

No. 93038-4

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No 31227-5-III  
(consolidated with 31338-7-III)



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,

Petitioner.

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OPENING BRIEF OF PETITIONER

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Judgment in Spokane County Superior Court No. 08-1-01641-3  
The Hon. Jerome Leveque, Presiding

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**A. ASSIGNMENTS OF ERROR<sup>1</sup>**

1. Petitioner Aleksandr Pavlik assigns error to the trial court's decision to take challenges for cause and hardship exemptions at a bench conference.

2. Mr. Pavlik assigns error to Inst. No. 20, attached in App. A.

3. Mr. Pavlik assigns error to Inst. No. 22, attached in App. A.

4. The trial court erred when it did not give self-defense instructions based on RCW 9A.16.020, WPIC 17.02 and WPIC 17.04.

5. The trial court erred when it did not give an instruction allowing for force to be used to protect against the actions of people acting in concert with the injured party.

6. The trial court erred when it did not give an instruction to the jury that allowed force to be used while resisting the commission of felony, under WPIC 16.03.

7. The trial court erred when it failed to give a jury unanimity instruction with regard to multiple acts constituting the crime of assault.

8. Mr. Pavlik was prejudiced when, either through a due process

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<sup>1</sup> These assignments of error only cover the topics in this brief -- there are two issues in the PRP that are not covered in this brief (the legal rulings at sidebars and the unanimity requirement for the special verdict).

violation or ineffective assistance of counsel, the jury never learned of key evidence related the backgrounds of Mr. Leenders and Mr. Smith.

9. Newly discovered evidence justifies the grant of a new trial.

10. The trial court erred when it admitted the State's witnesses' out-of-court statements.

11. This Court erred when it determined that the exclusion of Mr. Pavlik's excited utterances was harmless.

12. Mr. Pavlik received ineffective assistance of counsel at trial.

13. Mr. Pavlik received ineffective assistance of counsel on appeal.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the trial court have taken challenges for cause and hardship exemptions in jury selection in a closed bench conference?

2. Did the self-defense instructions improperly lower the burden of proof on the State and erect too high of a standard (a) by excluding assault from the second paragraph of Inst. No. 20, (b) by using the term "great bodily harm" in Inst. No. 22, (c) by not providing for self-defense if the person injured was working in concert others, (d) by not using the standard set out in RCW 9A.16.020 for non-homicide cases, and (e) by not providing for self-

defense in resistance to a felony?

3. Was petitioner's right to jury unanimity violated?

4. Did the State violate its obligation to disclose material impeachment information about two key witnesses and was trial counsel ineffective for not conducting a proper investigation and for misunderstanding the role of impeachment?

5. Was trial counsel ineffective for not introducing key impeachment evidence of Mr. Leenders' prior inconsistent statements?

6. Does new evidence justify a new trial?

7. Should the trial court have admitted hearsay by the State's witnesses, and was the exclusion of Mr. Pavlik's excited utterances harmless?

8. Were trial counsel and appellate counsel ineffective?

**C. STATEMENT OF FACTS**

The facts of this case are set out in detail in the Personal Restraint Petition, § B(1), and are incorporated herein by reference.

**D. ARGUMENT**

**1. *The Bench Conference During Jury Selection Violated the State and Federal Constitutions***

All discussion about challenges for cause and hardship exemptions took place at a reported bench conference between counsel and the judge. RP

(3/16/08) 103-04. Neither Mr. Pavlik nor anyone else in the courtroom (except for the court reporter using headphones) were present and did not know what was taking place. Exs. 33, 34. None of the information was then later placed on the record in open court. This procedure constituted an unconstitutional partial closure of jury selection.

A person accused of a crime has the right under U.S. Const. amends. 6 and 14 and Wash. Const. art. 1, § 22, to a public trial, which includes the selection of a jury. *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *In re Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). A defendant's right is paralleled, and protected, by the public's right to attend trials under U.S. Const. amends. 1 & 14 and Wash. Const. art. 1, § 10. *State v Sublett*, 176 Wn2d 58, 70-72 & n. 6, 292 P3.d 715 (2012) (plurality). Moreover, a defendant also has the right to be present at all critical stages of the trial, which include jury selection. U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22; *State v. Irby*, 170 Wn.2d 874, 880-84, 246 P.3d 796 (2011).

Whether a violation of the public trial right exists is a question of law that is reviewed de novo on appeal. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012). The first question is whether a closure that triggers the

public trial right has occurred. The court must ask if, under considerations of “experience and logic,” “the core values of the public trial right are implicated.” *State v. Sublett*, 176 Wn.2d at 73 (plurality) & 176 Wn.2d at 94-95 (Madsen, J., concurring). This test is necessarily based on historic experience – whether the procedure has traditionally been open to the public, and whether public access plays a significant role in the “functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73 (internal quotations omitted).

If there is a closure, the question is whether the trial court properly conducted a *Bone-Club*<sup>2</sup> analysis before closing the courtroom. *State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012). If the trial court failed to do so, then a “per se prejudicial” public trial violation has occurred “even where the defendant failed to object at trial.” *Wise*, 176 Wn.2d at 18. Moreover, the issue can be raised on collateral review, either as its own substantive violation or under the rubric of ineffective assistance of appellate counsel under the right to appeal and the Due Process Clauses of U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, §§ 3 & 22. *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012).

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<sup>2</sup> *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

There is no question but that jury selection generally is one portion of the trial that under logic and experience has traditionally been open to the public. To be sure, not *all* aspects of jury selection necessarily needs to take place in open court. For instance, the Court of Appeals recently affirmed a conviction where the bailiff had administratively excused jurors based on illness before voir dire began in the courtroom. *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013). On the other hand, the Court of Appeals has recently reversed convictions where (1) four jurors were dismissed following an in-chambers conference between the trial court and counsel without the defendant being present, *State v. Slert*, 169 Wn. App. 766, 282 P.3d 101 (2012), *rev. granted* 176 Wn.2d 1031, 299 P.3d 20 (2013), and (2) where, at the end of the case, a court clerk randomly selected four jurors to be alternates during a court recess. *State v. Jones*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 41902-5-II, 6/4/13).

In this case, after questioning of potential jurors in open court, counsel and the judge held a private “bench conference” to discuss which jurors would be excused for cause and which would be granted hardship exemptions. “Experience and logic” make it clear that the core values of the public trial right are implicated by these tasks.

Challenges for cause are governed by court rule, CrR 6.4, and by statute, RCW 4.44.150 -.250. These procedures make it clear that challenges for cause are not mere administrative tasks, but are an essential component of the open court process. CrR 6.4(d) actually provides for *trials* on contested challenges for cause, governed by the Rules of Evidence. *See also* RCW 4.44.250 (requiring challenges to be placed “upon the record”). Washington courts have therefore reversed judgments such challenges were conducted out of court. *State v. Tingdale*, 117 Wn.2d 595, 817 P.2d 850 (1991) (clerk excused jurors who were acquainted with parties); *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 857 P.2d 1094 (1993) (judges decided qualifications for jury service based upon written questionnaires). Similarly, in *State v. Irby, supra*, the Supreme Court reversed an aggravated murder conviction where the court discussed and excused jurors for cause and for hardship in email exchanges, from which the defendant was excluded. *Accord State v. Slett, supra* (reversal where challenges for cause were taken in chambers).

Here, although there were people in the courtroom when the judge called the lawyers to the bench, the judge and counsel might as well have been in chambers or have been communicating by email. No one could hear what they were talking about; the defendant was not present at the bench

conference; and no one even attempted to announce to the public what took place at the bench conference at a later point of the proceedings. To any observer (and to the defendant) what took place at the bench was part of the mystery of the legal world -- a secret proceeding that only those “in the know” could observe. The bench conference during jury selection was therefore a partial court closure, that violated Mr. Pavlik’s right to be present during critical portions of the trial and the right to an open and public trial under U.S. Const. amends. 1, 6 & 14 and Wash. Const. art. 1, §§ 10 & 22.

The trial court failed to justify conducting this critical portion of jury selection in a closed proceeding pursuant to the *Bone-Club* factors. Accordingly, the error was structural that is presumed prejudicial and is grounds for a new trial. *State v. Wise*, 176 Wn.2d at 16-20. Moreover, the failure of Mr. Wasson to raise the issue on direct appeal was ineffective and prejudicial and is the basis for relief on collateral review. *In re Morris*, *supra*. Relief should be granted under RAP 16.4(c)(2), (5) & (7).

**2. *The Jury Instructions Related to Self-Defense Were Defective***

Mr. Leenders and Mr. Smith threatened Mr. Pavlik, first by opening his car door during an argument about their blocking the street, then by damaging his car with a thrown bike, then by advancing on him and

threatening to kill him even when he showed that he was armed, and finally by leaning into the car and punching him repeatedly.

The jurors obviously understood Mr. Pavlik's plight when they acquitted him of attempting to kill Mr. Leenders. Under these facts, the jurors could easily reject the State's argument that Mr. Pavlik intended, with premeditation, to kill Mr. Leenders. While the same jury returned a verdict of "guilty" to the crime of assault in the first degree, this verdict was marred by the defects in the self-defense instructions.

The failure to propose proper instructions violates the right to effective assistance of counsel under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland v. Washington*, 466 U.S. 668, 685-90, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).<sup>3</sup> Moreover, "our Supreme Court subjects self-defense instructions to more rigorous scrutiny. Jury instructions on self-defense must more than adequately convey the law." *State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) ( (internal quotations omitted). "[B]ecause the State must disprove self-defense when properly raised, as part

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<sup>3</sup> See *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009) (proper self-defense instructions); *State v. Thomas*, 109 Wn.2d 222, 225-29, 743 P.2d 816 (1987) (diminished capacity instructions); *State v. Doogan*, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (invited error doctrine does not bar relief based on ineffectiveness if counsel was ineffective for proposing the wrong instructions).

of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude,” *Kyllo*, 166 Wn.2d at 862, thereby violating due process under U.S. Const. amends. 5 & 14 and Wash. Const. art 1, § 3.

a. **The Failure to Insert Assault into the Second Paragraph of Inst. 20 Was a Fatal Error**

In this case, through a clear oversight, trial counsel failed to propose proper instructions related to self-defense for the assault charge. Ms. Nordtvedt realized her error during the discussion in court about the jury instructions; the judge interlineated “first degree assault” into Inst. Nos. 20 and 22, and corrections were still being made even after judge read the instructions to the jury. RP 452-54, 473-75.

Unfortunately, the key self-defense instruction, Inst. No. 20 (App. A), was never completely corrected. While the words “first degree assault and/or” were inserted into the first and last paragraphs of the instruction, the key second paragraph -- the paragraph that sets out the circumstances when an actor can use self-defense -- was never corrected, and thus literally only applied to the attempted homicide charge. The jury was therefore never given

a clear instruction that allowed it to evaluate when an assault would be justifiable as being in self-defense. The jury was only explicitly given such an instruction for attempted homicide.

It has to be assumed that juries follow their instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Where instructions that address key elements of the crime are defective, even because of “scrivener’s errors,” reversal is the remedy. *See State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997) (reversal where “to convict” instruction mistakenly required finding that defendant and others agreed to conspire to commit murder, not that they agreed to commit murder.).

While *Smith* addressed an error in the “to convict” instruction, here, Inst. No. 20 was the functional equivalent of a “to convict” instruction because it listed the elements of self-defense, the absence of which is an essential element of the crime of assault and an element upon which the State bears the burden of proof. *State v. Acosta*, 101 Wn.2d 612, 616-19, 683 P.2d 1069 (1984). The Supreme Court has held that the absence of self-defense need not be listed as an element in the “to convict” instruction, *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), and Inst. No. 15 did not include any element of the lack of lawful force or the lack of self-defense.

App. A.<sup>4</sup> Thus, Inst. No. 20 became the only instruction by which the jurors would have a “road map” or “yardstick” to use to see if Mr. Pavlik’s use of force was justified. As such, Mr. Pavlik was entitled to have Inst. No. 20 accurately reflect the law related to self-defense. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” *State v. Smith*, 131 Wn.2d at 263.

Here, Inst. No. 20 failed to contain accurate information and precluded the jury from assessing whether Mr. Pavlik’s use of force was justifiable from the standpoint of the crime of assault in the first degree. Under the facts of this case, where the jurors acquitted Mr. Pavlik of attempted murder, the error was in fact prejudicial. Mr. Pavlik had a valid claim of self-defense (one sufficiently valid that the trial judge gave self-defense instructions and imposed an exceptionally low sentence). The assault conviction cannot be sustained where the jurors were not given a proper instruction to guide their application of self-defense for the assault count.

By not proposing a proper instruction and not excepting to the failure

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<sup>4</sup> For that matter, Instructions Nos. 14 and 16, Ex. 8, defining assault in the first degree and assault generally, also did not include an element that the force used was “unlawful.” *Compare* WPIC 35.50, Note on Use (“Include the phrase ‘with unlawful force’ if there is a claim of self defense or other lawful use of force.”).

of the trial judge to correct ¶ 2 of Inst. No. 20, Ms. Nordtvedt was ineffective under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22. The improper instruction relieved the State of its burden of proving the absence of self-defense -- an element of the crime of assault -- thereby violating Mr. Pavlik's due process rights under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3. The failure of Mr. Wasson to raise this issue on appeal also violated Mr. Pavlik's right to effective assistance of counsel on appeal, protected by due process and the right to appeal under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, §§ 3 & 22. *In re Dalluge*, 152 Wn.2d 772, 787-89, 100 P.3d 279 (2004). There is prejudice and the conviction should be vacated under RAP 16.4(c)(2), (5) & (7).

b. **Ms. Nordtvedt Erroneously Proposed the Wrong "Act on Appearances" Language**

Ms. Nordtvedt proposed an "act on appearances" instruction modeled on an older version of

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another is in actual danger of *great bodily harm*, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for an attempted homicide to be justifiable.

App. B (emphasis added). This proposed instruction became Inst. No. 22, which was changed after it was initially read to the jury so that the second paragraph then read: “Actual danger is not necessary for an attempted homicide and/or first degree assault to be justifiable.” App A, RP 473-75. Inst. No. 22's use of “great bodily harm,” however, is erroneous and weakened the State’s burden of proof.

RCW 9A.16.050 sets out the standard of self-defense for justifiable homicide.<sup>5</sup> In this statute, the Legislature provided a homicide is justifiable if “there is reasonable ground to apprehend a design on the part of the person slain . . . to do some *great personal injury* to the slayer . . . and there is imminent danger of such design being accomplished.” RCW 9A.16.050(1) (emphasis added). Following WPIC 2.04.01 and *State v. Painter*, 27 Wn.App. 708, 620 P.2d 1001 (1980), “great personal injury” was defined to the jury in this case as: “an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe

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<sup>5</sup> The Court of Appeals has held that the standard for self-defense for homicide cases in RCW 9A.16.050 and WPIC 16.02 applies to attempted homicide cases. *State v. Cowen*, 87 Wn.App. 45, 53, 939 P.2d 1249 (1997) (“[T]he important issue is the defendant's mental state in committing the crime, not whether the victim in fact died.”). Whether WPIC 16.02 should be given in an attempted homicide case without legislative authorization does not have to be decided in this case because Mr. Pavlik was acquitted of that charge. On the other hand, as noted in § D(2)(d), the failure to give separate self-defense instructions for the assault count, under RCW 9A.16.020, was itself a separate constitutional violation.

pain and suffering if inflicted upon either the actor or another person.” Inst. No. 21, App. A.

“Great bodily harm,” however, requires more than a fear of severe pain and suffering. Rather, the term is used in the first degree assault statute, RCW 9A.36.011, and was defined to the jury in Mr. Pavlik’s case in Inst. No. 17: “*Great bodily harm* means bodily injury that creates a probability of death, or that causes *significant permanent disfigurement*, or that causes a *significant permanent loss or impairment of the function of any bodily part or organ*.” App. A (emphasis added). See RCW 9A.04.110(4)(c).

Thus, Inst. No. 22 allowed Mr. Pavlik “to act on appearances” only if he reasonably feared, not just severe pain and suffering, but death, significant permanent disfigurement or significant permanent loss or impairment of the function of any bodily part or organ. A fear of being beat up severely and only temporarily losing vision would not qualify.

As noted, Ms. Nordtvedt proposed Inst. 22, citing WPIC 16.07. App. B. However, she proposed the pre-1998 version -- the later version was changed and uses the language of RCW 9A.16.050, “great personal injury.” See *State v. Rodriguez*, 121 Wn. App. at 186 (noting that the WPIC change from “great bodily harm” to “great personal injury” “took place in 1998, well

before this trial. WPIC 2.04.01 (Supp. 1998).”). See WPIC 16.07.

In *Rodriguez*, a case where the defendant was convicted of assault with a deadly weapon for stabbing someone in a scuffle, this Court specifically held that it was ineffective assistance of counsel in 2001 to propose the earlier version of “act on appearances” instruction using the “great bodily harm” language. This Court held that because “great bodily harm” was defined in the context of first degree assault to require a fear of permanent disfigurement or permanent loss of function, the instruction created too high of a standard. *Rodriguez*, 121 Wn. App. at 186.

Although the Court first held that the challenged the instruction was “invited error,” 121 Wn. App. at 183-84, the Court held that trial counsel was ineffective, finding both deficient performance and prejudice:

If we can conceive of some reason why Mr. Rodriguez's lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez's position at trial, then we would conclude that the lawyer's performance was not deficient. . . . But we can conceive of none here. The net effect was to decrease the State's burden to disprove self-defense. . .

121 Wn. App. at 187.

*Rodriguez* came out in 2004 – six years before Mr. Pavlik’s trial. The decision foreshadowed a 2009 decision from the Washington Supreme Court,

*State v. Kylo*, *supra*, which held it to be ineffective for counsel in a non-deadly force assault case (biting off the ear of another jail inmate) to propose the “great bodily harm” language even though no definition was given to the jury defining that term. The Court held that “[w]ith proper research, counsel should have determined . . . that proposing an ‘act on appearances’ instruction using ‘great bodily injury’ was improper.” 166 Wn.2d at 868.

Similarly, here, it is apparent that Ms. Nordtvedt’s self-defense instructions were not carefully thought out (she was correcting them as the judge was reading them to the jury). As in *Rodriguez*, there could be no tactical reason to propose an instruction that required a greater fear than what was required under the law. As in *Rodriguez*, the error “struck at the heart of Mr. [Pavlik]’s defense. . . . As instructed the jury was required to find that he was scared of death or at least permanent injury. And that is not the test.” 121 Wn. App. at 187.

Moreover, as *Rodriguez* and *Kylo* illustrate, this issue should have been raised on direct appeal. The error was so egregious – this Court and the Supreme Court could think of no legitimate reason for trial counsel to propose the former WPIC – that it fell into that rare category of ineffectiveness that can be raised on appeal. *See Kylo*, 166 Wn.2d at 169,

*citing State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). It was constitutionally ineffective, in violation of due process and the right to appeal, under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, §§ 3 & 22, for Mr. Pavlik's appellate counsel not to have raised this issue on direct appeal. *In re Orange*, *supra*. There was prejudice and relief should be granted under RAP 16.4(c)(2), (5), & (7).

c. **Ms. Nordtvedt Failed to Propose an Instruction Allowing Defense Against Multiple Assailants**

Mr. Pavlik not only feared the actions of Mr. Leenders, but also feared what Mr. Smith was going to do. Mr. Smith had been the angrier and more out of control of the two during their first interactions, and he was the one who threw his bike at Mr. Pavlik's car. Then, at the time that Mr. Leenders was punching Pavlik, Mr. Pavlik testified that Smith was circling around his car. Pavlik was concerned that Smith was heading for the passenger door, not an unreasonable fear given Leenders' prior unexpected opening of that same door. RP 364-65. Thus, Mr. Pavlik was afraid of both men -- he was afraid "[of] dying. *Them* killing me." RP 365 (emphasis added).

Yet, the defense proposed self-defense instruction, App. B, and the

one actually given, Inst. No. 20, only allowed for self-defense if “*the person injured intended to inflict death or great personal injury.*” App. A (emphasis added). Ms. Nordtvedt failed to propose, the court did not give, and Ms. Nordtvedt did not except to the failure to give WPIC 16.02's bracketed language providing for self-defense related to persons working in concert with each other.<sup>6</sup>

The comment to WPIC 16.02 states: “There is no requirement that the defendant's fear be caused by only the person slain. His self-defense is lawful if based on reasonable fear of imminent harm from either the person slain, or others whom the defendant also reasonably feared.” For authority, the comment cites to *State v. Harris*, 122 Wn.App. 547, 90 P.3d 1133 (2004) and *State v. Irons*, 101 Wn.App. 544, 4 P.3d 174 (2000).

