about what had happened to Thomas's truck which was initially left at Brady's property. RP 508. Detective Kimsey stated it was released to family. RP 508. The deputy prosecutor asked if the truck had been released to Thomas's brother and Detective Kimsey confirmed the truck had been released to Thomas's brother. RP 525-26.

The deputy prosecutor did not commit misconduct. The deputy prosecutor did not argue facts that were not in evidence or impermissibly appeal to the passion and prejudice of the jury. There was evidence submitted to the jury that Thomas had children and at least one sibling, a brother. The prosecutor is permitted to

remind the jury of the impact that the crime, in this case manslaughter, had on Thomas's family.

2. If This Court Were To Find That The Deputy Prosecutor Committed Misconduct, Brady Was Not Prejudiced And The Misconduct Was Therefore Harmless Error.

The State does not concede that any of the statements the deputy prosecutor made were improper. Arguendo, if this court were to find any or all of the statements improper and misconduct, the State argues that any such misconduct was harmless error.

If this court finds that the deputy prosecutor committed misconduct this Court is not required to reverse when Brady's trial counsel failed to request a curative instruction. *State v. Fisher*, 165 Wn. 2d at 747. Brady has the burden of showing the misconduct was prejudicial considering the context of the entire record. *State v. Gregory*, 158 Wn.2d at 809. The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *State v. Monday*, 171 Wn. 2d at 675.

Brady's trial counsel did not request a curative instruction. The question becomes, when evaluating the entire record, "is there a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial"? *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984).

Brady argues that the deputy prosecutor's improper statements denied Brady a fair trial. This is simply not the case.

The jury was instructed:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 214; WPIC 1.02. A jury is presumed to follow the instructions given by the trial court. *State v. Foster*, 135 Wn. 2d 441, 472, 957 P.2d 712 (1998). The totality of the evidence in this case was so overwhelming, the pictures, the statements from the witnesses, including Brady's own testimony, that there is not a substantial likelihood that the deputy prosecutor's misconduct affected the outcome of the jury verdict. This court should affirm Brady's conviction.

E. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO FIND BRADY GUILTY OF MANSLAUGHTER IN THE SECOND DEGREE.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v.*

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, “the specific criminal intent of the accused

may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

The State must prove that a person, with criminal negligence, causes the death of another person in order to convict that person of manslaughter in the second degree. RCW 9A.32.070(1).

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d). Criminal negligence in the context of manslaughter in the second degree requires a defendant to fail to be aware of a substantial risk that a death may occur, not just a wrongful act. *State v. Gamble*, 154 Wn. 2d 457, 467, 114 P.3d 646 (2005).

In the present case Brady chose to confront two people he suspected were about to burglarize a building he owned. RP 552, 575, 577. Thomas and Joanna never attempted to enter the garage or come through a window. RP 577. Brady did not call the police when he suspected he was being burglarized. RP 552-52, 564. Brady did not yell out to the people outside to get off of his

property or even ask them what they were doing on his property. RP 200, 575. Brady knew when he opened the garage that there would not be a threat that Thomas or Joanna would come into the garage. RP 577. Before he opened the garage, Brady had already decided that he was going to fire his gun. RP 577. According to Brady, after he shot at the truck, Thomas and Joanna just stood there with their flashlights pointed at him. RP 553. Brady fired multiple shots at the light that turned out to be Thomas. RP 578. Thomas was moving away from Brady as Brady continued to shoot at Thomas. RP 582. Brady fired the shots at Thomas with the intention of striking Thomas with the bullets. RP 581.

There was sufficient evidence presented to the jury that Brady acted with criminal negligence and thereby caused the death of Thomas McKenzie. Brady failed to be aware that there was a substantial risk that death may occur when he was shooting at Thomas as Thomas ran away from Brady. Brady's failure to be aware that there was a substantial risk that he could kill Thomas was a gross deviation from the standard of care that a reasonable person would exercise in the same situation. A reasonable person would not confront an unknown person, outside a building, by shooting at the person without even a question as to who that

person was or what that person is doing there. A reasonable person would realize that this conduct would cause a substantial risk of death to the unknown person. The conviction for manslaughter in the second degree should be affirmed.

Brady argues to this court that the jury's special verdict from AA is proof that there was insufficient evidence to sustain the verdict of guilty for the charge of manslaughter in the second degree. Brief of Appellant 43-45. Special verdict form AA was given to the jury after it found Brady not guilty of Count II, the Assault in the First Degree where Joanna was the victim. RP 757-59; CP 269-70. This special verdict was only in regards to Count II and the trial court and the instruction made that clear. RP 757-59; CP 270. What Brady is really arguing to this Court is that his verdicts are inconsistent.

Inconsistent verdicts are permissible in criminal cases. *State v. Goins*, 151 Wn.2d 728, 738, 92 P.3d 181 (2004). The courts have acknowledged that inconsistent verdicts inherently produce discomfort, but this discomfort does not make the verdicts impermissible or require vacation of an inconsistent verdict. *State v. Goins*, 151 Wn.2d at 733-34. The United States Supreme Court has even "recognized that a guilty verdict can stand, even where

the defendant was inconsistently acquitted of a predicate crime.”

Id. at 733, citing *United States v. Powell*, 469 U.S. 57, 68-69, 105 S. Ct. 471, 83 L.Ed.2d 461 (1984); *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L.Ed. 356 (1932). The Washington State Supreme Court has held:

Considering the important role of jury lenity, and problems inherent in second-guessing the jury’s reasoning, this court upheld the power of a jury to return a verdict of not guilty for impermissible reasons. So long as the jury’s guilty verdict was supported by sufficient evidence, the court concluded that it would not reverse the guilty verdict simply because it was inconsistent with an acquittal on another count.

Id. at 734 (citations and quotations omitted).

The Supreme Court has upheld inconsistent verdicts in a case where a person was charged with vehicular assault and vehicular homicide and the jury found the defendant guilty of vehicular assault by operating his vehicle under the influence of drugs but found the vehicular homicide was on the basis that he operated a motor vehicle with disregard for the safety of others. *State v. McNeal*, 145 Wn.2d 352, 360-62, 37 P.3d 280 (2002). The Supreme Court reasoned that sufficient evidence supported the verdicts and “the apparent inconsistency between the verdict [for

the vehicular assault] and the vehicular homicide verdict may be attributed to considerations of jury lenity.” *Id.* at 361.

In the present case, as argued above, there was sufficient evidence to find Brady guilty of Manslaughter in the Second Degree. Any inconsistency with the guilty verdict for Count I and special verdict form AA can be attributed to considerations of jury lenity. The Manslaughter in the Second Degree conviction need not be vacated and should be affirmed.

IV. CONCLUSION

For the foregoing reasons, this court should affirm Brady’s conviction for Manslaughter in the Second Degree.

RESPECTFULLY submitted this 22nd day of May, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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