

No. 73928-0-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

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Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON, Respondent,

v.

WILLIAM RALPH SMITH, Appellant.

BRIEF OF RESPONDENT

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demonstrating beyond any reasonable doubt Smith actions were not legally justified. Therefore, Any error in failing to reference the lesser included charges of manslaughter in the first and second degree from the justifiable homicide instructions were

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3. **The trial court did not abuse its discretion admitting extrinsic evidence for the limited purpose in evaluating Chena’s bias and credibility when Chena gave several conflicting accounts of Smith and Jeremy’s actions during the investigation and in testifying, admitted making some but not all of the reported statements and at times, claimed detectives got it wrong or that she was intimidated.**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred in removing justifiable homicide instructions from the lesser included offenses of manslaughter in the first and second degree when Smith modified the instructions directing the jury that they could not consider convicting Smith of a lesser included offense if they concluded when deliberating on the murder in the second degree offense, that the state could not prove Smith was lawfully justified in killing Jeremy beyond a reasonable doubt.
2. Whether the trial court acted within its discretion admitting four minutes of a recorded statement of witness Chena Fisher for the limited purpose of showing bias and impeaching her credibility, where Chena gave numerous conflicting statements related to facts critical to the circumstances of Jeremy's death including testifying at times that detectives misinterpreted or got her statements wrong.
3. Whether the trial court erred finding the state proved by a preponderance of the evidence Smith was convicted in 2003 in the state of California of unlawful possession of a controlled substance, where the state provided sufficient indicia evidence of this conviction with testimony, finger prints, a California Lake County probation report, in conjunction with a NCIC report, confirming Smith's conviction.

C. FACTS

1. Procedural facts

William Ralph Smith was charged with murder in the second degree. CP 1-2. At trial, Smith requested justifiable homicide instructions

as well as, instructing the jury on lesser included offenses of manslaughter in the first and second degree. CP 54, 59, 117, RP 1146. The parties initially separately filed proposed instructions on May 27th 2015. Thereafter, both the State and Smith filed two supplemental instructions. See, Supp. CP 123, 157, 46-76, 118-120, 115-117, 271-306; (Sub nom 48, 49, 52, 53, 55, 56, 57), RP 1695-6-1698, 1710-1714. Smith's attorneys also requested the trial court modify the standard WPIC 4.11 regarding the verdict form. Specifically, Smith modified the jury instructions to ensure the jury would not consider verdicts on the lesser included manslaughter offenses, if the jury were to find Jeremy was not guilty of murder in the second degree because the state could not prove beyond a reasonable doubt Smith's actions were not justifiable. If the state could not disprove Smith's actions were justifiable beyond a reasonable doubt, the jury was required to find Smith not guilty of all of the offenses and not consider the lesser included offenses at all. RP 1704. The state and the court agreed to make the requested modifications to the jury instructions consistent with Smith's theory of the case. RP 1705-7.

Before finalizing jury instructions, the State requested the trial court modify the lesser included instructions to remove the reference to 'justification' as an explicit stand-alone element of manslaughter in the first and second degree. RP 1715. Smith's attorneys initially objected,

though intellectually understood the State request. After discussion and review, Smith's attorneys stated their position and theory was that if the jury finds Smith's actions were justifiable, the jury should "not proceed in any way shape or form to the manslaughter first or second degree 'to convict' instructions. RP 1717. The Court articulated that the instructions were already set up to do this. The state asserted, albeit inartfully, 'justification' is not a stand-alone element and additionally, in the context of this case, not appropriate in the context of the lesser included manslaughter offenses. RP 1717-18, 1721. After Smith's attorneys agreed to removing the justification element from the manslaughter "to convict" instructions, the trial court agreed to do so, stating that this change was consistent with the modifications previously made to the instructions making it clear if the jury found Smith was justified in acting in self-defense that the jury was already directed to find Smith not guilty of all of the charges. RP 1723, 25. Subsequently, over initial objections from Smith, the court also modified WPIC 16.03 to remove the justification consideration from either of the lesser included instructions of manslaughter in the first or second degree. In the end Smith agreed to all of the changes because the instructions as requested did not permit the jury to consider, let alone convict Smith of manslaughter in the first or second

degree if the jury determined the state could not disprove Smith acted in self-defense.

In light of that, the parties agreed to the final packet of proposed instructions and made no “exceptions.” RP 1728. Smith’s attorney explicitly stated, “I don’t think there are any exceptions I think that’s fine.” In response the trial court informed the parties: “okay. All right. If you think of an exception, you can put it on the record just prior to bringing the jury out. All right.” RP 1729. Neither party took any exceptions to the instructions prior to instructing the jury. However, Smith’s attorneys did object as the trial court was reading the instructions and after jurors were excused, explaining that there appeared to be a flaw in the self-defense instructions unrelated to the issue Smith now raises. RP 1749. The parties thereafter agreed, in light of Smith’s concern, to add another instruction, 19(a) to remedy the mistake. RP 1751, 1753.

Following closing argument and deliberation, Smith was convicted of manslaughter in the first degree. CP 158-59. Smith subsequently complained the instructions as modified and ultimately agreed to by the parties, erroneously removed the defense of justifiable homicide from consideration in the context of the lesser included offense jury instructions for manslaughter in the first and second degree. The trial court denied Smith’s motion for new trial. Smith now appeals. CP 249-260.