In *Irons*, the Court of Appeals reversed a conviction where the defendant objected to the restriction a self-defense instruction to only the acts

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<sup>6</sup> WPIC 16.02 (as of 2/1/10) provides in part:

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 commit a felony] [to inflict death or great personal injury] . . .

Emphasis added. Obviously, the instruction would be modified to address attempted homicide and other working in concert with the person “injured.”

of the decedent, and not those acting in concert with him:

A self-defense instruction that requires the jury to find that the defendant reasonably believed that *the victim* (rather than *the victim and those whom the defendant reasonably believed were acting in concert with the victim*) intended to inflict death or great personal injury precludes the jury from considering the defendant's right to act upon reasonable appearances in a multiple assailant attack, thereby failing to make the relevant legal standard manifestly apparent to the average juror..

101 Wn. App. at 546 (emphasis in original). In *Harris*, the Court of Appeals went one step further and held, on a direct appeal, that trial counsel was ineffective for proposing a self-defense instruction which did not adequately allow for a defense to a multiple assailant attack. 122 Wn. App. at 551-52, 553-60.

Here, where Mr. Pavlik was legitimately in fear of the actions of both Leenders and Pavlik, it was ineffective for Ms. Nordtvedt to fail to propose the bracketed portion of WPIC 16.02, and the lack of such language lowered the State's burden of proof. Given evidence of Pavlik's fear of both Smith and Leenders, he can show prejudice. As in *Harris*, the issue should have been raised on direct appeal. The Court should grant relief under RAP 16.4(c) because Mr. Pavlik's right to due process of law, right to effective assistance of counsel, and right to an appeal were violated. U.S. Const. amends. 5, 6 &

14 and Wash. Const. art. 1, §§ 3 & 22, *Strickland, In re Orange, supra*.

Relief should be granted under RAP 16.4(c)(2), (5) & (7).

**d. Ms. Nordtvedt Failed to Propose Self-Defense Instructions for Assault**

When Ms. Nordtvedt realized that she had not proposed self-defense instructions for the assault count, she and the trial judge hastily interlineated “and/or” and “first degree assault” in the self-defense instructions for attempted murder (although, as noted, missing one key paragraph of Inst. No. 20), Instructions Nos. 20 and 22. Thus, if the jury assessed whether the State had proven beyond a reasonable doubt the absence of self-defense at all for the assault charge (*see supra* § D(2)(a)), the instructions tracked WPIC 16.02<sup>7</sup> – the self-defense instruction for justifiable homicide – rather than WPIC 17.02 and 17.04, the general self-defense instructions setting out the elements of lawful force for crimes other than homicide.

Because the standard for self-defense in a homicide or attempted homicide case is higher than that in an assault case, the failure to give an instruction tracking WPIC 17.02 and 17.04 weakened the State’s burden of proof and Ms. Nordtvedt was ineffective.

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<sup>7</sup> As for WPIC 16.07, as noted above, Instruction No. 22 used an even higher standard -- “great bodily harm” -- than even that required for homicide.

The Legislature set out two different standards for the use of force, depending on the type of crime the defendant is charged with committing. In RCW 9A.16.050, the Legislature provided that *homicide* was justified if committed in “the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain . . . to do *some great personal injury* to the slayer . . . .” Emphasis added.

The fear of “great personal injury” that someone must feel before killing (or trying to kill) another person is higher than that used in the general self-defense statute, RCW 9A.16.020(3) which allows for the use of force by “a party *about to be injured* . . . in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession.” Emphasis added. Thus, the Legislature has determined that, in non-homicide cases, the person need not fear “great personal injury” to use self-defense. This lower standard is memorialized in pattern instructions than the ones given in this case – WPIC17.02 (“Lawful Force -- Defense of Self, Others, Property”), as opposed to WPIC 16.02 (“Justifiable Homicide --Defense of Self and Others”), and WPIC 17.04 as opposed to WPIC 16.07.

As noted, the Court of Appeals has approved of the giving of WPIC

16.02 in attempted murder cases because the key element is the defendant's intent, not whether the other person died. *State v. Cowen*, 87 Wn.App. at 53. On the other hand, there has been a split of authority as to whether WPIC 16.02 or WPIC 17.02 should be given in a felony murder case, with courts reaching differing results depending on whether the underlying felony involved deadly force or not. *See State v. McCrevin*, 170 Wn. App. 444, 461-67, 284 P.3d 793 (2012); *State v. Slaughter*, 143 Wn. App. 936, 944-46, 186 P.3d 1084 (2008). The theory for using WPIC 16.02, rather than WPIC 17.02, in a felony murder case is the conclusion that deadly force can only be used if the defendant reasonably believes he or she is threatened with death or great personal injury. *McCrevin*, 170 Wn. App. at 467 (citing cases).

This conclusion makes sense because of the clear legislative preference to apply a higher standard of self-defense in homicide cases. RCW 9A.16.050. However, where the charge is not homicide, but rather is assault, there is no statutory authority to use RCW 9A.16.050's higher standard for self-defense.<sup>8</sup>

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<sup>8</sup> Notably, in RCW 9A.16.040, the Legislature set out the criteria for "homicide or the use of deadly force" by a police officer, demonstrating that when the Legislature wanted to combine the two concepts -- homicide and deadly force -- into one statute, it could easily do so. In this context, the failure of the Legislature to include the "use of deadly force" in addition to homicide in RCW 9A.16.050 should be seen as purposeful by the Legislature.

The Second Amendment clearly provides people with the right to bear arms and the right to use the threat of deadly force to protect themselves, even in situations where the person may not necessarily fear death or great personal injury. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 629, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (explaining handgun's popularity for in-home protection because "it can be pointed at a burglar with one hand while the other hand dials the police"). The Legislature has understood this right and has not required a threat of death or great personal injury to be a predicate before someone use a gun in a non-homicide case, particularly where, as here, the defendant did not have an intent to kill his assailant.

Ultimately, under WPIC 17.02 and RCW 9A.16.020, it is a jury issue to determine whether the force used is "not more than is necessary." RCW 9A.16.020(3). Mr. Pavlik had a right therefore to have the jury decide whether the State disproved his self-defense claim under RCW 9A.16.020. An instruction in the wording of RCW 9A.16.050 for the assault charge therefore lowered the State's burden of proof and violated Mr. Pavlik's right to due process and to a jury trial, under U.S. Const. amends. 5, 6 & 14 and Wash. Const. art. 1, §§ 3, 21 & 22.

Mr. Pavlik was prejudiced by this error. Mr. Leenders attacked Mr.

Pavlik, while his unpredictable and angry friend, Mr. Smith, was possibly going to enter the car from the other side. Mr. Pavlik legitimately feared injury and being carjacked. Perhaps he did not fear being killed or suffering “great personal injury.” Maybe the jury thought that all he really feared was being pulled from his car and having his head pounded against the ground, while Leenders and Smith stole his vehicle. Under these circumstances, it was a jury question whether Mr. Pavlik’s firing of one shot, aimed at Leenders’ shoulder, was not more than necessary.<sup>9</sup>

Ms. Nordtvedt did not propose instructions for the assault count tracking WPIC 17.02 and 17.04, and did not except to the trial court’s failure to give such instructions. Accordingly, she was ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22 and *Strickland*. Mr. Wasson’s failure to raise this issue on appeal was ineffective in violation of due process and Mr. Pavlik’s right to appeal. U.S. Const. amends. 5 & 14, Wash. Const. art. 1, §§ 3 & 22, *In re Orange, supra*.

Relief should be granted under RAP 16.4(c)(2), (5) & (7).

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<sup>9</sup> The jurors may have acquitted Mr. Pavlik of attempted murder because they did not conclude that he acted with the premeditated intent to kill Mr. Leenders. But, they may have rejected the self-defense claim for assault because they were using the higher standard of “great personal injury” (or even “great bodily harm”).

e. **Ms. Nordtvedt Failed to Propose an Instruction Related to Defense Against a Felony**

Mr. Pavlik's jury should also have received an instruction related to self-defense to a felony,<sup>10</sup> which based on the language of RCW 9A.16.050:

Homicide is also justifiable when committed either:

(1) In the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony . . . and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

Some felonies are not sufficiently dangerous to justify the use of deadly force. *See, e.g., State v. Nyland*, 47 Wn.2d 240, 287 P.2d 345 (1955) (adultery is not such an offense). However, WPIC 16.03 is appropriate when deadly force is reasonably necessary to protect against "*felonies* which are committed by *violence and surprise*; such as murder, robbery, burglary, arson, . . . sodomy, and rape." *State v. Brightman*, 155 Wn.2d 506, 522, 122

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<sup>10</sup> WPIC 16.03 provides in part:

Homicide is justifiable when committed in the actual *resistance of an attempt to commit a felony* [upon the slayer][in the presence of the slayer] . . . .

Emphasis added. This instruction would have to be modified to attempted homicide and/or assault. *But see* § D(2)(d), related to separate instructions for assault.

P.3d 150 (2005)(emphasis in original), *quoting Nyland*, 47 Wn.2d at 242.

Here, there is no question but that Mr. Pavlik reasonably feared that Mr. Leenders and Mr. Smith were not engaged in a minor crime. The two men were angry, irrational and out of control, and apparently not deterred by the warning shot. When Leenders entered Mr. Pavlik's car and began assaulting him, and when Pavlik feared that Smith was coming around to open the passenger door, Mr. Pavlik had a reasonable fear that Leenders and Smith were intending to commit a violent and surprising felony, such as robbery. This was not a situation where Mr. Pavlik shot a gun at someone where "the defendant was attempting to recover a small amount of money from someone whom the defendant did not fear." *Brightman*, 155 Wn.2d at 523.

Ms. Nordtvedt's failure to propose WPIC 16.03, the trial court's failure to give it, Ms. Nordtvedt's failure to except, and Mr. Wasson's failure to raise this issue on direct appeal all resulted in prejudice to Mr. Pavlik, because the State's burden of proof on self-defense was lowered. The Court should grant relief under RAP 16.4(c) because Mr. Pavlik's right to due process of law, right to effective assistance of counsel, and right to an appeal were violated. U.S. Const. amends. 5, 6 & 14 and Wash. Const. art. 1, §§ 3

& 22, *Strickland, supra*, and *In re Orange, supra*.

### 3. *The Instructions Failed to Insure Jury Unanimity*

Mr. Pavlik's fired two shots – one was the warning shot, the other struck Mr. Leenders after he attacked Pavlik in his car. Mr. Leenders and Mr. Smith claimed that the warning shot was aimed at them; that the bullet went flying by, and that Smith felt “heat” from the bullet. RP 86, 100-01,116, 250.

Thus, it is possible that some jurors may concluded that Pavlik acted in self-defense at the car, but rejected self-defense for the first shot, and based a conviction for assault on that act. Other jurors may have concluded that the first shot was only a “warning shot” that did not constitute an assault, and based a conviction on the shooting at the car. In fact, the State argued to the jury that both shots were not justified under the self-defense instructions. RP 486-87, 509-10. Yet, no instruction was proposed or given that required that the jurors be unanimous as to which of the two shots constituted the assault. Under such circumstances, Mr. Pavlik's right to jury unanimity (and unanimity of a substantial majority of jurors)<sup>11</sup> was violated under Wash.

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<sup>11</sup> Wash. Const. art. 1, § 21 & 22 guarantee unanimity of all jurors. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). U.S. Const. amends. 6 & 14 only require unanimity of at least a substantial majority of jurors in a state criminal trial. *State v. Kitchen*, 46 Wn. App. 232, 236-37 & n.3, 730 P.2d 103 (1986), *aff'd* 110 Wn.2d 403, 756 P.2d 105 (1988).

Const. art. 1, § 21 & 22 and U.S. Const. amends. 6 & 14.

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). "When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *Petrich*, 101 Wn.2d at 572. In such cases, to insure an unanimous verdict, the prosecutor must either elect which act it relies on for conviction, or the jury must be instructed that all twelve jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Id.*

"A *Petrich* unanimity instruction is not required, however, when the State presents evidence of multiple acts that indicate a 'continuing course of conduct.' A continuing course of conduct requires an ongoing enterprise with a single objective. To determine whether multiple acts constitute a continuing course of conduct, we evaluate the facts in a commonsense manner." *State v. Monaghan*, 166 Wn. App. 521, 537, 270 P.3d 616 (2012) (citations and internal quotes omitted).

Here, the two shooting incidents were not part of an "ongoing

enterprise with a single objective, such as multiple assaults of a young child over a two hour period, *see State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991), or multiple acts with one objective to kill someone as in *Monaghan*. Rather, the two incidents -- the warning shot and shot that hit Leenders -- were separated in time and distance, with different purposes.

A *Petrich* instruction should have been given. Mr. Pavlik's right to jury unanimity under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 21 & 22, was violated; and Ms. Nordtvedt was ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland*, for not proposing such an instruction and not excepting to the failure to give one.

There are different standards for harmlessness for a direct appeal and a PRP. In a direct appeal, the error is presumed prejudicial and "allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged." *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). On collateral attack, the burden is on the petitioner to show prejudice. *Id.* at 413-14.

Here, given the testimony about the two incidents and the prosecutor's argument that even the first shot was not lawful, Mr. Pavlik can satisfy either test. However, given Mr. Wasson's failure to raise the issue on direct appeal,

Mr. Pavlik's rights to due process and an appeal under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, §§ 3 & 22, were violated, and the Court should apply the direct appeal standard of harmlessness. *In re Orange*, 152 Wn.2d at 814. Relief should be granted under RAP 16.4(c).

**4. *Newly Discovered Evidence Requires a New Trial***

Officer Arrendondo saw Mr. Leenders hitting Mr. Pavlik, but came upon the scene after Leenders was already at Pavlik's car window. Several students saw the initial confrontations between Leenders, Smith and Mr. Pavlik, but they had walked on and were not present when Pavlik pulled into the parking lot. Mr. Clemens and Ms. Allen came into to the park and saw Leenders and Smith, but then left before Pavlik appeared because of Leenders' and Smith's strange behavior. Thus, no neutral witness at trial testified about what took place immediately before Leenders approached Mr. Pavlik's car window at the park.

Instead, there was credibility contest between Pavlik on one side and Leenders and Smith on the other as to who approached who.<sup>12</sup> The State used

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<sup>12</sup> See RP 363 (Pavlik does not see Leenders and Smith when he pulls in); RP 86 (Leenders says he turned around and Pavlik pulled up behind him); RP 117 (when asked if they would have been visible to a car pulling into the parking lot, Smith says "yes."); RP 251 (Storment relays that Smith told him that the car pulled into "the same parking lot they were in with the driver's door facing toward them.").

this testimony to insinuate that Pavlik was trying to continue the confrontation,<sup>13</sup> and this Court, on appeal used this testimony to affirm the conviction.<sup>14</sup>

Thus, Shea McKeon turns out to be a key, neutral witness. He saw Mr. Pavlik drive into the parking lot and stop his car.<sup>15</sup> However, contrary to what Leenders and Smith claimed, Mr. McKeon states that Mr. Pavlik parked his car in the lot at a time *when Leenders and Smith were not in sight* and had traveled on their bikes significantly westbound on Mission Street. It was only after Pavlik parked his car, that, two minutes later, Leenders and Smith entered the parking lot from the west through bushes. Ex. 21. Mr. McKeon supports Mr. Pavlik's version as to what took place -- that he did not drive up to Mr. Leenders and Mr. Smith, but rather that they came out of nowhere and approached him

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<sup>13</sup> RP 479-80 ("Within minutes of firing the first shot at them, he happens to come back to the exact location where they're standing . . . This is a man who is anticipating another confrontation.").

<sup>14</sup> *State v. Pavlik*, Ex. 13, Slip Op. at 14 ("Then, the decision to return to the area where the bicyclists had been heading and drive up to them also suggested that aggression rather than reporting to the police was on his mind."); Slip Op. at 16 ("It was Mr. Pavlik who then left the scene, only to return unexpectedly and pull up five feet from the victim.").

<sup>15</sup> McKeon's observations are consistent with the location of Mr. Pavlik's car -- facing out toward the street. RP 132. If he had driven into the lot and pulled up near Leenders and Smith on purpose, his car would have been facing in the opposite direction.

Mr. McKeon's testimony is clearly material and has not previously been presented, and "in the interest of justice" requires vacating the conviction. RAP 16.4(c)(3). A PRP based on newly discovered evidence should be granted if the evidence (1) would probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

Here, given the importance placed on Leenders' and Smith's claims that Mr. Pavlik drove up to them, Mr. McKeon's testimony -- credible because of his lack of bias -- would in fact have probably changed the result of the trial. The testimony definitely was discovered since the trial, and it was not merely cumulative or impeaching -- no other neutral witness saw Leenders and Smith leave the area before Mr. Pavlik drove into the parking lot, and thus the testimony is clearly material.

In terms of due diligence, Mr. McKeon left the area when the police arrived because he did not want to get involved. Ex. 21. Thus, there was no initial contact with the police and no way for Ms. Nordtvedt to get in touch with him. It was just fortuitous that Mr. McKeon's friend saw the ad in the

newspaper in July 2012.

To the extent that the State argues that, Ms. Nordtvedt should have placed an ad in the newspaper earlier, then if she did not use due diligence, she was ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland* for not properly investigating the case. *See infra*, § D(5). On the other hand, evidence from Mr. McKeon is newly discovered evidence of Ms. Nordtvedt's ineffectiveness and thus satisfies the test under RAP 16.4(c)(3)

Again, the allegation that Mr. Pavlik drove up to Mr. Leenders and Mr. Smith played a role not only at trial, but on appeal, and was the basis upon which this Court rejected some of Mr. Pavlik's arguments. Now, as it turns out, Mr. Pavlik was correct. Mr. Pavlik can show prejudice and the Court should grant relief under RAP 16.4(c)(2), (3), (5) & (7).

**5. *Mr. Pavlik Was Prejudiced by the Lack of Information at Trial About Leenders' and Smith's Backgrounds***

From the jury's perspective, Mr. Leenders and Mr. Smith were just "normal" people out for a ride. They may have been drinking and were a bit obnoxious, but were otherwise simply out and about one hot night. If Mr. Leenders said some odd things during interviews (such as claiming not to

have consumed alcohol until after he was shot), the jury could have written that off as confusion from a person who had been the subject of a traumatic event.

What the jurors did not know is that both Mr. Leenders and Mr. Smith had difficulties telling the truth. Both of them lied to the police, repeatedly, for their own self-interest.<sup>16</sup> This evidence would have been admissible under ER 608(b) and the right to confront witnesses under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.<sup>17</sup>

Mr. Leenders, in particular, constantly played “tit-for-tat” games by repeatedly calling the police on people who called the police on him or by calling the police “first” to avoid being charged with a crime, or who thought

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<sup>16</sup> See SPD No. 06-290578 (Leenders lies about his name during accident investigation); SPD No. 06-272787 (Leenders admits lying to police in prior incidents and it appeared that he self-inflicted neck scratches); SPD No. 06-343435 (Leenders makes false report of robbery at gunpoint to cover up NCO violation); SPD No. 07-055615 (Leenders lies about being scratched by Moon); SPD No. 06-251583 (Leenders lies about motorcycle incident); No. 08-053095 (Leenders lies in DUI investigation); SPD No. 06-51325 (Smith lies about driving and involvement in accident); Ex. 28 & 32. A selection of reports can be found in App. D. **The PRP contains a detailed recitation of all these cases with specific page numbers in Ex. 28 for each report.** Selections from Ex. 28 are attached to this brief in App. D.

<sup>17</sup> See *State v. Gregory*, 158 Wn.2d 759, 798-799, 147 P.3d 1201 (2006); *State v. McDaniel*, 83 Wn. App. 179, 186-87, 920 P.2d 1218 (1996); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997).

that the orders of the court could be violated at will.<sup>18</sup> Such obstructionist behavior would have been admissible at trial. *See United States v. Kohring*, 637 F.3d 895 (9<sup>th</sup> Cir. 2011) (due process violation where Government failed to disclose allegations against main witness of sexual improprieties and attempts to solicit perjury).<sup>19</sup>

The jurors did not know that Mr. Leenders, when he was drinking, was loud,<sup>20</sup> obnoxious and violent, and in many respects his behavior was escalating in the two years before the shooting.<sup>21</sup> This was important because Judge Leveque restricted Dr. Julien's testimony about the effect of alcohol unless the defense could show that when Mr. Leenders drank, he became violent. RP 42-43.

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<sup>18</sup> See SPD Nos. 09-236458, 09-214920, 08-188751, 08-136054, 08-123495, 08-123118, 08-001116, 07-374901, 07-374794, 07-357694, 07-351504, 06-360907, 06-343435, 06-184017, 06-057241, 06-174508, 05-248270, 05-81626, 05-039182, 05-24317, 04-443525, 04-434209, 04-286667; Ex. 28.

<sup>19</sup> In *Kohring*, the 9<sup>th</sup> Circuit held that the defense could have cross-examined the witness about such information, even if the defense could not introduce extrinsic evidence under ER 608(b). 637 F.3d at 905 n.4.

<sup>20</sup> As opposed to his "soft" voice in court, as both the court and the prosecutor described it. RP 80, 87.

<sup>21</sup> See, e.g. SPD No. 09-402542 (Leenders arrested for assault with threats to kill and yelling); SPD No.08-110932 (Leenders was argumentative at party and threw brick through car window); SPD No.06-57241 (Leenders drinking and assaults girlfriend). Ex. 28. It appears that the State released No. 09-402452 to Ms. Nordtvedt, but may have done so after the judge ruled that it could not be brought up (and possibly after he testified).

The jurors did not know that Mr. Leenders was suicidal (which would explain why he would rush at Mr. Pavlik even though Pavlik was armed) and that he did not care much for human life.<sup>22</sup> See *Browning v. Trammell*, \_\_\_ F.3d \_\_\_, No. 11-5102 (10<sup>th</sup> Cir. 5/6/13) (disclosure of mental health history). The jurors did not know that, far from not being afraid of guns, as Leenders claimed, he had told his DOC officer he “hated” guns, Ex. 30, an arguably prior inconsistent statement. The jury did not know that Smith had a prior incident of riding a bike at night without lights. SPD No. 06-277480, Ex.32.

The jurors also did not know that, at the time of the incident or the time of trial, both Mr. Leenders and Mr. Smith had charges hanging over their heads, and that both were subject to various release orders, such as a “no alcohol” condition.<sup>23</sup> Not only does the Sixth Amendment allow for cross-examination about probation and pending charges (including the perception

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<sup>22</sup> SPD Nos. 02-348457 & 02-392923 (Leenders’ suicide attempt); SPD No. 06-340410 (Leenders delays for hours before calling in girlfriend’s suicide attempt). Ex. 28.

<sup>23</sup> At the time of the shooting, Leenders was under court order in four cases not to consume any alcohol. Spokane Municipal Court Nos. B0070858, B0067331, B466898 & DV0600224. He owed a lot of money to the court from his VUCSA case in Spokane Superior Court No. 06-1-04713-4, and there were warrants for his arrest issuing and being quashed throughout 2008 to 2010. Ex. 29. Smith’s pending stipulated orders of continuances were in Spokane County District Court (No. P00080437) and Spokane Municipal Court (No. B00079495). Ex. 31. Moreover, both Smith and Leenders had recently been accused of committing crimes but were never charged with them. SPD No. 08-110932 (brick through car window); SPD Nos. 09-330482 & 09-333599 (Smith accused of telephone harassment). Ex. 28, 32.

of the witness that he or she might be charged),<sup>24</sup> but here, the no alcohol conditions placed on Mr. Leenders would have shown that when he claimed to be drinking after he was shot, RP 335, 427, 432, this was the result of a lie, designed to protect himself from going to jail, rather than the result of confusion. Both Smith and Leenders also were felons (and had domestic violence convictions) who were barred from possessing firearms. This fact alone would have shown that they had a motive to lie about their intentions of taking Mr. Pavlik's gun.

Much of the evidence about Mr. Leenders' and Mr. Smith's backgrounds was within the control of the Spokane Police Department, the main investigating police agency in Mr. Pavlik's case.<sup>25</sup> In fact, many of the police officers involved in Pavlik case had direct contacts with Mr. Leenders in the past.<sup>26</sup> See PRP at § B(1)(f)(vi).

Accordingly, under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194,

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<sup>24</sup> See *Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)(cross-examination about being on probation); *State v. Pickens*, 27 Wn. App. 97, 100, 615 P.2d 537 (1980) ("A defendant has a right to cross-examine the State's witness concerning possible self-interest in cooperating with the authorities.").

<sup>25</sup> As noted in the PRP, the State did apparently disclose some reports connected to Leenders' Nov. 2009 assault arrest.

<sup>26</sup> The officers' very familiarity with Leenders from past contacts may itself have been evidence of preferential treatment, a topic that could have been explored on cross-examination. Similarly, Mr. Smith's and Mr. Leenders' frequent contacts in various criminal episodes leading up the shooting could have been used to show bias.

10 L.Ed.2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), the State had an obligation to disclose this information to the defense. See *United States v. Price*, 566 F.3d 900, 903 (9<sup>th</sup> Cir. 2009) (*Brady* violation based on lack of disclosure of “lengthy history of run-ins with the Portland police that suggests that she has little regard for truth and honesty”). The failure to disclose this material information about Mr. Leenders’ and Mr. Smith’s background therefore violated Mr. Pavlik’s due process rights under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3, which then violated Pavlik’s right to confront witnesses under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

On the other hand, independent of the State’s obligation to disclose this information, Ms. Nordtvedt had an obligation to investigate the backgrounds of Smith and Leenders. *Strickland*, 466 U.S. at 691; *Duncan v. Ornoski*, 528 F.3d 1222, 1234-35 (9<sup>th</sup> Cir. 2008). While considerable discretion is given to lawyers to make strategic decisions about what to investigate, [“w]hen defense counsel merely believes certain testimony *might* not be helpful, no reasonable basis exists for deciding not to investigate.” *Duncan v. Ornoski*, 528 F.3d at 1235 (emphasis in original).

While Ms. Nordtvedt did conduct some minimal investigation,<sup>27</sup> all of the police reports and court records in Ex. 22 & 28-32, were available by PRA requests or through publicly accessible court records. Ms. Nordtvedt's failure to discover publicly available information was ineffective. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 383-89, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (ineffective in capital case not to look at court file of client's prior conviction).

It actually is likely that Ms. Nordtvedt's failure to investigate was based on her misconception of admissibility. Ms. Nordtvedt agreed that she would not bring up the prior histories of Leenders and Smith because she believed that unless there were convictions under ER 609 for crimes of dishonesty, their prior acts would not be admissible. RP 46. This analysis of the Sixth Amendment's confrontation right is wrong and ineffective under *Strickland*. While a prior conviction (such as a drug conviction) in and of itself may be inadmissible under ER 609, it is not the fact of conviction that would have been admissible. Rather, it would be the underlying facts (such as, giving a fake name when contacted by the police, SPD No.06-290578), and the continuing supervision (as under *Davis v. Alaska, supra*) that would

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<sup>27</sup> It is not clear exactly what Ms. Nordtvedt knew and did not know.

be admissible as legitimate cross-examination. Similarly, the fact that Mr. Leenders was arrested for DUI shortly before he was shot is in and of itself not admissible -- but the fact that he lied to the officer, even denying he was driving, SPD No. 08-053095, as he did on an earlier occasion, SPD No. 06-251583, would be admissible. App. D. The fact that Mr. Leenders falsely claimed to be a victim of a robbery to build an alibi, SPD No.06-343435, or the fact that he was a suspect in a property destruction investigation (with Mr. Smith as a witness) that was pending as of the date of the shooting, SPD No.08-110932, are what would be admissible. App. D. Ms. Nordtvedt's failure to understand the role of impeachment and the right to confront witnesses, under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, thereby caused her failure to investigate and her improper concession not to bring up past history. This made her ineffective under *Strickland*.

Ms. Nordtvedt agreed not to bring up Leenders' and Smith's pasts without knowing their full histories. No deference is required to tactical decisions made by counsel where counsel fails to conduct appropriate investigations. *Rios v. Rocha*, 299 F.3d 796, 805-11 (9<sup>th</sup> Cir. 2002); *Correll v. Ryan*, 539 F.3d 938, 949 (9<sup>th</sup> Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all."). Her concession here was

not reasonable, and is not entitled to deference.

Thus, there was a violation either of *Brady* or *Strickland*. Under either case, the standard is near identical for determining prejudice. Under *Strickland*, to show prejudice, petitioners need not prove that "counsel's deficient conduct more likely than not altered the outcome in the case," but rather only must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "[T]he question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. This is the same standard utilized under *Brady* to show materiality. *In re Stenson*, 174 Wn.2d 474, 486-93, 276 P.3d 286 (2012).

Here, there is a reasonable probability that if the jurors had known Mr. Leenders' and Mr. Smith's pasts (their repeated lies to law enforcement, manipulative drunken behavior, aggressiveness), one juror would have had a reason to doubt the State proved the absence of self-defense. Under either *Brady* or *Strickland*, Mr. Pavlik's right to due process, right to confront witnesses and right to effective assistance of counsel under U.S. Const. amends. 5, 6, & 14 and Wash. Const. art. 1, §§ 3 & 22 were violated, and he

was prejudiced. Relief should be granted under RAP 16.4(c).<sup>28</sup>

**6. *Ms. Nordtvedt Was Ineffective in Her Presentation of Undisputed Evidence***

Ms. Nordtvedt was constitutionally ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland* because she failed to follow up on her impeachment of Leenders, and failed to bring out through non-leading questions to Det. Gilmore that Leenders was fearful of speaking to the police because he was afraid he “would be arrested for some type of attempted carjacking because he opened the suspect's passenger side door.” Ex. 17 at 8. She also failed to impeach Mr. Leenders with his inconsistent statement “If that's a gun, you're going to have to shoot me and kill me 'cause I'm going to kill you if that's a gun.” Ex.17 at 9. This statement differed significantly from his testimony that he merely said “something along the lines of ‘you better kill me.’” RP 85.

There could be no tactical reason for not bringing out this evidence. Ms. Nordtvedt attempted to introduce some of this evidence, but just failed to bring it in through an admissible manner. When the State objected to her

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<sup>28</sup> Apart from the constitutional violations, justifying relief under RAP 16.4(c)(2), (5) & (7), the new evidence related to Smith's and Leenders' backgrounds justifies relief under RAP 16.4(c)(3) -- new evidence. The new evidence includes both that finally released by the SPD pursuant to PRA requests and new evidence of Ms. Nordtvedt's ineffectiveness.

impeachment of Det. Gilmore as “leading,” Ms. Nordtvedt simply moved on, as if merely asking the question was sufficient to introduce to the jury.

All of this evidence was critical and would have shown supported Pavlik’s fears that Leenders and Smith were in fact trying to carjack him and had actually threatened to kill him. Because Mr. Pavlik’s self-defense claim was strong, he can make out the necessary prejudice to gain relief under *Strickland* and relief should be granted under RAP 16.4(c)(2), (5) & (7).

**7. Ms. Nordtvedt Had a Conflict of Interest**

Mr. Pavlik own attorneys represented Mr. Leenders in his pending VUCSA case. Lawyers from the Spokane Public Defender represented Mr. Leenders when he pled guilty in 2007 and during his multiple violation hearings in 2009 and 2010. Ex. 22. One of Mr. Leenders’ attorneys was Mr. Boe, who also met with Mr. Pavlik before assigning the case to Ms. Nordtvedt. Ex. 23. Presumably, when Mr. Leenders failed to appear in court in April 2010, and a warrant issued for his arrest, his attorneys would have been representing him at that time if he needed legal assistance.

The right to effective assistance of counsel, under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, “includes the right to the assistance of an attorney who is free from any conflict of interest in the case.”

*State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). “Effective assistance includes a duty of loyalty and a duty to avoid conflicts of interest.” *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). A conflict of interest exists when a defense attorney or her firm<sup>29</sup> owe duties to a party whose interests are adverse to those of the defendant. *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995).

“The defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance.” *Dhaliwal*, 150 Wn.2d at 573. In this regard, a conflict does not exist simply because an a public defender agency represented a both the defendant and a witness. *See, e.g., In re Pirtle*, 136 Wn.2d 467, 474-77, 965 P.2d 593 (1998); *State v. Ramos, supra*. In this case, however, it was not just Ms. Nordtvedt who represented Mr. Pavlik – Mr. Boe also directly represented both Mr. Pavlik (meeting with him in the early part of the case) and Mr. Leenders (handling the violation hearing while Pavlik’s case was pending).

Moreover, the conflict was significant because Ms. Nordtvedt agreed not to bring up Mr. Leenders’ VUCSA conviction at trial. Yet, as noted, the issue was not just admissibility under ER 609. Rather, the VUCSA case

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<sup>29</sup> See *State v. Ramos*, 83 Wn. App. 622, 629, 922 P.2d 193 (1996) (public defense office is a law firm for purposes of RPC 1.10).

should have been used to impeach Leenders with (1) the fact that he lied about his own name during the course of the VUCSA case, and (2) with the fact that he was under the control of the prosecutors and subject to arrest and incarceration when he did not pay his legal financial obligations (as occurred when Mr. Boe represented him in 2009).

Ms. Nordtvedt's loyalties were divided -- her office represented both Mr. Leenders and Mr. Pavlik . This direct conflict was never disclosed to Mr. Pavlik, Ex. 34. Unlike Mr. Pirtle, who agreed to continued representation by his attorneys after the conflict was disclosed, *In re Pirtle*, 136 Wn.2d at 475-76, Mr. Pavlik did not waive the conflict because it was never explained to him.

Mr. Pavlik's right to effective assistance of counsel under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, was violated. Because the conflict impeded his attorney's impeachment of Mr. Leenders with the very matter that her office represented him on, Mr. Pavlik can show prejudice. *Dhaliwal*, 150 Wn.2d at 571. The conviction should be vacated under RAP 16.4(c)(2), (3), (5) & (7).

**8.      *This Court Should Reconsider the Hearsay Issues***

On appeal, this Court held that the exclusion of Mr. Pavlik's

statements to the police that he was acting in self-defense was “at worst harmless error.” *State v. Pavlik*, Ex. 13, Slip Op. at 6. The majority opinion centered on Mr. Pavlik’s “peculiar” decision not to drive home, but rather to “drive up” to the bicyclists. Moreover, the Court speculated that if the evidence had been admitted, the prosecutor would have used it to show premeditation. Slip Op. at 13-14 & n 8. Judge Sweeney dissented and would have reversed. Slip Op. at 18-23 (Sweeney, J., dissenting).

Normally, issues raised on direct appeal are not reviewed in collateral petitions unless the ends of justice would be served by reexamining the issue. *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Mr. Pavlik asks that the Court reconsider the prior determination that the error was harmless.

First, the Court’s original decision was predicated on an incomplete presentation of the facts. Not only did Mr. Pavlik deny that he “drove up” to Leenders and Smith, there is the new evidence – Mr. McKeon – that verifies Mr. Pavlik’s testimony that Leenders and Smith were not present when Pavlik parked his car. It is now clear that Mr. Leenders threatened to kill Mr. Pavlik and had previously thought about trying to “carjack” him – evidence that Ms. Nordtvedt did not get out properly at trial.

Moreover, Mr. Pavlik’s argument in his appeal to this Court did not

include argument about the effect of the hearsay that the State offered. The presentation of the evidence was completely one-sided. Mr. Pavlik could not bring up his short statements to the police, made immediately after the incident, but the State was allowed, as noted in the PRP, § B(1)(b), to bring up hearsay statement after hearsay statement of its witnesses. While some of this evidence may have been admissible, it created a picture of sympathy for the State's witnesses, and bolstered Smith's and Leenders' weak testimony. In particular, the jury was allowed to hear a complete narrative by Mr. Smith to Cpl. Storment that corroborated the State's version of facts. RP 245-252 Yet, the trial court's ruling allowing in Smith's narrative was error, an issue that should have been raised on appeal.

Mr. Smith's narrative was not an excited utterance under ER 803(a)(2). A narrative, by definition, is not spontaneous. *See State v. Sellers*, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985); *State v. Dixon*, 37 Wn. App. 867, 873-74, 684 P.2d 725 (1984).<sup>30</sup> It was ineffective for Mr. Wasson not to raise this issue on appeal, violating U.S. Const. amend. 14 and Wash.

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<sup>30</sup> Admitting the hearsay by rotely stating that it is admitted for the "effect on the listener" cannot cure the problem, and such an effect would be irrelevant or prejudicial under ER 401-403. *See State v. Aaron*, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990) (hearsay evidence improperly admitted to explain why the officer acted as he did). Ms. Nordtvedt did not make such a relevancy objection and she was therefore ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland*.

Const. art.1, §§ 3 & 22; *In re Orange, supra*.

More importantly, the admission of this hearsay makes the exclusion of Mr. Pavlik's statements less harmless. The presentation of the evidence was stilted in the State's favor. Through the selective admission of hearsay, Mr. Smith was seen as sympathetic (expressing, for instance, concern for Mr. Leenders' welfare), and the State was able to bolster both Smith's and Leenders' weak testimony with Smith's complete narrative given at the scene. In this light, the exclusion of Mr. Pavlik's excited utterances cannot be harmless.

As for the possibility that the statements would have helped the prosecution, *Pavlik*, Slip Op. at 13-14 n. 8, reconsideration of this holding is required under the recent case of *State v. Coristine*, \_\_\_ Wn.2d \_\_\_, 300 P.3d 400 (No. 86145-5, 5/9/13). In that case, the Supreme Court recognized the Sixth Amendment's deference to a defendant's strategic decisions, critical to respecting the defendant's autonomy and individual dignity.

In *Coristine*, the error was instructing the jury on an affirmative defense the defense did not want to pursue. But the same principles apply to the situation where a court excludes proffered evidence (or upholds its exclusion below) because it concludes it would not have been helpful to the

defense. *Corstine* makes it clear that it is not the court that gets to decide what evidence is tactically beneficial to the defendant. That is a defense function.

Here, Mr. Pavlik wanted to introduce evidence that at the first moment, when he could not have fabricated, he blurted out that he was acting in self-defense. Any problems with syntax could have been explained by Mr. Pavlik's cultural background and language skills. He wanted to offer this excited utterance, no less than the State was able to introduce evidence that Smith was concerned about Leenders, or that Smith gave a full narrative to Cpl. Storment. It violates the Sixth Amendment to conclude that, by excluding this statement, the trial court was really helping Mr. Pavlik.

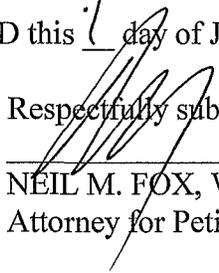
This Court should reconsider the hearsay issues and grant relief under RAP 16.4(c)(2), (3), (5) & (7).

**E. CONCLUSION**

For these reasons, and those set out in the amended PRP, this Court should grant relief under RAP 16.4(c) and vacate the conviction.

DATED this 1 day of July, 2013.

Respectfully submitted,

  
\_\_\_\_\_  
NEIL M. FOX, WSBA NO. 15277  
Attorney for Petitioner

## Appendices

- A. Selected Court's Instructions
- B. Selected Defense Proposed Instructions
- C. Selected WPICs
- D. Selected Police Reports (with index)
- E. Statutory Appendix

APPENDIX A

FILED

MAR 26 2010

THOMAS R. FALLOUST  
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON  
Plaintiff,

v.

ALEKSANDR V. PAVLIK,  
Defendant.

)  
) No. 08-1-01641-3  
)  
)  
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)

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COURT'S INSTRUCTIONS TO THE JURY

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Date: March 24, 2010



Jerome J. Leveque  
Superior Court Judge

**ORIGINAL**

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INSTRUCTION NO. 14

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm.

INSTRUCTION NO. 15

To convict the defendant of the crime of assault in the first degree, under Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of May, 2008, the defendant assaulted Gabriel A. Leenders.

(2) That the assault was committed with a firearm;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

An assault is an intentional touching or striking or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive, if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 17

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 20

It is a defense to a charge of attempted murder and/or first degree assault that the first degree assault and/or attempted homicide was justifiable as defined in this instruction.

Attempted homicide is justifiable when committed in the lawful defense of the actor and/or any person in the actor's presence or company when:

(1) the actor reasonably believed that the person injured intended to inflict death or great personal injury;

(2) the actor reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the actor employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the actor, 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 first degree assault and/or attempted 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.

INSTRUCTION NO. 21

In determining whether a use of deadly force in self defense was justifiable, the phrase "great personal injury" means an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the actor or another person.

INSTRUCTION NO. 22

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for an attempted homicide and/or first degree assault to be justifiable.

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INSTRUCTION NO. 23

No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 24

Necessary means that, no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

INSTRUCTION NO. 25

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

## APPENDIX B

FILED

MAR 22 2010

THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
Plaintiff,	)	No. 08-1-01641-3
	)	
v.	)	
	)	
ALEKSANDR V. PAVLIK,	)	
Defendant.	)	

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DEFENDANT'S PROPOSED INSTRUCTIONS TO THE JURY

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*Anna K. Nordtvedt*  
 ANNA K. NORDTVEDT, WBSA# 15622

*22 March 2010*  
 Date

DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
 Spokane County Public Defender  
 1116 W. Broadway  
 Spokane, Washington 99260-0280  
 Phone:(509) 477-4246 Fax:(509) 477-2567

INSTRUCTION NO. \_\_\_\_\_

In determining whether a use of deadly force in self defense was justifiable, the phrase "great personal injury" means an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the actor or another person.

WPIC 2.04.01  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
Spokane County Public Defender  
1116 W. Broadway  
Spokane, Washington 99260-0280  
Phone:(509) 477-4246 Fax:(509) 477-2667

INSTRUCTION NO. \_\_\_\_\_

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

Attempted homicide is justifiable when committed in the lawful defense of the actor and/or any person in the actor's presence or company when:

(1) the actor reasonably believed that the person injured intended to inflict death or great personal injury;

(2) the actor reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the actor employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the actor, 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 attempted 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.

WPIC 16.02  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
Spokane County Public Defender  
1116 W. Broadway  
Spokane, Washington 99260-0280  
Phone:(509) 477-4246 Fax:(509) 477-2667

INSTRUCTION NO. \_\_\_\_\_

One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor.

WPIC 16.04.01  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
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INSTRUCTION NO. \_\_\_\_\_

Necessary means that, no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

WPIC 16.05  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
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1116 W. Broadway  
Spokane, Washington 99260-0280  
Phone:(509) 477-4246 Fax:(509) 477-2567

INSTRUCTION NO. \_\_\_\_\_

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 16.08  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

John T. Rodgers, Director  
Spokane County Public Defender  
1116 W. Broadway  
Spokane, Washington 99260-0280  
Phone:(509) 477-4246 Fax:(509) 477-2567

INSTRUCTION NO. \_\_\_\_\_

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for an attempted homicide to be justifiable.

WPIC 16.07  
DEFENDANT'S PROPOSED  
INSTRUCTION NO. \_\_\_\_\_

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APPENDIX C



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## Welcome to the online source for the Washington Criminal Jury Instructions

### 11 WAPRAC WPIC 2.04.01

WPIC 2.04.01 Great Personal Injury—Justifiable Homicide—Justifiable Deadly Force in Self-Defense—Definition

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.04.01 (3d Ed)

Washington Practice Series TM  
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal  
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part I. General Instructions  
WPIC CHAPTER 2. Definitions

### **WPIC 2.04.01 Great Personal Injury—Justifiable Homicide—Justifiable Deadly Force in Self-Defense—Definition**

"Great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

#### **NOTE ON USE**

Use this instruction with WPIC 16.02, Justifiable Homicide—Defense of Self and Others, or WPIC 17.02, Lawful Force—Defense of Self, Others, Property.

#### **COMMENT**

**Justifiable homicide.** RCW 9A.16.050 provides in part that homicide is justifiable when there is reasonable ground to apprehend a design on the part of the person slain to do some "great personal injury."

The pattern instruction's definition for "great personal injury" is taken from *State v. Painter*, 27 Wn.App. 708, 620 P.2d 1001 (1980). The *Painter* court rejected the pre-existing common law definition, which had adopted an objective standard ("injury of a more serious nature than an ordinary striking with hands or fists"). The court held that under the justifiable homicide statute, a defendant's actions are to be judged against his or her own subjective impressions rather than those that a detached jury might determine to be objectively reasonable. The court stated that "the jury must be instructed to interpret the evidence in each case in determining if the defendant had reasonable grounds to fear imminent danger of death or great bodily harm given his or her knowledge and the circumstances at the time of the assault." *State v. Painter*, 27 Wn.App. at 713. As more recent opinions have recognized, this determination involves both subjective and objective components. See *State v. Read*, 147 Wn.2d 238, 243–44, 53 P.3d 26 (2002); *State v. Walker*, 136 Wn.2d 767, 966 P.2d 883 (1998).

**Use of deadly force in self-defense.** In *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997), the court explicitly approved the use of this instruction and the term "great personal injury" in the context of a claim of self-defense in an assault case in which the defendant had brandished a deadly weapon. The court cited the Comment to this instruction in affirming the proposition that the preferable term for cases



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## Welcome to the online source for the Washington Criminal Jury Instructions

### 11 WAPRAC WPIC 16.02

WPIC 16.02 Justifiable Homicide—Defense of Self and Others

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (3d Ed)

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Part IV. Defenses  
WPIC CHAPTER 16. Justifiable Homicide

### WPIC 16.02 Justifiable Homicide—Defense of Self and Others

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

Homicide is justifiable when committed in the lawful defense of *[the slayer]* *[the slayer's [husband] [wife] [registered domestic partner] [parent] [child] [brother] [sister]]* *[any person in the slayer's presence or company]* 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 commit a felony]* *[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]* *[her]*, 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.

#### NOTE ON USE

Use this instruction in any homicide case in which this defense is an issue supported by the evidence. Use bracketed material as applicable.

Use WPIC 25.01, Homicide—Definition, with this instruction. Use WPIC 2.04.01, Great Personal Injury—Definition, and WPIC 2.09, Felony—Designation of, as applicable with this instruction. If there is an issue whether the defendant was the aggressor, use WPIC 16.04, Aggressor—Defense of Self and Others.

If resistance to a felony is involved, see WPIC 16.03, Justifiable Homicide—Resistance to Felony.

Do not use this instruction if the deadly force was used to defend against a non-violent felony, such as forgery, bribery, perjury, or the like.

When the offense charged is attempted murder, use this instruction, rather than WPIC 17.02, Lawful Force—Defense of Self, Others, Property.



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### 11 WAPRAC WPIC 16.03

WPIC 16.03 Justifiable Homicide—Resistance To Felony

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.03 (3d Ed)

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Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part IV. Defenses  
WPIC CHAPTER 16. Justifiable Homicide

### **WPIC 16.03 Justifiable Homicide—Resistance To Felony**

It is a defense to a charge of *[murder][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][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][her]* 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.

#### **NOTE ON USE**

This instruction should be given in homicide cases in which there is evidence to support a claim that the defendant was acting in resistance to the commission of a felony upon the defendant or in the defendant's presence or upon or in a dwelling or other place of abode in which the defendant was present. If self-defense against a felony is involved, see WPIC 16.02, Justifiable Homicide—Defense of Self and Others.

Use bracketed material as applicable.

Use WPIC 2.09, Felony—Designation of, and WPIC 25.01, Homicide—Definition, with this instruction. Use WPIC 2.08, Dwelling—Definition, as applicable with this instruction.

#### **COMMENT**

RCW 9A.16.050(2).

The common law requires that the use of force in the prevention of a felony must be limited to that which would be used by a reasonably prudent person under circumstances as they might appear to him. *State v. Castro*, 30 Wn.App. 586, 636 P.2d 1099 (1981).

Although the statute does not limit the kind of attempted felony that will justify a homicide, the deadly force appears to be limited to resisting felonies committed by violence such as those when great



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### **11 WAPRAC WPIC 16.05** WPIC 16.05 Necessary—Definition

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.05 (3d Ed)

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Part IV. Defenses  
WPIC CHAPTER 16. Justifiable Homicide

#### **WPIC 16.05 Necessary—Definition**

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

#### **NOTE ON USE**

Use this instruction when the word "necessary" is used in instructions relating to defenses in WPIC Chapters 16 and 17.

#### **COMMENT**

RCW 9A.16.010. The statutory definition of "necessary" applies only to RCW Chapter 9A.16.

It is error to give an instruction that defines "necessary" in the language of the statute, as the statutory language fails to make the subjective standard of necessity apparent to the jury. *State v. Fischer*, 23 Wn.App. 756, 598 P.2d 742 (1979). See the Comment to WPIC 17.02, Lawful Force—Charges Other than Homicide. So that the subjective nature of this standard is entirely clear, the phrase "under the circumstances as they reasonably appeared to the actor at the time" has been moved forward in the instruction, and the numbers (1) and (2) have been added.

If there is an issue of defendant's right to stand firm and not retreat, see WPIC 16.08, No Duty to Retreat.

*[Current as of July 2008.]*

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11 WAPRAC WPIC 16.05

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### 11 WAPRAC WPIC 16.07

WPIC 16.07 Justifiable Homicide—Actual Danger Not Necessary

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.07 (3d Ed)

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Part IV. Defenses  
WPIC CHAPTER 16. Justifiable Homicide

### **WPIC 16.07 Justifiable Homicide—Actual Danger Not Necessary**

A person is entitled to act on appearances in defending *[himself][herself][another]*, if that person believes in good faith and on reasonable grounds that *[he][she][another]* 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.

#### **NOTE ON USE**

Use this instruction with WPIC 16.02, Justifiable Homicide—Defense of Self and Others, and WPIC 16.03, Resistance to Felony, when appropriate.

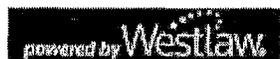
#### **COMMENT**

The prior version of this instruction used the language "great bodily harm," which appeared in earlier cases defining this defense. E.g., *State v. Miller*, 141 Wash. 104, 250 Pac. 645 (1926). The term "great personal injury" is now used, because it is the term utilized by RCW 9A.16.050(1). See *State v. Walden*, 131 Wn.2d 469, 475 n.3, 932 P.2d 1237 (1997) (noting confusion); *State v. Freeburg*, 105 Wn.App. 492, 505, 20 P.3d 984 (2001) (holding that term "great personal injury" should be used rather than "great bodily harm").

RCW 9A.16.050(1) provides in part that a homicide is justifiable when committed in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer and there is imminent danger of such design being accomplished. The committee is unaware of any cases that address the relationship between this defense and the element of imminent danger under RCW 9A.16.050(1).

This defense applies not only to self-defense but also to the use of force to protect third persons from apparent injury. See *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977) (a person may defend another when the defender reasonably believes that the other person is in danger even though such belief may be later shown to have been erroneous).

It is not clear whether this defense applies when a person erroneously uses force to defend against an apparent property offense. The committee could find no cases addressing this issue.



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### 11 WAPRAC WPIC 17.02

WPIC 17.02 Lawful Force—Defense of Self, Others, Property

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (3d Ed)

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Part IV. Defenses  
WPIC CHAPTER 17. Lawful Force—Charges Other Than Homicide

#### WPIC 17.02 Lawful Force—Defense of Self, Others, Property

It is a defense to a charge of \_\_\_\_\_ that the force *[used][attempted][offered to be used]* was lawful as defined in this instruction.

*[The [use of][attempt to use][offer to use] force upon or toward the person of another is lawful when [used][attempted][offered] [by a person who reasonably believes that [he][she] is about to be injured] [by someone lawfully aiding a person who [he][she] reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]*

*[The [use of][attempt to use][offer to use] force upon or toward the person of another is lawful when [used][attempted][offered] in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]*

The person *[using][or][offering to use]* the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of *[and prior to]* the incident.

The *[State][City][County]* has the burden of proving beyond a reasonable doubt that the force *[used][attempted][offered to be used]* by the defendant was not lawful. If you find that the *[State][City][County]* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty *[as to this charge]*.

#### NOTE ON USE

Use this instruction in any case in which this defense is an issue supported by the evidence.

Use bracketed material as applicable. Use this instruction for any charge other than homicide or attempted homicide. If homicide is involved, use WPIC 16.02, Justifiable Homicide—Defense of Self and Others.

With this instruction, use WPIC 16.05, Necessary—Definition. Also use, as applicable, WPIC 2.13, Malice—Maliciously—Definition. If there is an issue whether the defendant was the aggressor, use WPIC 16.04, Aggressor—Defense of Self, or WPIC 16.04.01, Aggressor—Defense of Others.



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### 11 WAPRAC WPIC 17.04

WPIC 17.04 Lawful Force—Actual Danger Not Necessary

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed)

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Part IV. Defenses  
WPIC CHAPTER 17. Lawful Force—Charges Other Than Homicide

#### **WPIC 17.04 Lawful Force—Actual Danger Not Necessary**

A person is entitled to act on appearances in defending *[himself][herself][another]*, if *[he][she]* believes in good faith and on reasonable grounds that *[he][she][another]* is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

#### **NOTE ON USE**

Use this instruction with WPIC 17.02, Lawful Force—Defense of Self and Others, when appropriate.  
Do not use this instruction when self-defense is asserted in the context of resisting an unlawful or excessive force arrest. See the Comment to WPIC 17.02.01, Lawful Force—Resisting Detention.  
Use bracketed material as applicable.

#### **COMMENT**

This instruction has its origin in case law. See *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977); *State v. Miller*, 141 Wash. 104, 250 P. 645 (1926); *State v. Dunning*, 8 Wn.App. 340, 506 P.2d 321 (1973). In *Miller*, the court stated:

If the appellants, at the time of the alleged assault upon them, as reasonably and ordinarily cautious and prudent men, honestly believed that they were in danger of great bodily harm, they would have the right to resort to self-defense, and their conduct is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the jury in light of the testimony before it.

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, although it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have acted under the circumstances as they appeared to them, they were justified in defending themselves.



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### 11 WAPRAC WPIC 35.50 WPIC 35.50 Assault—Definition

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed)

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Part VI. Crimes Against Personal Security  
WPIC CHAPTER 35. Assault and Reckless Endangerment

#### **WPIC 35.50 Assault—Definition**

[An assault is an intentional *[touching]* *[or]* *[striking]* *[or]* *[cutting]* *[or]* *[shooting]* of another person *[, with unlawful force,]* that is harmful or offensive *[regardless of whether any physical injury is done to the person]*. *[A [touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] cutting [or] [shooting] would offend an ordinary person who is not unduly sensitive.]*

[An assault is *[also]* an act *[, with unlawful force,]* done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. *[It is not necessary that bodily injury be inflicted.]*

[An assault is *[also]* an act *[, with unlawful force,]* done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

*[An act is not an assault, if it is done with the consent of the person alleged to be assaulted.]*

#### **Note on Use**

Use this general definition with any instruction that refers to assault.

Use the first bracketed definition in cases involving a battery whether accompanied or unaccompanied by an apprehension or fear of bodily injury on the part of the victim. Use the bracketed sentence of this paragraph, if it is necessary to define "offensive" for the jury. See Comment.

Use the second bracketed definition in cases involving an attempt to inflict bodily injury but not resulting in a battery. The inner bracketed sentence should be used if there is a factual issue as to the extent of the act committed, i.e., whether it constituted mere preparation or had progressed far enough to constitute an attempt, or if there is a factual issue as to the existence of an apparent present ability to inflict bodily injury.

Use the third bracketed definition in cases in which there is evidence that the actor's intent was not to inflict bodily injury but only to create the apprehension or fear of bodily injury in the victim. Use WPIC 5.01, Direct and Circumstantial Evidence, with this instruction if this paragraph is given. See the Comment below.

Use the fourth bracketed paragraph relating to consent if there is an issue whether the victim consented to the defendant's act and the act is not otherwise a breach of the peace.

APPENDIX D

<b>Page</b>	<b>Inc. No.</b>	<b>Case</b>
1-3	SPD Inc. No. 09-051325	2/16/09, Smith Hit-and-Run
4-6	SPD Inc. No. 06-277480	9/9/06, Smith bicycling infraction
7-8	SPD Inc. 04-443525	12/30/04, Leenders report of no assault
9-14	SPD Inc. No. 06-057241	2/24/06, Leenders Assault
15-16	SPD Inc. No. 54484	8/19/06, Leenders Reckless Driving
17-19	SPD Inc. No. 06-272787	9/6/06, Leenders' self-inflicted injuries
20-23	SPD Inc. No. 06-343435	11/11/06, Leenders "Robbery" Report
24-25	SPD Inc. No. 06-290578	9/21/06, Leenders, VUCSA (fake name)
26-27	SPD Inc. No. 07-357694	12/10/07, Leenders reports Moon assault
28-35	SPD Inc. No. 08-053095	2/24/08, Leenders DUI
36-38	SPD Inc. No. 08-110932	4/19/08, Leenders, Malicious Mischief

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>TRAFFIC-HIT AND RUN</b>		ATTEMPTED <input type="checkbox"/>		INCIDENT NUMBER <b>09-051325</b>	
CODE <b>V-2</b>	CIRCUMSTANCES <i>Investigative Information</i>	LICENSE NO.	STATE	LIC. YEAR	LICENSE TYPE
YEAR <b>1993</b>	MAKE <b>GEO</b>	MODEL <b>Metro</b>	BODY STYLE <b>Hatchback, 2 Door</b>		TOP/FRONT ONLY COLOR <b>Green</b>
SPECIAL FEATURES/DESCRIPTION					
DECAL NUMBER	REGISTERED OWNER <b>Colucci, Linda S</b>			HOME PHONE	
VEHICLE DISPOSITION <input type="checkbox"/> LEFT AT SCENE <input type="checkbox"/> DRIVEN AWAY <input type="checkbox"/> TOWED	REGISTERED OWNER'S ADDRESS: STREET, CITY STATE ZIP			VALUE \$	
LOCKED <input type="checkbox"/> Yes <input type="checkbox"/> No	KEYS IN VEHICLE <input type="checkbox"/> Yes <input type="checkbox"/> No	OLD CLIENT PAYMENT <input type="checkbox"/> Yes <input type="checkbox"/> No	VICTIM CONSENT <input type="checkbox"/> Yes <input type="checkbox"/> No	DRIVABLE <input type="checkbox"/> Yes <input type="checkbox"/> No	ESTIMATED DAMAGE
TOW COMPANY		HOLD REQUESTED BY		HOLD FOR	
DATE	TIME	RELEASE NO.	RELEASING AUTHORITY	DATE	TIME
NARRATIVE					

On 02/16/2009 at 0328 hrs, I responded to [redacted] S. Adams [redacted] to assist Co-op Burson and Co-op Taylor with a hit and run call. Co-op Taylor stated that they investigated a hit and run that occurred at Madison/8th and a license plate [redacted] was left behind at the location. Off of a DOL search, they were able to get an address for the registered owner (Shaleen Harris) at [redacted].

At the intersection of Adams/8th I observed a white Ford F150 truck with the above mentioned license plate parked on the East side of street (Adams). On the front of the truck I then observed front end damage to the grill and bumper. On the bumper, I observed smudge marks where it appeared someone tried to rub off damage to the vehicle. I also observed a dark green chip of paint matching the vehicle struck on 8th/Madison. A Cpl. was requested for photographs of the damage.

I then contacted Harris and asked her what happened to her truck. Harris stated that she did not know, and was unaware that there was damage to her vehicle. I asked her when she drove her car and she stated that she drove it home after work around 1500 hours, and then drove her and her boyfriend, Bradley Smith, to the Sunset Junction at about 1800 hours.

I then asked Harris again if she was involved in a collision, Harris stated that she was not. Harris stated that it was possible that Smith may have driven the vehicle. Harris then went outside and observed her vehicle, Harris stated to me that her truck was not parked where she had left it.

I then contacted Smith who stated the following:

He stated that him and Harris went to the bar earlier in the evening and Harris drove back because he does not drive when he drinks. He then stated that they went to the store after they returned from the bar around 2200 hours. I asked if he had been driving and was involved in a collision. Smith stated that he had not been driving and did not know anything about a collision.

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 4

INCIDENT CLASSIFICATION <b>TRAFFIC-HIT AND RUN</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>09-051325</b>
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I informed both Harris and Smith that I know their vehicle was involved in the incident and that one of them was driving and it would be best to be honest with me. Both Harris and Smith stated they did not know what happened.

I informed Harris and Smith that they both would be listed as suspects in a hit and run.

Cpl. McNab responded to the location to take photographs of the damage to the truck.

Cpl. McNab then contacted Smith and talked to him about the incident.

Cpl. McNab then informed me that Smith confessed to driving the vehicle and being involved in the hit and run. See Cpl. McNab's report for more information.

I then issued Smith criminal citation B79495 for fail to leave information - unattended. I also issued smith NOI U106620 for Improper turn plus collision, and NVOL 2nd.

Smith was then released at the location without further incident.

See Collision Report 09-51325 for more information.

See Cpl. McNab's report for more information.

See Co-op Taylor's report for more information.

E. Specht #978

Incident Report #11	END OF INCIDENT REPORT
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02/16/2009 10:00:17.961

**Supplemental Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION		EVIDENCE NUMBER		INCIDENT NUMBER <b>09-051325</b>	
REPORT PURPOSE			REPORTED ON DATE	TIME	INCIDENT XREF
			Mon	02/16/2009	02:28
INCIDENT CLASSIFICATION #1 <b>TRAFFIC-HIT AND RUN</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #2 <b>ACCIDENT REPORT</b>	ATTEMPTED <input type="checkbox"/>		
INCIDENT CLASSIFICATION #3	ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #4	ATTEMPTED <input type="checkbox"/>		
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE	REPORT TIME	
			02/16/2009	04:59	
PRIMARY CHARGE					UCR/NIBRS CODE
NARRATIVE					

On 021609 at 0304 I responded to 8th and Madison to photograph damage to a vehicle that was involved in a hit and run collision. Upon arrival, I learned the victim vehicle was parked on 8th unoccupied when it was hit by a vehicle traveling north Madison turning west on 8th. I observed the tire tracks left by the suspect vehicle in a fresh layer of snow.

By looking at the tracks it was apparent that the suspect vehicle was traveling north on Madison and attempted to turn left (west) onto 8th but slipped on the ice hitting the victim vehicle. The tracks then reversed away from the collision and proceeded west on 8th. I photographed the damage to the suspect vehicle and the tire tracks.

At 0357 I responded to ██████ Adams to assist officer Specht who had located the suspect vehicle. Upon arrival, officer Specht advised the registered owner of the vehicle was denying any involvement in a collision despite the fact that her vehicle's license plate was found at the scene and there was damage to her vehicle consistent with the collision. I photographed front-end damage to the suspect vehicle. I noted there was green paint found on the vehicle's front bumper which matched the victim vehicle's color.

Officer Specht was talking with the registered owner, Shallen Harris, outside the residence. She was denying that she was involved in a collision and mentioned that her boyfriend could have driven it while she was sleeping.

I contacted the boyfriend, Bradley Smith, inside the residence while officer Specht continued to talk with Harris outside. Smith invited me in the residence saying "come on in". I advised Smith that I knew Harris's vehicle was involved in a collision and we needed to clarify who was driving. At first Smith denied having knowledge of a collision. When I pointed out the fact that the license plate was found at the scene, he admitted that he may have "tapped" a car by accident. He advised he was alone in the vehicle when the collision occurred. Smith stated he was sorry, that he had been drinking but thought he was ok to drive.

I advised officer Specht of the information I had received. Smith was cited and released for fail to leave information- unattended.

See officer Specht's arrest report for further details.

M. McNab #689 SPD

ID NO / NAME OF REPORTING OFFICER #689 - McNab, Michael	APPROVAL #331 - Overhoff, David	DATE/TIME 02/24/2009 05:23	DISTRIBUTION
RECORDS	DISTRIBUTION DATE	BY	SUPERVISOR

Supplemental Report #1

02/24/2009 05:40:11.184

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>06-277480</b>	
INCIDENT TYPE <i>Information</i>		INCIDENT CLASSIFICATION #1 <b>INFORMATIONAL</b>		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #2		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONDING TO (Officer Assault)				ASSIGNMENT (Officer Assault)	
REPORTED ON <b>Sat 09/09/2006</b>	DATE/TIME <b>23:30</b>	OCCURRED ON <b>Sat 09/09/2006</b>	DATE/TIME <b>23:30</b>	OCCURRED TO <b>Sat 09/09/2006</b>	DATE/TIME <b>23:45</b>
DISPATCH TIME <b>23:30</b>		ARRIVED TIME <b>23:30</b>		Cleared TIME <b>23:45</b>	
REPORT DATE <b>09/10/2006</b>		REPORT TIME <b>00:27</b>		EST. TOTAL PROPERTY LOSS	
PRIMARY CHARGE					UCR/NIBRS CODE
LOCATION OF INCIDENT <b>307 1/2 W 2nd, Spokane, WA 99201</b>				LOCATION NAME (IF APPLICABLE)	
ENTRY POINT	METHOD	WEAPON/TOOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>Suspect Named</b>					
RELATED INCIDENT NUMBERS					INCIDENT XREF
ADDITIONAL REPORTING OFFICERS <b>na</b>					
VICTIM/WITNESSES/OTHERS					
CODE <b>CON-1</b>	NAME LAST, FIRST MIDDLE <b>Kling, Elizabeth A. M.</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White</b>
HEIGHT <b>5'05"</b>	WEIGHT <b>140</b>	BUILD	HAIR <b>Blonde or</b>	EYES <b>BLU - Blue</b>	DATE OF BIRTH/AGE <b>20</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS, STREET, CITY STATE ZIP			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS				OCCUPATION	EMPLOYER PHONE
ADDITIONAL ADDRESSES					ADDRESS TYPE
ADDITIONAL PHONES					
DRIVER'S LICENSE		<input type="checkbox"/> FAKE	STATE	SOCIAL SECURITY NO.	<input type="checkbox"/> FAKE
					OTHER ID

ID NO./NAME OF REPORTING OFFICER <b>#890 - Rosenthal, Marie</b>	APPROVAL <b>#812 - Wohl, Steven</b>	DATE/TIME <b>09/10/2006 01:19</b>	DISTRIBUTION <b>Child Protective Services</b>
RECORDS	DISTRIBUTION DATE	BY	SUPERVISOR

Incident Report #1

09/10/2006 01:20:21.640



**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION <b>INFORMATIONAL</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>06-277480</b>
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I stopped them at the rear entrance of the complex. As they got off the bicycles, I saw the female was holding a small baby against her chest in a chest carrier. She had ridden the bike with the baby in front of her. She had covered it with a shirt, but his legs were bare and he was whimpering.

The female identified herself as Tlea Kling and she said the baby was her nephew. She said the baby's mother, her sister Elizabeth Kling, brought the 1 1/2 month old baby, Keashawn Torngren, to her and "she didn't know I had a bicycle." She stated Elizabeth brought her the baby because she had to leave. Elizabeth was at the window of the apartment and came down the stairs to get the baby. Elizabeth said the baby's father lives on the "westside".

Tlea said she was handicapped and was pregnant, due next year. She told me I should have asked her if she was handicapped. I advised Tlea to let Elizabeth know I was writing a report for CPS about tonight's incident. She became very irate and yelled up to her sister, "you'd better clean your house because CPS will be here tomorrow! Now they will take my baby away when it's born!" The male bicyclist, Bradley Smith, also became angry and swore at me several times. He said he was already fighting a child custody battle for his other baby. He also said he was handicapped.

I issued them tickets for No Helmet Law. They were very upset. Tlea signed the NOI, but Smith refused.

M. Rosenthal #690

Incident Report #	END OF INCIDENT REPORT
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09/10/2006 01:20:22.265

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

Page 1

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>04-443525</b>	
INCIDENT TYPE <b>Domestic Violence</b>		INCIDENT CLASSIFICATION #1 <b>DOMESTIC VIOLENCE</b>		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONDING TO (Other Assault)				ASSIGNMENT (Officer/Assault)	
REPORTED ON <b>Thu 12/30/2004</b>	DATE/TIME <b>09:47</b>	OCCURRED ON <b>Thu 12/30/2004</b>	DATE/TIME <b>09:00</b>	OCCURRED TO <b>Thu 12/30/2004</b>	DATE/TIME <b>09:58</b>
DISPATCH TIME <b>09:51</b>	ARRIVED TIME <b>09:58</b>	CLEARED TIME <b>10:16</b>	REPORT DATE <b>12/30/2004</b>	REPORT TIME <b>13:32</b>	EST. TOTAL PROPERTY LOSS
PRIMARY CHARGE					UCR/NIJS CODE
LOCATION OF INCIDENT <b>Spokane, WA 99207</b>				LOCATION NAME (IF APPLICABLE)	
ENTRY POINT	METHOD	WEAPON/TOOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>None</b>					
RELATED INCIDENT NUMBERS					INCIDENT AREF
ADDITIONAL REPORTING OFFICERS <b>none</b>					
CONFIDENTIALITY <input type="checkbox"/>					
CODE <b>C-1</b>	NAME: LAST, FIRST, MIDDLE <b>Leenders, Gabriel A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White/Non-Hispanic</b>
HEIGHT <b>5'08"</b>	WEIGHT <b>195</b>	BUILD <b>Medium</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>	DATE OF BIRTH/AGE <b>30</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
CONFIDENTIALITY <input type="checkbox"/>					
CODE <b>V-1</b>	NAME: LAST, FIRST, MIDDLE <b>Thomas, Jennifer C</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White/Non-Hispanic</b>
HEIGHT	WEIGHT	BUILD	HAIR	EYES	DATE OF BIRTH/AGE <b>27</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99208</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	

I responded to [redacted] for a City Assault (DV) report.

IO NO/NAME OF REPORTING OFFICER <b>#371 - McHugh, Steven</b>	APPROVAL <b>#103 - Dubrow, Rick</b>	DATE/TIME <b>12/30/2004 14:17</b>	DISTRIBUTION
CONFIDENTIALITY <input type="checkbox"/>			

Incident Report #1

12/30/2004 14:17:55:000

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 2

INCIDENT CLASSIFICATION <b>DOMESTIC VIOLENCE</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>04-443625</b>
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Comp. Leenders had called police to advise that he and his girlfriend, Thomas, had been arguing. He wanted to call police first to say no assault had occurred. He was concerned that Thomas would call and say he had assaulted her.

I contacted Thomas outside the residence. She was removing belonging from the apt, Thomas was upset and crying. While interviewing Thomas, Leenders came outside. He was also upset and was going on how he was the one that had called police first.

Thomas said she woke up this morning and was washing the dishes. Leenders was woken up by the dishwashing and became mad. Thomas and Leenders got into a verbal argument.

Thomas decided to leave to cool down. She returned after approx ½ hour because she realized she had Leenders vehicle keys. They started to argue again. Thomas said she was trying to call her friend. Leenders pushed her down on the bed trying to get the telephone from her.

Thomas had a small scratch on her left hand. Thomas did not know how she received the scratch.

Leenders said the argument was verbal only. He denied any assault had taken place.

Thomas retrieved what items of hers that was not disputed by Leenders.

Thomas left with her mother who arrived while we were onscene.

There is no po for assault at this time.



(2/20/2004 4:17:58.017)

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER	INCIDENT NUMBER <b>06-057241</b>	
INCIDENT TYPE <i>Arrest, Domestic Violence</i>	INCIDENT CLASSIFICATION #1 <b>ASSAULT 4TH/CITY</b>	ATTEMPTED	INCIDENT CLASSIFICATION #2 <b>MALICIOUS MISCHIEF</b>	ATTEMPTED
	INCIDENT CLASSIFICATION #3 <b>DOMESTIC VIOLENCE</b>	ATTEMPTED	INCIDENT CLASSIFICATION #4	ATTEMPTED
RESPONDING TO (Officer Assign)		ASSIGNMENT (Officer Assign)		

REPORTED ON <b>Fri 02/24/2006</b>	DATE/TIME <b>22:00</b>	OCCURRED ON <b>Fri 02/24/2006</b>	DATE/TIME <b>21:30</b>	OCCURRED TO <b>Fri 02/24/2006</b>	DATE/TIME <b>21:59</b>	DISTRICT
DISPATCH TIME <b>22:02</b>	ARRIVED TIME <b>22:08</b>	CLEARED TIME <b>23:30</b>	REPORT DATE <b>02/25/2006</b>	REPORT TIME <b>05:00</b>	EST. TOTAL PROPERTY LOSS	
PRIMARY CHARGE <b>M-10.11.010DV CITY ASSAULT-DV</b>					UCR/NIBRS CODE <b>/</b>	

ADDITIONAL CHARGES  
**M-10.12.020DV MALICIOUS MISCHIEF DV**

LOCATION OF INCIDENT  
**Spokane, WA 99204** LOCATION NAME (IF APPLICABLE)

ENTRY POINT	METHOD	WEAPON/TOOL/FORCE USED	SECURITY	EVIDENCE
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED) <b>Apartment/Condominium</b>				

SOLVABILITY FACTORS  
**Suspect Arrested, Useful Physical Evidence, Witness to Crime**

RELATED INCIDENT NUMBERS

INCIDENT XREF

ADDITIONAL REPORTING OFFICERS  
**C. Haugan**

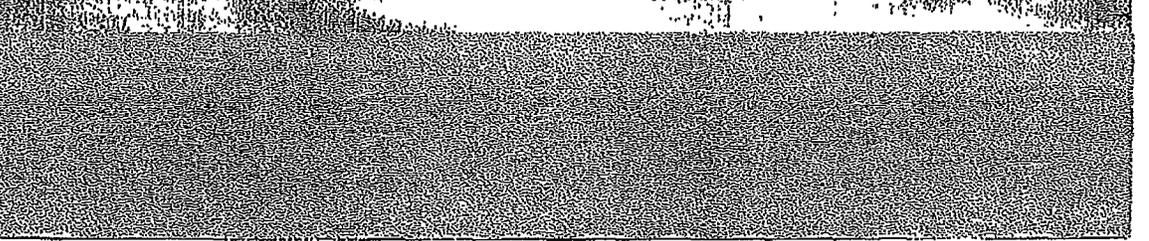
**VICTIM/WITNESSES/OTHERS**

CODE <b>V-1</b>	NAME: LAST, FIRST, MIDDLE <b>Erio-Rosa, Barbara J</b>	SEX <b>F</b>	RACE/ETHNICITY <b>W-White/Non-Hispanic</b>	DATE OF BIRTH/AGE <b>28</b>
HEIGHT	WEIGHT	BUILD	HAIR	EYES
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99204</b>	RESIDENTIAL STATUS	PHONE	
	PLACE OF EMPLOYMENT/SCHOOL/ADDRESS	OCCUPATION	EMPLOYER PHONE	

RELATIONSHIP TO SUSPECT  
**Victim was Girlfriend**

VICTIM OF  
**Off. # M-10.11.010DV CITY ASSAULT-DV**

OFFNR. #  
**A-1**



ID NO./NAME OF REPORTING OFFICER <b>#740 - Juarez, Mauricio</b>	APPROVAL	DATE/TIME	DISTRIBUTION
RECORDS	DISTRIBUTION DATE	SUPERVISOR	

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>ASSAULT 4TH/CITY</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>06-057241</b>
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ADDITIONAL PHONES

[REDACTED]

CODE <b>A-1</b>	NAME: LAST, FIRST, MIDDLE <b>Leenders, Gabriel A</b>	SEX <b>M</b>	RACE/ETHNICITY <b>W-White/Non-Hispanic</b>	DATE OF BIRTH/AGE <b>31</b>
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HEIGHT <b>5'08"</b>	WEIGHT <b>195</b>	BUILD <b>Medlum</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>	DESCRIPTORS
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CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99204</b>	RESIDENTIAL STATUS	PHONE
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PLACE OF EMPLOYMENT/SCHOOL/ADDRESS	OCCUPATION	EMPLOYER PHONE
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ADDITIONAL PHONES

[REDACTED]

CHARGE LEVEL <b>Misdemeanor</b>	DESCRIPTION <b>M-10.11.010DV CITY ASSAULT-DV</b>	UCR/NCIC CODE
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WARRANT #	BAIL	TYPE OF ARREST <b>Taken Into Custody</b>	MULTIPLE ARRESTEE SEGMENTS INDICATOR <input type="checkbox"/>
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CHARGE LEVEL <b>Misdemeanor</b>	DESCRIPTION <b>M-10.12.020DV MALICIOUS MISCHIEF DV</b>	UCR/NCIC CODE
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WARRANT #	BAIL	TYPE OF ARREST <b>Taken Into Custody</b>	MULTIPLE ARRESTEE SEGMENTS INDICATOR <input type="checkbox"/>
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CITATION # <b>B46698</b>	DATE <b>02/24/2006</b>	TIME <b>22:58</b>	BOOKED WHERE <b>Spokane County Jail</b>	DATE <b>02/24/2006</b>	TIME <b>22:37</b>
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ARREST LOCATION <b>Spokane, WA 99204</b>	STATEMENT <input type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	CHARGES <input type="checkbox"/> ADMITTED <input type="checkbox"/> DENIED	SUSPECT ARMED WITH
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JUV. PARAGR. Notified <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME/RELATIONSHIP OF PERSON NOTIFIED	DATE & TIME NOTIFIED	NOTIFIED BY	DISPOSITION OF JUVENILE
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[REDACTED]

CODE <b>C-1</b>	NAME: LAST, FIRST, MIDDLE	SEX <b>M</b>	RACE/ETHNICITY	DATE OF BIRTH/AGE
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HEIGHT	WEIGHT	BUILD	HAIR	EYES	DESCRIPTORS
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CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99204</b>	RESIDENTIAL STATUS	PHONE
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PLACE OF EMPLOYMENT/SCHOOL/ADDRESS	OCCUPATION	EMPLOYER PHONE
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**NARRATIVE**

On 02-24-06 at approximately 2202 hrs Officer Haugen and I (two-

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION  
**ASSAULT ATH/CITY**

ATTEMPTED  INCIDENT NUMBER  
**06-057241**

officer unit) responded to [REDACTED] for a report of a trouble unknown. Complainant advised that for approximately (10) minutes it sounded as if someone was getting slammed around. Complainant also advised that he witnessed a male hit a female however he refused to identify himself. According to information from dispatch, the complainant was calling from [REDACTED]

Upon arrival I observed a female exit from the front door as she removed a resin chair from the front patio and proceed to the west side of the residence. The female was crying and appeared to be very upset. The female indicated that she had a fight with her boyfriend and he locked her out of her apartment. She identified herself as Barbara J. Erol-Rosa [REDACTED] and she stated that her boyfriend was Gabriel A. Leenders [REDACTED]

I advised dispatch to perform a wanted person check on both subjects and dispatch advised that neither had outstanding arrest warrants. Officer Haugen contacted Leenders inside the apartment.

I asked her if she had been injured and she pulled down the sleeves of her fleece pullover exposing injuries to her right wrist and forearm. I observed that there was fresh and dried blood on this arm and she stated that the injury was caused by Leenders. Ms. Erol-Rosa advised that she and Leenders have been dating and residing together for approximately (18) months.

Ms. Erol-Rosa advised me of the following. Leenders had been out drinking today at the Satellite Diner since approximately 1600 hrs. She met Leenders at the aforementioned establishment for a short while and eventually wanted to leave. According to Ms. Erol-Rosa, he became angry with her because she would not stay and drink with him and she eventually took the last bus home.

Leenders arrived home a short while later and he continued his angry demeanor with her as he stated something similar to, "Now you've fucking done it!" Leenders wanted Erol-Rosa out of the apartment and he demanded that he give him the cell phone and keys to the apartment, which she stated were hers. Leenders grabbed the cell phone from Ms. Erol-Rosa and attempted to get the keys from her pants pocket.

Ms. Erol-Rosa stated that they were in the bedroom directly across from the front apartment entrance and she was drinking Dr. Pepper from a glass. Leenders wrestled Erol-Rosa down onto the bed as she held onto the glass and in the process, the glass broke causing the injury to her right wrist/forearm. I later observed the broken glass which was in a fairly tight pattern on the bed in question. Erol-Rosa also advised that Leenders grabbed her around the front of the neck as he held her down on the bed, however, I did not observe any injuries to the front of her neck.

Ms. Erol-Rosa eventually got up from the bed and he pushed her out of the apartment, locking the door behind her. Mr. Erol-Rosa unsuccessfully pleaded with him through the door to give her the cell phone back and she was unable to get back inside the apartment because he propped something behind the door to hold it shut. Ms. Erol-Rosa stated that she would not have called for police because the last time police were called, she was arrested. According to Ms. Erol-Rosa, she had phone numbers for friends

Incident Report # [REDACTED]

CONTINUED ON NEXT PAGE  
02/25/2006 06:06:05,109

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 4

INCIDENT CLASSIFICATION  
**ASSAULT 4TH/CITY**

ATTEMPTED  INCIDENT NUMBER  
**06-057241**

stored on her cell phone that she would have called.

I asked Ms. Erol-Rosa if anyone was in the hallway and she remembered people from one of the upstairs apartments in the stairwell. While talking to Ms. Erol-Rosa I observed the keypad portion of a cell phone and battery lying on the floor outside the door to her apartment. It was a flip phone style phone and Ms. Erol-Rosa indicated that it was her phone. Upon looking closely at the phone I observed that a section of the keypad facing was slightly lifted, indicating that the screen portion of the phone may have been twisted off. I seized the broken phone pieces and later placed them on property as evidence.

I later contacted [redacted] and [redacted] and they advised that they were in the hallway going outside as they saw Ms. Erol-Rosa outside of apartment [redacted]. Prior to this, [redacted] advised that they were [redacted] when they heard a commotion coming from the [redacted]. They heard what sounded like yelling, slapping, and things being knocked over. They specifically indicated that they heard a male voice shout something similar to, "Give me the fucking keys!" and a female voice yell something similar to, "Get away from me, leave me alone!"

As [redacted] were in the stairwell, they heard the female pleading for her phone back. [redacted] offered her phone to Ms. Erol-Rosa but she refused.

After conferring with Officer Haugen it was determined that probable cause existed to charge Leenders with city assault (DV) and malicious mischief (DV). Leenders was placed under arrest, handcuffed (d/l), and searched incident to arrest. Cpl. Freitag (P319) photographed the crime scene and injuries to both subjects (refer to photo log). After providing Ms. Erol-Rosa with a completed victim's rights card, we transported Leenders to Spokane County Jail for booking on the aforementioned charges. The broken cell phone was placed on property (refer to evidence report).

See Officer Haugen's additional report for further information.

*Mario S. Juarez* #740  
MARIO S. JUAREZ  
SDD #740

INCIDENT REPORT END OF INCIDENT REPORT

02/25/2003 06:06:05.128

**Supplemental Report  
Spokane Police/Spokane County Sheriff**

Page 1

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>06-057241</b>	
REPORT PURPOSE			REPORTED ON DATE <b>Sat 02/25/2006</b>	TIME <b>22:00</b>	INCIDENT XREF
INCIDENT CLASSIFICATION #1 <b>ASSAULT 4TH/CITY</b>		ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #2 <b>MALICIOUS MISCHIEF</b>		ATTEMPTED <input type="checkbox"/>
INCIDENT CLASSIFICATION #3 <b>DOMESTIC VIOLENCE</b>		ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE <b>02/25/2006</b>	REPORT TIME <b>05:12</b>	
PRIMARY CHARGE					UCR/NIBRS CODE

**NARRATIVE**

On 02-25-06, at about 2208 hrs, Ofc. Juarez and I responded to reference a DV. The anonymous complainant was reporting that they were hearing sounds of people being slammed around. The complainant also advised they saw a male hit a female with his hand. Upon arrival Ofc. Juarez and I were walking up to the residence and saw a female carrying a chair around the side of the house. The female was identified as Barbara Erol-Rosa. Barbara appeared to be crying and stated that she was locked out of her apartment. Ofc. Juarez then spoke to Barbara.

I contacted Gabriel Leenders in apartment . When I contacted Leenders I immediately noticed he was bleeding from his right hand. Leenders said he didn't need any medical attention. Leenders said he has been in a relationship with Barbara for about one and one half years. He said they currently live together at the listed address.

Leenders said he and Barbara have been arguing all day. He said earlier in the night, they were arguing because Barbara thought he was seeing someone else. He said he left and went to the Satellite. He said on the way to the Satellite, he bought two bottles of liquor. He said while he was at the Satellite, he called Barbara. He said he called her so she could come join him at the Satellite. He said Barbara came down to the Satellite, but they started arguing again. He said she grabbed the two bottles of liquor and left. He said he tried to walk after her, but he couldn't keep up with her. He said he couldn't keep up with her because of an injury to his left leg. He said he then called a cab to take him home.

Leenders said Barbara was already home when he got home. He said they were in their bedroom. He said they were still arguing. He said Barbara had a glass in her hand. He said Barbara raised the glass and tried to hit him in the head with the glass. He said he raised his right hand and blocked the glass, causing it to break. He said this is how he cut his hand. He said Barbara was then going to walk out of the front door of their apartment. Their front door leads to a common area in the complex. He said, "I admit, I tried to push her out," when Barbara was walking out the front door. He said he pushed her in the back. He right after this occurred, there some people walking in the front door to the complex. He said Barbara then walked out of the house, and he stayed

ID NO./NAME OF REPORTING OFFICER <b>#481 - Haugen, Craig</b>	APPROVAL	DATE/TIME	DISTRIBUTION
RECORDS	DEPOSITION DATE	BY	SUPERVISOR

Supplemental Report #1

02/25/2006 05:59:11.234

**Supplemental Report Continued**  
**Spokane Police/Spokane County Sheriff**

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INCIDENT CLASSIFICATION  
**ASSAULT 4TH/CITY**

ATTEMPTED  INCIDENT NUMBER  
**06-057241**

inside the apartment.

I looked around the bedroom, and noticed there was broken glass on the bed. I also noticed there was a darker colored liquid spilled on the dresser.

I then spoke to Ofc. Juarez. I told him what Leenders had told me, and how he said Barbara had tried to hit him in the head with the glass. Ofc. Juarez said Barbara said the glass was broken by them rolling around on the bed.

I then spoke to Leenders again. I told him what Ofc. Juarez had told me. Leenders then said they may have rolled around on the bed, but he couldn't remember for sure.

I spoke to Ofc. Juarez again. He said that he had a portion of Barbara's broken cell phone. He said Barbara claimed Leenders broke it, but he couldn't find the other half of the phone.

I spoke to Leenders again and asked him about the phone. He said he never broke the phone, and he didn't know what happened to it. We were unable to locate the other half of the phone.

Cpl. Freitag responded to the scene and took photos of injuries to both Barbara and Leenders, and also of the broken glass.

After speaking with Ofc. Juarez it was determined that there was PC to arrest Leenders for City Assault DV and City Malicious Mischief DV. I advised Leenders he was under arrest for these charges and handcuffed (dl) him.

Ofc. Juarez and I transported Leenders to jail, where he was booked for City Assault DV, and City Malicious Mischief DV. See Criminal Citation: B46698.

Supplemental Report #1

END OF SUPPLEMENTAL REPORT

02/25/2006 05:59:11.269

**CRIMINAL**    **TRAFFIC**    **NON-TRAFFIC**    **B 54484**

IN THE  DISTRICT     MUNICIPAL COURT OF WASHINGTON  
 STATE OF WASHINGTON    PLAINTIFF VS. NAMED DEFENDANT     CITY OF SPOKANE  
 COUNTY OF SPOKANE     DISTRICT COURT OF SPOKANE    MUNICIPAL DEPT. WA032051J  
 CITY/TOWN OF SPOKANE    SPOKANE, WA WA032013J     CITY OF DEFT PUNK  
MUNICIPAL COURT WA032021J

L.F.A. OFF. WA0320400 CS 25183    COURT ORIGIN

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

NAME: **LEENDERS GIBBETAL A**

ADDRESS: [REDACTED]     IF NEW ADDRESS

CITY: **Spokane**    STATE: **WA**    ZIP CODE: **99207**    EMPLOYER: [REDACTED]

RACE & SEX: **W M**    HEIGHT: **5 8**    WEIGHT: **175**    HAIR: **BROWN**    EYES: [REDACTED]

VIOLATION DATE: MONTH **08**    DAY **19**    YEAR **06**    TIME **241000Z**     INTERPRETER LAWS

ALLOCATION: **Market - Euclid to Graceland**    CITY/COUNTY OF: **SPOKANE**

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE MAKE	VEHICLE MODEL	VEHICLE YEAR	VEHICLE COLOR
[REDACTED]	<b>Rouge</b>	<b>1990</b>	<b>MC</b>

TRAFFIC LICENSE NO. [REDACTED]    STATE: [REDACTED]    EXPIRES: [REDACTED]

OTHER COMPANY'S OTHER FULL DRIVER: **Resler, Sheila K**    ADDRESS: **Billings**    STATE: **MT**    EXP. CODE: **59106**

AGENT: **NO**    HAZARD:  YES    EXEMPT:  FARM     FIRE

VEHICLE: **NO**    PLACARD:  NO    VEHICLE:  RV     OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

1. VIOLATION STATUTE CODE: **16-01-500**     DV    **Reckless Driving**

2. VIOLATION STATUTE CODE: **16-20-347 (c)**     DV    **OWLS 3rd**

MANDATORY  BAR U.S. FUNDS \$ **76.00**

APPEARANCE DATE: [REDACTED]    JUL. DAY YEAR TIME: [REDACTED]    JUDGE: [REDACTED]    RELATED # [REDACTED]    DATE ISSUED: **8-19-06**

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), I PROMISE TO RESPOND AS DIRECTED BY THIS NOTICE.

DEFENDANT SIGNATURE: **[Signature]**    OFFICER: **[Signature]**    287

COMPLAINT / CITATION

CRG	PLEA	CNO	#PUNISH	FINE	SUSPENDED	SUB-TOTAL	FIND/JUDGE DATE
1	G NO		G NO D BF S	\$	\$	\$	ASS. MLD TO CLY
2	G NO		G NO D BF S	\$	\$	\$	TO SERVE
OTHER COSTS: [REDACTED]							WITH: [REDACTED] DAYS SUSP.

This off was parked on Bridgeport at Market watching traffic. I could see the intersection of Euclid / Market from my location.

I initially heard the sound of a motorcycle engine accelerating quickly. I saw the motorcycle approaching. It passed me 100+ mph and had passed 3 cars in the process. I pulled out to 17 and came up to the det. As I crested the hill, I could see brake lights on the motorcycle and then it turned left onto Lorain. The det got behind a cube van. I caught up to the det and activated my emergency lights. The det pulled over onto stone.

The det denied being the one driving recklessly. His license through's det. showed suspended 3rd in Washington. Det also had a warrant for suspended. The det was placed under arrest. Handcuffed (OK) Search #808.59 on person except in front of him: K. Hewitt. Det was cited for Reckless & Susp. 3rd.

I HEREBY INCORPORATE REPORT # \_\_\_\_\_ A COPY OF WHICH IS ATTACHED HERETO AND MADE A PART HEREOF BY REFERENCE.

TRAFFIC LY (MED) IV	WEATHER RN FG SN	STREET D W I S	LIGHT D GWN DSK (OK)
WITNESS NAME (LAST, FIRST, MI.)		PHONE	
ADDRESS		CITY	STATE ZIP
WITNESS NAME (LAST, FIRST, MI.)		PHONE	
ADDRESS		CITY	STATE ZIP
INCIDENT NUMBER 0	RELATED CITATION/INFRACTION NUMBERS	OFFICER NO. H. Hagan 287	

# Incident Report

## Spokane Police/Spokane County Sheriff

Page 1

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>06-272787</b>	
INCIDENT TYPE <b>Domestic Violence, Information</b>		INCIDENT CLASSIFICATION #1 <b>INFORMATIONAL</b>		ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #2
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #4
		RESPONDING TO (Officer Assault)		ASSIGNMENT (Officer Assault)	
REPORTED ON <b>Wed 09/06/2006 02:53</b>	DATE/TIME	OCCURRED ON <b>Wed 09/06/2006 02:30</b>	DATE/TIME	OCCURRED TO <b>Wed 09/06/2006 02:59</b>	DISTRICT
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE <b>09/06/2006</b>	REPORT TIME <b>04:42</b>	EST. TOTAL PROPERTY LOSS
PRIMARY CHARGE					UCR/NIBRS CODE
LOCATION OF INCIDENT <b>Spokane, WA 99223</b>			LOCATION NAME (IF APPLICABLE)		
ENTRY POINT	METHOD	WEAPON/TOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>Suspect Named, Useful Physical Evidence</b>					
RELATED INCIDENT NUMBERS					INCIDENT XREF
ADDITIONAL REPORTING OFFICERS <b>Ofc Altken</b>					
VICTIM/WITNESSES/OTHERS					
CODE <b>C-1</b>	NAME: LAST, FIRST MIDDLE <b>Leenders, Gabriel A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White</b>
HEIGHT <b>5'08"</b>	WEIGHT <b>195</b>	BUILD <b>Medlum</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>	DATE OF BIRTH/AGE <b>31</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99204</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL PHONES					
CODE <b>S-1</b>	NAME: LAST, FIRST MIDDLE <b>Erol-Rosa, Barbara J</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White</b>
HEIGHT <b>5'04"</b>	WEIGHT <b>140</b>	BUILD <b>Medlum</b>	HAIR <b>Black</b>	EYES <b>BRO - Brown</b>	DATE OF BIRTH/AGE <b>29</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99204</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL ADDRESSES					ADDRESS TYPE <b>Home</b>

ID NO./NAME OF REPORTING OFFICER <b>#691 - Gorman, Paul</b>	APPROVAL <b>#581 - Auslin, Brent</b>	DATE/TIME <b>09/06/2006 05:19</b>	DISTRIBUTION
RECORDS	FILED	INDEXED	SUPERVISOR

Incident Report #1

09/06/2006 05:21:13.020

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>INFORMATIONAL</b>		ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>06-272787</b>		
ADDITIONAL ADDRESSES				ADDRESS TYPE <b>Temporary</b>	
ADDITIONAL PHONES					
CITATION #	DATE	TIME	BOOKED WHERE	DATE	TIME
ARREST LOCATION			STATEMENT <input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	CHARGES <input type="checkbox"/> ADMITTED <input checked="" type="checkbox"/> DENIED	SUSPECT ARMED WITH
JUV. PARAGR. Noticed <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME/RELATIONSHIP OF PERSON NOTIFIED		DATE & TIME NOTIFIED	NOTIFIED BY	DISPOSITION OF JUVENILE
DRIVERS LICENSE	<input type="checkbox"/> FAKB	STATE	SOCIAL SECURITY NO.	<input type="checkbox"/> FAKB	OTHER ID
NARRATIVE					

On 090606 at approx 0259 hrs, Ofc Aitken and I responded to a possible DV at [REDACTED]. The comp Gabriel Leenders called in to report he had been assaulted by his girlfriend, Barbara Rosa with a screwdriver. He left the residence, walked to 10th/Adams and was awaiting contact with officers. I contacted Leenders and asked for him to make a statement in chronological order. He advised the following:

He had been dating Rosa for approx two years. They had been living together for approx the same amount of time. Approx two months earlier, he didn't assault Rosa but she called the police anyway. He lied so she wouldn't go to jail and he was arrested and booked into jail. He had to enter a guilty plea to get out of jail. On 090606 at approx 0230 hrs, the two got into a verbal argument over money so he left.

That was his entire statement. He mentioned nothing about being assaulted with a screwdriver. I asked him to be more specific about the physical part of the incident. He advised the following:

He was arguing with Rosa because she wanted money for rent. She had been drinking and wouldn't leave him alone. He didn't want to give her cash, so he was going to pay the rent and give her the receipt. While on the couch, she attempted to get into his pockets and take his money. He pulled her hands away and left the residence.

I asked him again if he was assaulted. He replied "Yes, with a screwdriver!" I told him he left that part out of the story for a second time. He changed his story and advised the following:

The two were arguing about money on the couch in the living room. She tried to get money out of his pockets and he pushed her hands aside. "From out of nowhere" she grabbed a screwdriver and made a "Girly swing at my neck with her right hand." He was able to deflect the swing, but she still scratched the left side of his neck with the screwdriver. He took the screwdriver from her and shoved it between the couch cushions. He grabbed his dog and left the residence. He was unable to describe the screwdriver in any way.

Continued Report / [REDACTED] CONTINUED ON NEXT PAGE

09/06/2006 09:21:13.270

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION  
INFORMATIONAL

ATTEMPTED

INCIDENT NUMBER  
06-272787

I observed a scratch on the lower left side of his neck. The scratch was not consistent with being scratched once with a semi-sharp object. The scratch I observed was approx 1/2 inch thick and four inches long and had multiple scratch lines in it, as if someone scratched the neck several times to make the area red. The scratch was photographed.

I contacted Rosa in the apartment. She advised the following:

She was having an argument with Leenders about money. She advised both were listed on the lease but he never pays his half of the rent. She told him to give her rent money or move out. He refused to give her money. The two continued to argue so she left on foot and walked to her friend's house at 18th/Grand. Her friend was not home so she returned to their apartment. When she arrived home, Leenders and his puppy were gone, so she locked the door and figured the incident was over. She didn't see him again until the police arrived. She denied touching Leenders and didn't have any clue where the scratch came from.

I observed a bleu phillips screwdriver on the end table next to the couch. Rosa advised she didn't know where it came from because her tools are yellow.

Due to the inconsistencies in Leender's story and the scratch that appeared self inflicted, no arrest was made. Rosa was transported and booked into SCJ on a non related DWLS warrant. Both were advised to seek restraining orders against each other.

No PC exists at this time.

Golden-Rosa/THA  
END OF INCIDENT REPORT  
09/06/2006 05:21:13.301

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>06-343435</b>	
INCIDENT TYPE <b>Gun Involved</b>		INCIDENT CLASSIFICATION #1 <b>ROBBERY</b>		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #2		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONDING TO (Officer Assault)				ASSIGNMENT (Officer Assault)	
REPORTED ON <b>Sat 11/11/2006 16:11</b>	DATE/TIME	OCCURRED ON <b>Fri 11/10/2006 09:00</b>	DATE/TIME	OCCURRED TO <b>Fri 11/10/2006 10:00</b>	DISTRICT
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE <b>11/12/2006</b>	REPORT TIME <b>05:28</b>	EST. TOTAL PROPERTY LOSS
PRIMARY CHARGE					UCR/NIBRS CODE
LOCATION OF INCIDENT <b>165 S Washington, Spokane, WA 99201</b>				LOCATION NAME (IF APPLICABLE) <b>Downtown</b>	
ENTRY POINT	METHOD	WEAPON/TOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>Suspect Named</b>					
RELATED INCIDENT NUMBERS					INCIDENT XREF
ADDITIONAL REPORTING OFFICERS <b>None</b>					
US DOMESTIC VIOLENCE SECTION					
CODE <b>CV-1</b>	NAME: LAST, FIRST, MIDDLE <b>Leenders, Gabriel A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White</b>
				DATE OF BIRTH/AGE <b>31</b>	
HEIGHT <b>5'09"</b>	WEIGHT <b>190</b>	BUILD <b>Medium</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>	DESCRIPTORS
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS				OCCUPATION	EMPLOYER PHONE
HAIR LENGTH	HAIR TYPE	HAIR STYLE	FACIAL HAIR <b>Mustache, Thin</b>	FACIAL SHAPE	TEETH
APPEARANCE	COMPLEXION	FACIAL FEATURES	DISTINCTIVE FEATURES	GLASSES	R/L HANDED
				SPEECH	

ID NO./NAME OF REPORTING OFFICER <b>#591300 - Rohde, Darrell</b>	APPROVAL <b>#59820 - McNall, Jay</b>	DATE/TIME <b>11/12/2006 20:06</b>	DISTRIBUTION <b>SPD Detectives</b>
RECORDS	INVESTIGATOR	SUPERVISOR	

Incident Report #1

11/12/2006 20:20:59.610

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>ROBBERY</b>				ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>06-343435</b>
CODE <b>S-1</b>	NAME LAST, FIRST, MIDDLE <b>Erol-Rosa, Barbara J</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White</b>
HEIGHT <b>5'04"</b>	WEIGHT <b>140</b>	BUILD <b>Medium</b>	HAIR <b>Black</b>	EYES <b>BRO - Brown</b>	DATE OF BIRTH/AGE <b>29</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS - STREET, CITY, STATE, ZIP <b>Spokane, WA 99204</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS				OCCUPATION	EMPLOYER PHONE
ADDITIONAL PHONES					
DRIVER'S LICENSE		<input type="checkbox"/> FAKE	STATE	SOCIAL SECURITY NO.	<input type="checkbox"/> FAKE
OTHER ID					
NARRATIVE					

**SUSPECT STATUS:** One suspect is named; two others are unknown.

**NARRATIVE:** About 1611 hrs, 11-11-06, Gabriel Leenders called the Sheriff's Office to report being robbed at gunpoint the previous day in downtown Spokane. I met Leenders at [redacted] his temporary residence.

Leenders told me that he did not report the Robbery when it happened because he did not want to be arrested for violating a protection order that prevents him from contacting his ex-girlfriend, Barbara Erol-Rosa. Leenders related the following:

About 0900 hrs, 11-10-06, he received a call from an acquaintance named "Dara," who claimed she had been beat up by her "old man" and wanted Leenders to come get her at room #203 at the Downtowner Motel in Spokane. Leenders said that he "thought" the person who called him was "Dara," but now he is not sure. Leenders claims he does not know Dara's last name, residence or phone number.

Leenders said that when he arrived at room 203, he was invited in by his ex-girlfriend, Barbara Erol-Rosa, and he did so in violation of a restraining order. After entry, however, two men approached Leenders from behind and placed what he believed was a silver revolver on his right shoulder. Leenders told me he was "pretty sure" it was a gun, but only got a side glimpse of what he thought was a barrel. Leenders said the two men and Rosa ordered him out of his jeans and shirt, and then made him leave the room wearing only shorts. Leenders claims loss of his wallet containing two thousand dollars cash, his wallet and driver's license.

Leenders told me that the only person he can identify is Barbara. He said one male was white and the other was black, but he did not see any details of their persons to identify them. Leenders said that Rosa was aware he was receiving a large settlement and is unhappy with him for breaking up with her two months ago.

I asked Leenders why he was making the report at the risk of being arrested for violating the protection order, and he replied "what if my identification shows up at a crime scene? I don't want to be a suspect." I explained to Leenders that making a report that he lost his wallet in a robbery is not an alibi for involvement in some other crime.

Continued on next page

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION <b>ROBBERY</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>06-343435</b>
---	---------------------------------------	-------------------------------------

Leenders was not very forthcoming with details about the robbery. I told him that it was my feeling there was much more to the story, but he maintained the event occurred as he described. Leenders said there were no witnesses to the robbery and he has no idea who the two accomplices were that assisted Barbara. Further, he states he does not know where Barbara lives now and has no phone number or other means of contacting her.

I telephoned the Downtowner and spoke to front desk clerk Alley Holman. She said that the room had been rented to a man named Do Minh Quang on the day of the alleged robbery. She had no further information on Quang and said the day manager would have to access that information.

**CASE STATUS:** Forward to SPD detectives for review.

I HEREBY CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DEPUTY: D. L. Rohde  
NUMBER: 591300  
DATE: 11-12-06  
PLACE: Spokane County, WA

Incident Report M1 END OF INCIDENT REPORT

11/12/2006 20:20:55.848

SPOKANE POLICE DEPARTMENT  
ADDITIONAL REPORT

DATE: 1/26/07

CASE NO: 06-343435

CHARGES: ROBBERY

SUSPENDED INVESTIGATION

Detective W. G. Wood #160

SUSPECT: Erol-Rosa, Barbara J.

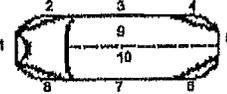
I was assigned the investigative responsibility for this reported incident in November 2006. Because of caseload requirements and commitments outside of the office I was unable to attend to this. I have since had the opportunity to attempt to contact both the victim, Gabriel Leenders, and attempt to contact the suspect, Barbara Erol-Rosa. The phone number provided by the complainant, [REDACTED], as well as the address of [REDACTED] the listed victim, the phone had been disconnected and he was no longer at the residence on [REDACTED]. The phone numbers provided for Barbara Erol-Rosa (two cell phone numbers and a home phone number) the listed home phone of [REDACTED] was a working number. The individuals I spoke with indicated they did not know Erol-Rosa and they had had that phone number for approximately 11 years. Both cell phones came back as not in service.

I've been unable to contact either the original complainant or locate the alleged suspect. Therefore, because of the lack of current and accurate information that would lead to the contact and interview of both parties this case will be suspended.

Detective W. G. Wood #160  
South Investigations

lmc  
1/29/07

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>DRUGS-POSSESS</b>				ATTEMPTED <input type="checkbox"/>		INCIDENT NUMBER <b>06-290678</b>	
CITATION #		DATE	TIME	BOOKED WHERE <b>Spokane County Jail</b>		DATE <b>09/21/2006</b>	TIME <b>23:15</b>
ARREST LOCATION <b>W 8th Avenue &amp; S McClellan Street, Spokane, WA</b>				STATEMENT <input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	CHARGES <input type="checkbox"/> ADMITTED <input checked="" type="checkbox"/> DENIED	SUSPECT ARMED WITH	
JUV. PAROLED. Noted <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME/RELATIONSHIP OF PERSON NOTIFIED		DATE & TIME NOTIFIED	NOTIFIED BY		DISPOSITION OF JUVENILE	
CODE <b>CON-1</b>	NAME LAST, FIRST, MIDDLE <b>GREEN, LISA M</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White</b>	DATE OF BIRTH/AGE <b>18</b>	
HEIGHT <b>5'09"</b>	WEIGHT <b>138</b>	BUILD <b>Medium</b>	HAIR <b>Blonde or</b>	EYES <b>-</b>	DESCRIPTORS		
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS		PHONE	
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS				OCCUPATION		EMPLOYER PHONE	
CODE <b>W-1</b>	NAME LAST, FIRST, MIDDLE <b>Howard, Ray G</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White/Non-Hispanic</b>	DATE OF BIRTH/AGE <b>55</b>	
HEIGHT	WEIGHT	BUILD	HAIR	EYES	DESCRIPTORS		
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA</b>			RESIDENTIAL STATUS		PHONE	
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS				OCCUPATION		EMPLOYER PHONE	
CODE <b>V-1</b>	CIRCUMSTANCES <b>Investigative information</b>		LICENSE NO.	STATE	LIC. YEAR	LICENSE TYPE <b>Regular</b>	VIN/IN
YEAR <b>2001</b>	MAKE <b>Chevrolet</b>	MODEL <b>Malibu (no chevella</b>	BODY STYLE <b>Hardtop, 4 Door</b>		TOP/FRONT/ONLY COLOR <b>Blue</b>		BOTTOM/REAR COLOR
SPECIAL FEATURES/DESCRIPTION							
DECAL NUMBER		REGISTERED OWNER <b>GREEN, LISA M</b>				HOME PHONE	
VEHICLE DISPOSITION <input type="checkbox"/> LEFT AT SCENE <input type="checkbox"/> DRIVEN AWAY <input type="checkbox"/> TOWED		REGISTERED OWNER'S ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>				VALUE \$	
LOCKED <input type="checkbox"/> Yes <input type="checkbox"/> No	KEYS IN VEHICLE <input type="checkbox"/> Yes <input type="checkbox"/> No	DELINQUENT PAYMENT <input type="checkbox"/> Yes <input type="checkbox"/> No	VICTIM CONSENT <input type="checkbox"/> Yes <input type="checkbox"/> No	DRIVABLE <input type="checkbox"/> Yes <input type="checkbox"/> No	ESTIMATED DAMAGE	DAMAGE <input type="checkbox"/> Window <input type="checkbox"/> Top <input type="checkbox"/> Interior <input type="checkbox"/> Underbody	SHADE IN DAMAGED AREA 
TOW COMPANY			HOLD REQUESTED BY		HOLD FOR		
BY	DATE	TIME	RELEASE NO.	RELEASING AUTHORITY	DATE	TIME	OPERATOR'S NAME
NARRATIVE							

On Thursday, 9-21-06, at 2046 hours I responded to 8th and McClellan in reference to an injury accident involving one car. Upon arrival I contacted Lisa Green at her Blue 2001 Chev. Malibu, [redacted]. She stated that she was by herself going S/B onto McClellan at 8th. She said that she pushed on her brake pedal and found she had none. She stated that she tried to avoid other traffic

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION  
**DRUGS-POSSESS**

ATTEMPTED

INCIDENT NUMBER  
**06-290578**

and ended up busting her right front tire on the curb.

While I was getting the vehicle info I was approached by Ray Howard. Howard stated that he was walking his dog down the street when the accident occurred. He stated that he saw the female driver get out of the car, along with two white males. He pointed to Leenders, and another male that had just walked up and were helping Green get her tire iron and jack out of the trunk, and said "the males looked kinda like these two here". Howard said that he heard one of the males tell Green "I've got a warrant, I gotta leave" as the two males walked off S/B on McClellan.

I pulled Green aside and advised her that her that a witness had seen her and two males get out of the car right after she flattened her tire. She stated that she had been covering for one of the males named "Gabriel" who told her that he had an outstanding warrant.

I then contacted the males who were attempting to change the car tire. One of the males, Swafford, produced a WA. DL. as identification. Leenders stated that he did not have an ID and told me his name was Chris Jacobs with a dob of [REDACTED]. A radio check of this name showed no returns, no information. A little talking with the male got him to produce a tattered WA. ID with the name of Gabriel Leenders on it. The photo on the ID matched the male I was talking to. Radio confirmed two outstanding warrants on Leenders. # SPP-B00054484 for Reckless driving and DWLS 3rd, and # LLP-CR0031571 for DWLS 3rd and Poss Dangerous Wpn.

I placed Leenders in handcuffs (dl/sf) and searched him incident to arrest. In his right front pants pocket I found a small plastic baggie tightly tied around 7 white pills of two different drugs. In the right pants watch pocket I found a small plastic bag (cigarette cellophane) that contained white crystals that field tested positive for meth.

I advised Leenders that in addition to the warrants he was under arrest for PCS-meth. At jail I contacted the Poison Control Center and found that the pills were 1) Carisoprodol, a prescription drug, and 2) generic vicadin-hydrocodone, a schedule III drug. I added a second PCS-hydrocodone charge at jail.

There is probable cause for Possession of Controlled Substance - Meth and Hydrocodone, for Leenders.

I placed the drugs on property as evidence.

Officer F.Erhart #704

Incident Report #1

INCIDENT REPORT  
06/22/2006 05:00:55.988

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>07-357694</b>	
INCIDENT TYPE <b>Information</b>		INCIDENT CLASSIFICATION #1 <b>ASSAULT 4TH/CITY</b>		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONSORS TO (Officer Assault)				ASSIGNMENT (Officer Assault)	
REPORTED ON <b>Mon 12/10/2007</b>	DATE/TIME <b>19:58</b>	OCCURRED ON <b>Mon 12/10/2007</b>	DATE/TIME <b>19:46</b>	OCCURRED TO <b>Mon 12/10/2007</b>	DATE/TIME <b>19:50</b>
DISTRICT					
DISPATCH TIME <b>20:00</b>	ARRIVED TIME <b>20:11</b>	CLEARED TIME <b>20:46</b>	REPORT DATE <b>12/10/2007</b>	REPORT TIME <b>20:36</b>	EST. TOTAL PROPERTY LOSS
PRIMARY CHARGE					UCR/NARS CODE
LOCATION OF INCIDENT <b>Spokane, WA 99207</b>			LOCATION NAME (IF APPLICABLE)		
ENTRY POINT	METHOD	WEAPON/TOOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>Suspect Named</b>					
RELATED INCIDENT NUMBERS					INCIDENT XREF
ADDITIONAL REPORTING OFFICERS <b>None</b>					
VICTIM INFORMATION					
CODE <b>V-1</b>	NAME: LAST, FIRST, MIDDLE <b>Leenders, Gabriel A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White</b>
				DATE OF BIRTH/AGE <b>33</b>	
HEIGHT <b>5'09"</b>	WEIGHT <b>190</b>	BUILD <b>Medlum</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>	DESCRIPTORS
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL PHONES					
DRIVERS LICENSE <input type="checkbox"/> MAKE STATE SOCIAL SECURITY NO. <input type="checkbox"/> MAKE OTHER ID					
VICTIM INFORMATION					
CODE <b>S-1</b>	NAME: LAST, FIRST, MIDDLE <b>Moon, Fawnya M</b>			SEX <b>F</b>	RACE/ETHNICITY <b>W-White</b>
				DATE OF BIRTH/AGE <b>30</b>	
HEIGHT <b>5'03"</b>	WEIGHT <b>100</b>	BUILD <b>Light</b>	HAIR <b>Brown</b>	EYES <b>BRO - Brown</b>	DESCRIPTORS
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	

ID NO./NAME OF REPORTING OFFICER <b>#330 - Bulkeley, Craig</b>	APPROVAL <b>#318 - Tolgen, Troy</b>	DATE/TIME <b>12/11/2007 04:33</b>	DISTRIBUTION
INCIDENT #1 12/11/2007 04:42:12:365			

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>ASSAULT 4TH/CITY</b>				ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER <b>07-357694</b>
ADDITIONAL PHONES					
DRIVER'S LICENSE		<input type="checkbox"/> FAKE	STATE	SOCIAL SECURITY NO.	<input type="checkbox"/> FAKE OTHER ID
[REDACTED]					
CODE <b>W-1</b>	NAME LAST, FIRST, MIDDLE <b>Eachus, Lonny A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White</b>
HEIGHT <b>5'08"</b>	WEIGHT <b>180</b>	BUILD <b>Heavy</b>	HAIR <b>Brown</b>	EYES <b>BRO - Brown</b>	DATE OF BIRTH/AGE <b>49</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS - STREET CITY/STATE ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL PHONES					
DRIVER'S LICENSE		<input type="checkbox"/> FAKE	STATE	SOCIAL SECURITY NO.	<input type="checkbox"/> FAKE OTHER ID
[REDACTED]					

On this date I responded to the Buckeye address and contacted the Compl. who stated that his girlfriend had been drinking all night. The Compl. stated he and his girlfriend, Fawnya started arguing. He states that while standing in the living room Fawnya punched him in the chest with a closed fist.

The Compl. stated the punch didn't hurt but he was arrested a couple of months ago for DV assault and he doesn't want anything to happen to him again. The Compl. stated that Fawnya got into her van and drove off.

Wit. Eachus stated he was sitting in the living room and did see Fawnya punch the Compl. in the chest. Wit. Eachus stated the punch didn't look like it would of hurt but then he wasn't the one being punched.

There was no apparent makes on the Compl.'s chest. He stated he had been wearing a heavy coat when he was hit.

I was unable to contact the Suspect.

C. Bulkley 290  
 Team 10

**Incident Report**  
**Spokane Police/Spokane County Sheriff**

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER		INCIDENT NUMBER <b>08-053095</b>	
INCIDENT TYPE <b>Arrest</b>		INCIDENT CLASSIFICATION #1 <b>DW/DUI</b>		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONDING TO (Officer Assault)				ASSIGNMENT (Officer Assault)	
REPORTED ON <b>Sun 02/24/2008</b>	DATE/TIME <b>02:41</b>	OCCURRED ON <b>Sun 02/24/2008</b>	DATE/TIME <b>00:58</b>	OCCURRED TO <b>Sun 02/24/2008</b>	DATE/TIME <b>02:30</b>
DISPATCH TIME		ARRIVED TIME		CLEARED TIME	
REPORT DATE <b>02/24/2008</b>		REPORT TIME <b>02:41</b>		EST. TOTAL PROPERTY LOSS	
PRIMARY CHARGE <b>M-16.61.502G VEH(DWUIL/DRUG)</b>					UCR/NIBRS CODE <b>/90D</b>
LOCATION OF INCIDENT <b>E Mission &amp; N Perry, Spokane, WA 99202</b>				LOCATION NAME (IF APPLICABLE)	
ENTRY POINT	METHOD	WEAPON/TOL/FORCE USED	SECURITY	EVIDENCE	
TYPE OF PREMISE (FOR VEHICLES STATE WHERE PARKED)					
SOLVABILITY FACTORS <b>Suspect Arrested</b>					
RELATED INCIDENT NUMBERS				INCIDENT XREF	
ADDITIONAL REPORTING OFFICERS <b>C. Lyons</b>					
VICTIM/WITNESSES/OTHERS					
CODE <b>A-1</b>	NAME- LAST, FIRST, MIDDLE <b>Leenders, Gabriel A</b>			SEX <b>M</b>	RACE/ETHNICITY <b>W-White</b>
DATE OF BIRTH <b>33</b>	HEIGHT <b>5'08"</b>	WEIGHT <b>195</b>	BUILD <b>Medium</b>	HAIR <b>Brown</b>	EYES <b>BLU - Blue</b>
CONFIDENTIALITY <input type="checkbox"/>	ADDRESS- STREET, CITY, STATE, ZIP <b>Spokane, WA 99207</b>			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/ADDRESS			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL ADDRESSES				ADDRESS TYPE <b>Home</b>	
ADDITIONAL ADDRESSES				ADDRESS TYPE <b>Temporary</b>	
ADDITIONAL ADDRESSES				ADDRESS TYPE <b>Home</b>	
ADDITIONAL PHONES					
CHARGE LEVEL <b>Gross Misdemeanor</b>	DESCRIPTION <b>M-16.61.502G VEH(DWUIL/DRUG)</b>			UCR/NIBRS CODE <b>/90D</b>	
WARRANT #	BAIL	TYPE OF ARREST		MULTIPLE ARRESTEE SEGMENTS INDICATOR <input type="checkbox"/>	

ID NO./NAME OF REPORTING OFFICER <b>#838 - Storch, Shaldon</b>	APPROVAL <b>#881 - Aultin, Brent</b>	DATE/TIME <b>02/24/2008 04:53</b>	DISTRIBUTION
RECORDS	DISTRIBUTION DATE	BY	SUPERVISOR

Incident Report #1

02/24/2008 05:01:45.858

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

INCIDENT CLASSIFICATION <b>DW/DUI</b>		ATTEMPTED <input type="checkbox"/>		INCIDENT NUMBER <b>08-053095</b>	
CITATION # <b>B70858</b>	DATE <b>02/24/2008</b>	TIME <b>01:11</b>	BOOKED WHERE <b>Spokane County Jail</b>		DATE <b>02/24/2008</b>
ARREST LOCATION <b>E Mission &amp; N Perry, Spokane, WA 99202</b>			STATEMENT <input type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	CHARGES <input type="checkbox"/> ADMITTED <input type="checkbox"/> DENIED	SUSPECT ARMED WITH
JUV. PARAGR. Notified <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME/RELATIONSHIP OF PERSON NOTIFIED	DATE & TIME NOTIFIED	NOTIFIED BY	DISPOSITION OF JUVENILE	
TYPE OF INJURY OR ILLNESS/DESCRIBE INJURIES <b>None</b>			TYPE OF VICTIM		MEDICAL RELEASE OBTAINED? <input type="checkbox"/> YES <input type="checkbox"/> NO
HOSPITAL TAKEN TO	TAKEN BY	<input type="checkbox"/> EMPLOYEE <input type="checkbox"/> ON DUTY	ATTENDING PHYSICIAN	SUICIDE NOTE FOUND? <input type="checkbox"/>	HOLD PLACED BY
<b>NARRATIVE</b>					

On 2-24-08 I responded to the parking lot at the south end of Perry at Mission. I arrived and contacted Officer C. Lyons who advised me that he could smell a strong odor of intoxicants on the drivers breath. He also advised me that the male said he had a few beers.

I contacted the male and could immediately smell the odor of intoxicants on his breath when he started talking. I could see his eyes were bloodshot and watery. I asked the male if he had been drinking and he said, "I had a few beers". I asked the male to step out of the truck. I then asked if he was willing to participate in some voluntary Field Sobriety Tests. The male answered my question by saying, "man, Im DUI".

I explained and demonstrated the FST's to him and he then performed the tests. I started with the Horizontal Gaze Nystagmus See DUI packet for test details. Based on his the results of the FST's I arrested the driver, Gabriel Leenders, for DUI.

I placed him into handcuffs (DL), searched him, and placed him into my car. I transported him to BAC where the breath samples were taken. I then booked him into Jail for DUI.

I certify (declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. (RCW 9A.72.085.)

S. Storch #838 C366

**Supplemental Report**  
**Spokane Police/Spokane County Sheriff**

Page 1

AGENCY NAME/SUBSTATION <b>SPD</b>		EVIDENCE NUMBER	INCIDENT NUMBER <b>08-053095</b>	
REPORT PURPOSE			REPORTED ON DATE <b>Sun 02/24/2008 00:58</b>	INCIDENT XREF
INCIDENT CLASSIFICATION #1 <b>DW/DUI</b>	ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #2	ATTEMPTED <input type="checkbox"/>	
INCIDENT CLASSIFICATION #3	ATTEMPTED <input type="checkbox"/>	INCIDENT CLASSIFICATION #4	ATTEMPTED <input type="checkbox"/>	
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE <b>02/24/2008</b>	REPORT TIME <b>02:44</b>
PRIMARY CHARGE				UCR/NIBRS CODE
NARRATIVE				

On 022408 at approximately 0058 hours, I was traveling eastbound on Mission at Cincinnati in the center lane of travel. A white truck, Washington plate [redacted] was stopped at the stop sign on Cincinnati at Mission facing northbound. The vehicle turned eastbound into the center lane of travel in front of my patrol vehicle, causing me to brake to avoid rear ending the vehicle. It should be noted that the center lane of travel was not the closest available lane of travel for the vehicle to turn into. The vehicle continued eastbound.

I activated my emergency lights just west of Superior on Mission. The vehicle continued eastbound past Superior and changed lanes to the south most, or outside lane of travel. The vehicle continued eastbound on Mission at approximately 20 MPH to Perry. Once at Perry the vehicle stopped for a red light. I activated my PA and advised the occupants of the vehicle to pull into the parking lot. It should be noted that there was a parking lot entrance immediately to the vehicles right. Once the light turned green the vehicle continued eastbound past the parking lot entrance. The vehicle continued past the rail road tracks and turned southbound into the parking lot east of Perry on Mission.

I contacted the driver and asked him for his driver license, registration, and proof of insurance. The driver, who was identified as Gabriel A. Leenders provided me with his Washington driver's license and registration. Gabriel could not provide me with proof of insurance. As I spoke with Gabriel I could smell a strong odor of intoxicants on Gabriel's breath. Gabriel's speech was slurred and his eyes were watery. I asked Gabriel how much he had to drink and he stated that he had 3 or 4 beers.

At that point Ofc. Storch arrived and I advised him of the situation.

Ofc. Storch contacted Gabriel and conducted standardized field sobriety tests. (See Ofc. Storch's report).

Ofc. Storch placed Gabriel under arrest for DUI. I searched Gabriel's vehicle incident to arrest. In a coat in the cab of the vehicle I found a small white pill with "M357" written on it. The pill was identified as generic vicaden by poison control. I collected the pill as evidence.

Gabriel's vehicle was impounded for DUI by Superior towing.

ID NO./NAME OF REPORTING OFFICER <b>#929 - Lyons, Cory</b>	APPROVAL <b>#581 - Austin, Brent</b>	DATE/TIME <b>02/24/2008 04:54</b>	DISTRIBUTION
RECORDS	INSTRUMENT/DONOR DATE	BY	SUPERVISOR

Supplemental Report #1

02/24/2008 05:01:52.621

**Supplemental Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 2

INCIDENT CLASSIFICATION DWIIDUI	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER 08-053095
------------------------------------	---------------------------------------	------------------------------

I issued Gabriel and infraction for no insurance, improper turn, and fail to yield the right of way at arterial (U089282).

I responded to Police Property and placed the pill on as evidence.

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing and the accompanying reports/copies of documents and the information contained therein are true, correct, and accurate.

C. Lyons #929

Supplemental Report      END OF ADDITIONAL REPORT

02/24/2008 05:01:62.639

WASHINGTON STATE  
DUI ARREST REPORT  
DUI INTERVIEW

CASE / CITATION NUMBER

08-053025

1. DO YOU HAVE ANY PHYSICAL IMPAIRMENTS? EXPLAIN: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		13. ANYTHING MECHANICALLY WRONG WITH THE VEHICLE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
2. DO YOU LIMP? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		14. HAVE YOU BEEN INJURED OR INVOLVED IN ANY COLLISION(S) IN THE PAST 24 HOURS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
3. ARE YOU SICK / INJURED? EXPLAIN: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		15. HAVE YOU HAD ANY ALCOHOL TO DRINK SINCE BEING STOPPED / THE COLLISION? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
4. UNDER CARE OF A DOCTOR OR DENTIST? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		15A. WHAT?	15B. HOW MUCH?
5. ARE YOU DIABETIC / EPILEPTIC? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		16. TIME COLLISION OCCURRED?	
6. DO YOU TAKE INSULIN? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		17. WHERE WERE YOU GOING BEFORE STOPPED / THE COLLISION? NO WHERE	
7. HAVE YOU TAKEN ANY MEDICINES/DRUGS IN THE PAST 24 HOURS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		18. WITHOUT LOOKING, WHAT TIME DO YOU THINK IT IS? 0210	(ACTUAL TIME) 0149
7A. PRESCRIPTION? <input type="checkbox"/> YES <input type="checkbox"/> NO	19. WHAT STREET / HIGHWAY WERE YOU ON? "WASNT DRIVING"		20. DIRECTION OF TRAVEL? "WASNT TRAVEL"
7B. NON-PRESCRIPTION? <input type="checkbox"/> YES <input type="checkbox"/> NO	21. STARTED FROM? "WHEN I WAS BORN"		22. TIME STARTED?
7C. LAST DOSE?	7D. QUANTITY?	23. DAY OF THE WEEK? <input type="checkbox"/> Mon <input type="checkbox"/> Tues <input type="checkbox"/> Wed <input type="checkbox"/> Thurs <input type="checkbox"/> Fri <input checked="" type="checkbox"/> Sat <input checked="" type="checkbox"/> Sun	
7E. COCAINE? <input type="checkbox"/> YES <input type="checkbox"/> NO	MARIJUANA? <input type="checkbox"/> YES <input type="checkbox"/> NO	OTHER? 24. WHAT CITY / COUNTY ARE YOU IN NOW? SPOKANE	
8. DO YOU HAVE IMPAIRED VISION? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		8A. DO YOU WEAR CORRECTIVE LENSES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	25. WHAT IS THE DATE? 2-24-08
8B. WERE YOU WEARING THEM WHEN YOU WERE STOPPED / BEFORE COLLISION? <input type="checkbox"/> YES <input type="checkbox"/> NO		26. HOW MUCH? "ENOUGH TO SURVIVE"	26A. WHAT HAVE YOU BEEN DRINKING? "WATER"
9. WHERE DO YOU WORK? D.N. EMP	9A. DID YOU WORK TODAY?	10. TIME YOU GOT OFF WORK?	26B. WHEN DID YOU START? "WHEN I WAS BORN"
11. HOURS OF SLEEP LAST NIGHT? UNK	12. WERE YOU DRIVING THE VEHICLE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		26C. WHERE WERE YOU DRINKING? "WHEREVER THERE IS WATER"
11. HOURS OF SLEEP LAST NIGHT? UNK		29. TIME OF LAST DRINK? CANT SPECIFY	30. DO YOU BELIEVE YOUR ABILITY TO DRIVE WAS AFFECTED BY YOUR ALCOHOL AND/OR DRUG USAGE? NO
31. HAVE YOU EVER BEEN ARRESTED FOR DUI BEFORE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, HOW MANY TIMES?			
If drug use indicated, please contact WSP Communications or local DRE after breath test and continue with DUI process.			
<b>PRE-ARREST OBSERVATIONS</b>			
1. ATTITUDE <input type="checkbox"/> COOPERATIVE <input checked="" type="checkbox"/> MOOD SWINGS <input type="checkbox"/> ARGUMENTATIVE <input type="checkbox"/> CRYING <input type="checkbox"/> LAUGHING <input type="checkbox"/> OTHER:	2. COORDINATION <input type="checkbox"/> GOOD <input checked="" type="checkbox"/> FAIR <input type="checkbox"/> POOR <input type="checkbox"/> FUMBLER FOR DRIVER'S LICENSE <input type="checkbox"/> OTHER:	3. CLOTHES <input checked="" type="checkbox"/> ORDERLY <input type="checkbox"/> SOILED -- EXPLAIN <input type="checkbox"/> OTHER: EXPLAIN <input type="checkbox"/> SHOES (Describe)	4. EYES <input type="checkbox"/> NORMAL <input checked="" type="checkbox"/> WATERY <input type="checkbox"/> DROOPY <input checked="" type="checkbox"/> BLOODSHOT <input type="checkbox"/> PUPILS DILATED <input type="checkbox"/> PUPILS CONSTRICTED <input type="checkbox"/> OTHER:
5. FACIAL COLOR <input type="checkbox"/> NORMAL <input checked="" type="checkbox"/> FLUSHED <input type="checkbox"/> PALE <input type="checkbox"/> OTHER:		6. ODOR OF INTOXICANTS ON BREATH <input type="checkbox"/> NONE <input type="checkbox"/> FAINT <input type="checkbox"/> MEDIUM <input checked="" type="checkbox"/> STRONG <input type="checkbox"/> OBVIOUS <input type="checkbox"/> OTHER:	
7. SPEECH <input type="checkbox"/> GOOD <input checked="" type="checkbox"/> FAIR <input type="checkbox"/> REPETITIVE <input type="checkbox"/> FAST <input type="checkbox"/> SLURRED <input type="checkbox"/> OTHER:		8. OFFICER'S OPINION (of subject's impairment due to use of alcohol/drugs) <input type="checkbox"/> SLIGHT <input checked="" type="checkbox"/> OBVIOUS <input type="checkbox"/> EXTREME	
9. SUBJECT'S NATIVE LANGUAGE <input checked="" type="checkbox"/> ENGLISH <input type="checkbox"/> OTHER		9A. SUBJECT APPEARED TO UNDERSTAND INSTRUCTIONS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
9B. INTERPRETER REQUESTED? EXPLAIN BELOW: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO TIME:		INTERPRETER PROVIDED	
10. PASSENGER(S) INFORMATION			

WASHINGTON STATE  
DUI ARREST REPORT  
SOBRIETY TESTS

CASE / CITATION NUMBER

08-053095

SURFACE				GRADE			LIGHTING		
<input checked="" type="checkbox"/> PAVED	<input type="checkbox"/> GRAVEL	<input type="checkbox"/> DIRT	<input type="checkbox"/> GRASS	<input checked="" type="checkbox"/> LEVEL	<input type="checkbox"/> SLIGHT GRADE	<input type="checkbox"/> MODERATE GRADE	<input type="checkbox"/> DAYLIGHT	<input type="checkbox"/> DARK	<input checked="" type="checkbox"/> STREET LIGHT
<input type="checkbox"/> OTHER				<input type="checkbox"/> OTHER			<input type="checkbox"/> OTHER		

**1. HORIZONTAL GAZE NYSTAGMUS (HGN)**

I have been trained in the administration of HGN testing and performed the test in accordance with this training.

EQUAL TRACKING	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO	L	<input checked="" type="checkbox"/>	R	<input checked="" type="checkbox"/>	Lack of smooth pursuit	VERTICAL NYSTAGMUS	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
EQUAL PUPILS	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Distinct and sustained nystagmus at max deviation			
RESTING NYSTAGMUS	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Angle of onset prior to 45 degrees			

COMMENTS: SUBJ. HAD TO BE REMINDED SEVERAL TIMES TO FOLLOW STIMULUS WITH EYES ONLY AND NOT TURN HEAD.

**2. WALK AND TURN**

Cannot keep balance       Starts too soon

	1 <sup>st</sup> Nine Steps	2 <sup>nd</sup> Nine Steps
Stops Walking		
Misses Heel - Toe	STEPS 7 AND 8	STEPS 5, 6, 7
Steps off line		
Raises arms	ENTIRE TEST	ENTIRE TEST
Actual # steps	9	9

DESCRIBE TURN: LOST BALANCE AND ALMOST FELL DURING TURN

CANNOT DO TEST (EXPLAIN):

COMMENTS:

**3. ONE LEG STAND**

	L	R	
		YES	Sways while balancing
		YES	Uses arms for balance
		NO	Hopping
		NO	Put foot down

COMMENTS: SUBJ RAISE RIGHT FOOT, COUNTED TO 8, PUT FOOT DOWN, STARTED COUNTING OVER AGAIN WHEN FOOT RAISED AGAIN, COUNT 10 ALMOST FELL OVER, COUNT 17 ALMOST FELL OVER, GAVE UP AT 19.

SUPPLEMENTAL TESTS

ABC'S A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

<b>BALANCE</b>	<b>NOTES</b>	<b>FINGER DEXTERITY</b>	<b>NOTES</b>	<b>FINGER TO NOSE</b>

WASHINGTON STATE  
DUI ARREST REPORT  
NARRATIVE

CASE/CITATION NUMBER

08-053095

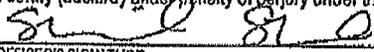
Vehicle in Motion (Initial Observation, Observation of Stop):

Personal Contact (Observation of driver, statements, pre-exit, sobriety tests, observation of the exit, odors, general observations such as speech, attitude, clothing, etc.)

Pre-Arrest Screening (Field Sobriety Tests):

Administrative Process (BAC and Disposition):

I certify (declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. (RCW 9A.72.095.)

  
OFFICER'S SIGNATURE

838  
BADGE NUMBER

S. STORCK  
PRINTED NAME OF OFFICER

SPOKANE P.D.  
AGENCY

SPOKANE/SPOKANE/WA  
PLACE SIGNED (city / county / state)

2-24-08  
DATE SIGNED

WASHINGTON STATE PATROL  
BAC DATAMASTER CDM 140030  
SOFTWARE VERSION 76043-004 (04/28/04)

FEBRUARY 24, 2008

SIM TEMP 34c +/- .2c: YES

OBSERVATION BEGAN: 01:30

CITATION NUMBER: B70858

OPERATOR'S NAME (L/F/M):  
STORCH/SHADON/P

SUBJECT'S NAME (L/F/M):  
LEENDERS/GABRIEL/A

SUBJECT'S DOB: [REDACTED]

EXTERNAL STANDARD BATCH #: 07045

--- BREATH ANALYSIS ---

BLANK TEST	:000	01:57
INTERNAL STANDARD	VERIFIED	01:57
SUBJECT SAMPLE	.140	01:59
BLANK TEST	.000	01:59
EXTERNAL STANDARD	.081	02:00
BLANK TEST	.000	02:01
SUBJECT SAMPLE	.130	02:02
BLANK TEST	.000	02:03

ALL RESULTS IN g/210L

OPERATOR S. Storch # 238

AGENCY SPOKANE P.D.

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 3

INCIDENT CLASSIFICATION <b>MALICIOUS MISCHIEF</b>		ATTEMPTED <input type="checkbox"/>		INCIDENT NUMBER <b>08-110932</b>	
VEHICLE CODE <b>V-1</b>	CIRCUMSTANCES	LICENSE NO.	STATE	LIC. YEAR	LICENSE TYPE <b>Regular</b>
YEAR <b>1992</b>	MAKE	MODEL <b>Coupe</b>	TOP/FRONT ONLY COLOR <b>Red</b>		BOTTOM/REAR COLOR
SPECIAL FEATURES/DESCRIPTION					
DECAL NUMBER	REGISTERED OWNER <b>ANDERSON, DAVID D</b>				HOME PHONE
VEHICLE DISPOSITION <input type="checkbox"/> LEFT AT SCENE <input type="checkbox"/> DRIVEN AWAY <input type="checkbox"/> TOWED	REGISTERED OWNER'S ADDRESS: STREET, CITY STATE ZIP <b>Spokane, WA 99207</b>				VALUES
LOCKED <input type="checkbox"/> Yes <input type="checkbox"/> No	KEYS IN VEHICLE <input type="checkbox"/> Yes <input type="checkbox"/> No	DELINQUENT PAYMENT <input type="checkbox"/> Yes <input type="checkbox"/> No	VICTIM CONSENT <input type="checkbox"/> Yes <input type="checkbox"/> No	DRIVABLE <input type="checkbox"/> Yes <input type="checkbox"/> No	ESTIMATED DAMAGE
TOW COMPANY		HOLD REQUESTED BY		HOLD FOR	
DATE		TIME	RELEASE NO.	RELEASING AUTHORITY	OPERATOR'S NAME
NARRATIVE					

08-110932

On 041908, at 1040 hours, I responded to a domestic violence situation at [REDACTED] in the City of Spokane.

Upon arrival, I contacted Tami L. Smith, who advised that she was arguing with her live in boyfriend, Gabriel A. Leenders. Tami said that "Gabe" had come home and she wanted him to leave. Tami said she and Gabe had been living at the house [REDACTED] together for a couple of months, but advised that he had not paid any of the rent.

Tami advised that Gabe had vandalized her friend's vehicle the night before. Tami provided me with the phone number of David D. Anderson, and informed me that Gabe had thrown a brick through his car window. Tami said that her friend, Shelley, had witnessed the vandalism.

I contacted Gabe and he informed me he had not damaged anyone's vehicle. Gabe said that he was willing to leave the residence for a while, but advised that he was not going to move out.

I was not able to contact David or Shelley until Gabe had been transported to another location.

I was finally able to speak with Shelley D. Schrader, by telephone. Shelley informed me that she had a party the night before and Gabe and Tami had been in attendance. Shelley said Gabe was causing problems and she had asked him to leave several times. Shelley said Gabe left the residence and was in her yard yelling at her. Shelley said Gabe threw a beer can at her window.

Shelley said she witnessed Gabe throw a brick through the windshield of a car that Tami had borrowed. Shelley said she called 911.

Incident Report # [REDACTED] CONTINUED ON NEXT PAGE

04/19/2008 21:21:09.653

**Incident Report Continued**  
**Spokane Police/Spokane County Sheriff**

Page 4

INCIDENT CLASSIFICATION MALICIOUS MISCHIEF	ATTEMPTED <input type="checkbox"/>	INCIDENT NUMBER 08-110932
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Shelley advised that the police did not make contact with them that night.

I contacted David Anderson and he told me he was at his home, located at [REDACTED] I met David at his residence and observed that his windshield was smashed and the driver side window was broken out. The driver side head light and the driver side tail light was also smashed.

David said that it would cost about \$400.00 to have his 1992 Ford Tempo fixed. David said he had loaned his vehicle to Tami. David said that he was informed that the police had been called and that was why he hadn't called.

I provided David with a report number and a victim rights card. I had a Corporal respond to take photographs of the damaged vehicle. I observed a diamond shaped brick on the front seat of David's vehicle. The brick matched the bricks Shelley had described were in her yard.

I was unable to locate Gabe again. Shelley said that there was another witness named "Brad" who had seen Gabe throw the brick at David's vehicle. I was unable to locate Brad or speak to him by telephone.

I logged the brick onto Spokane Police Property.

Officer P. Brasch, #952

Incident Report # [REDACTED] END OF INCIDENT REPORT

04/19/2008 21:21:09.000

**SPOKANE POLICE/SPOKANE COUNTY SHERIFF PHOTOLOG**

REPORT NUMBER <i>080110937</i>	DATE <i>4-19-08</i>	LOCATION [REDACTED]
COMPLAINANT/VICTIM	D.O.B.	INVESTIGATOR <i>Brasch</i>
CRIME <i>Mal MIS</i>	PHOTOGRAPHED BY <i>Olsen</i>	LATENTS YES <input type="radio"/> NO <input checked="" type="radio"/>
PHOTOGRAPHS: NUMBER ON ROLL IN SEQUENCE # <i>1</i> THROUGH # <i>11</i>		
#	NO.	DESCRIPTION
#	<i>1</i>	<i>Plate</i> [REDACTED]
#	<i>2</i>	<i>damaged L. Rear taillight</i>
#	<i>3</i>	<i>" " R. Front headlight</i>
#	<i>4</i>	<i>" " L. Front headlight</i>
#	<i>5-6</i>	<i>Cracked Front windshield</i>
#	<i>7-8</i>	<i>broken driver door window</i>
#	<i>9-10</i>	<i>broken spoiler</i>
#	<i>11</i>	<i>Photo log</i>
#		
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FORM # 2007 • WHITE - RECORD • YELLOW - PHOTO LAB

4/19/2008

**08-0110932**

Department Case Number

**Department Case Report**

Related Case #'s:

**Case Information**

Case Officer: 952 - Christopher Brasch  
 Offense Date/Time: 04/19/2008 - 10:40Hrs  
 Offense Location: 6129 N Standard  
 Offense Type: MALMIS12 Malicious Mischief 1st & 2nd  
 Expiration Date: 04/19/2011  
 Jurisdiction: City of Spokane  
 Disposition:  
 Disposition Date:  
 Case Comments:

**Case Names**

Name: Schrader, Shelley, D	Sex: F	Race: W	DOB:	Home Phone#:
Address: Spokane Wa 99217			ID#:	
Additional Name Information:			SSN#:	

**Case Items**

<b>Detail Description:</b> Diamond shaped brick	<b>Process:</b> Hold In Property Facility
<b>Container #:</b>	
<b>Status/Location:</b> Stored In Location - Temp Locker 050	
<b>Packaging/Quantity/Item Type:</b> Brown paper bag containing - 1 - Miscellaneous	
<b>Make/Model:</b>	<b>Weight Rec:</b> Value: 50.00
<b>Owner:</b> Shelley Schrader	
<b>Collection Date/Time:</b> 04/19/2008 - 10:40Hrs	<b>Collected By:</b> 952 - Christopher Brasch
<b>Collection Location:</b> 3911 N Crestline	
<b>Item Notes:</b>	

APPENDIX E

## **Relevant Statutory Provisions and Rules**

CrR 6.4 provides:

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) Challenges for Cause.

(1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause.

(d) Exceptions to Challenge.

(1) Determination. The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by

the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) Trial of Challenge. Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

(e) Peremptory Challenges.

(1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.

(2) Peremptory Challenges--How Taken. After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

ER 608(b) provides:

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 609 provides:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old

as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

ER 803(a) provides in part:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition . . .

RAP 16.4 provides:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons: (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding

instituted by the state or local government; or (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RCW 4.44.150 provides:

A challenge for cause is an objection to a juror, and may be either:

(1) General; that the juror is disqualified from serving in any action; or

(2) Particular; that the juror is disqualified from serving in the action on trial.

RCW 4.44.160 provides:

General causes of challenge are:

(1) A want of any of the qualifications prescribed for a juror, as set out in RCW 2.36.070.

(2) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action

RCW 4.44.170 provides:

Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.180 provides:

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

RCW 4.44.190 provides

A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

RCW 4.44.220 provides:

The challenges of either party shall be taken separately in the following order, including in each

challenge all the causes of challenge belonging to the same class:

- (1) Challenges for cause.
- (2) Peremptory challenges.

RCW 4.44.230 provides:

The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall determine the facts and decide the issue.

RCW 4.44.240 provides:

When facts are determined under RCW 4.44.230, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

RCW 4.44.250 provides:

The challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side

RCW 9A.04.110(4)(c) provides:

(c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ . . .

RCW 9A.16.020 provides in part:

Use of force — When lawful.

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . .

. . .

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary . . .

RCW 9A.16.040 provides in part:

(1) Homicide or the use of deadly force is justifiable in the following cases:

(a) When a public officer is acting in obedience to the judgment of a competent court; or

(b) When necessarily used by a peace officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.

(c) When necessarily used by a peace officer or person acting under the officer's command and in the officer's aid:

(i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;

(ii) To prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility; or

(iii) To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or

(iv) To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon . . .

RCW 9A.16.050 provides:

Homicide is also justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW 9A.36.011 provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony

RCW 10.73.090 provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RPC 1.10 provides in part:

Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. . .

U.S. Const. amend. 1 provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. 6 provides:

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.

U.S. Const. amend. 5 provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 14, § 1 provides in part:

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 laws.

Wash. Const. art. 1, § 10 provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 1, § 22 (Amendment 10) provides:

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 or 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.