2. Substantive Facts

On March 22nd 2015, the Whatcom county sheriff's office responded to 319 Pacific Highway to discover Jeremy Mclellan lying in the door way of a single wide trailer, covered in blood and dead. RP 1774. *See* Supplemental CP ____ (Plaintiff's exhibits 165, 104, 98, 100, 114). Jeremy suffered from 9-10 stab wounds and cuts to his neck, arms, chest and back. The most severe stab wound to his neck, punctured the carotid artery of his neck resulting in him bleeding to death. 1774. The medical examiner unequivocally found the cuts and stab wounds, except for the fatal wound to the neck, were caused by a single fixed blade knife. RP 960, 963, Supp. CP ____ (Plaintiff's Exhibits 81, 82). A knife consistent with the knife investigators found in Smith's trailer with Jeremys' blood on it. Supp. CP 54, 77.

The single wide travel trailer where Jeremy died was owned by Ron White and located on nine acres of property at 319 Pacific Hwy in Whatcom County. RP 302. Also living on Ron's property, in a separate travel trailer, were William Ralph Smith and his girlfriend, Chena Fisher. RP 306, 308. Ron, Smith and his girlfriend were methamphetamine users who struggled with addiction. RP 1206-7. All three reportedly used meth on March 21st 2015 prior to Jeremy's death. RP 1207-09, 2012. Jeremy

was also a moderate drug user and had methamphetamine, marijuana and low levels of alcohol in his system at the time of his death. RP 957.

Jeremy came over to Ron's place on the evening March 21st 2015, accompanied by his sister Nikki and friends, Cathy and Shawn. RP 313, 523. Ron didn't know Jeremy but did know Nikki, Shawn and Cathy. RP. Neither Ron nor Nikki thought Jeremy knew Smith. RP 315, 536-7. Nikki and Jeremy had smoked methamphetamine together, prior to agreeing to drive together with Shawn and Cathy and coming over to Ron's trailer. RP 549, 550, 577.

When Shawn, Cathy, Nikki and Jeremy arrived, Shawn first knocked on Smith's travel trailer door to let him know they were moving rope and orange traffic cones that were blocking the driveway so they could gain access to Ron's trailer that was situated further down the shared driveway. RP 630, Supp. CP ____, Ex 47, 49, 55. Smith volunteered that he was mad at Ron but Shaun wasn't interested in hearing the details of the dispute at that point. RP 637.

After being at Ron's trailer a short time, Nikki decided to let Jeremy take her car and cell phone to deal with a situation with a girl and help get Jeremy into a better mood. RP 322, 531. When Jeremy first arrived Ron noticed Jeremy's bad mood and thought maybe Jeremy was upset with him about an ex-girlfriend. After talking to Jeremy about the

situation however, Ron felt the hostility toward him dissipated. RP 316-18, 583.

After Jeremy left Ron's property, Ron, Nikki, Shawn and Kathy consumed methamphetamine in Ron's trailer and then later, Nikki and Cathy went up to Smith's trailer where they smoked some more meth with Chena. RP 340-1, 403, 527, 1211, 1220. Chena told investigators Smith did not use meth at that time. Cathy however, testified Smith did smoke meth together with her, Chena and Nikki. RP 735. Cathy reported that while at Ron's Ron complained about Smith and Chena and while at Smith's trailer, Smith and Chena complained about Ron. RP 730, 733.

When leaving Smith and Chena's trailer with Cathy, Nikki was surprised to hear Chena and Ron start yelling at each other outside; Chena was demanding Ron to give her phone back. RP 527-8. Once back at Ron's trailer, Nikki visited while Ron played guitar and Shawn and Cathy went to sleep in a spare bedroom. RP 530.

Jeremy returned with Nikki's car somewhere around 3:30-4:30 a.m. in a much happier mood. RP 327, 332. Smith followed Jeremy into Ron's trailer said 'hey,' walked over to Jeremy began playing foosball and conversing back and forth with Jeremy. RP 333. Ron was surprised to see Smith because he and Smith weren't really getting along or socializing, he didn't know Smith to be into foosball and like Nikki, didn't think Smith

knew Jeremy. RP 327, 333, 535-6. After playing foosball for five or six minutes, Smith stopped and said he'd be right back. RP 334, 337. Minutes later Smith returned from his trailer and gave Jeremy a glass of Bacardi. RP 334. Smith then said to Jeremy, alright. Give me about half an hour" "I've got to do something with my woman" and then "come on up." RP 338.

Ron speculated Jeremy was going to see Smith about drugs RP 344, 345. Earlier that evening Jeremy had asked Ron if he could get him some drugs and told Ron he [Jeremy] wanted to 'come up' and make some money. RP 320. Ron told Jeremy that he couldn't help him, explained dealing drugs wasn't the job for him and tried to encourage Jeremy to follow a more positive path of employment. RP 320. Nikki overheard this conversation and was appreciative for Ron's encouragement. Nikki thought Jeremy was just going up to Smith's trailer to get beer or a cigarette before they left Ron's property for their grandmother's house. RP 566.

Smith claimed he never saw Jeremy before March 21st 2015 and only knew of him as a 'gang banger.' CP 77-107, Plaintiff Exhibit 184. Smith also claimed however, that after meeting Jeremy, he called a friend named "Church" and learned Jeremy was a 'gunslinger' or 'fist fighter' from the Reservation. Id. In the same taped statement however, Smith told

investigators he sent Chena to the neighbor to call 911 because his phone wasn't working.' Id.

Despite inviting Jeremy up to his travel trailer, Smith told investigators initially during his taped statement, he didn't know why Jeremy came up. CP 77-107, Plaintiff's Exhibit 184. Smith also asserted he felt like he was going to 'get stomped' while he was playing foosball at Ron's trailer with Jeremy and just made up an excuse to return to his trailer. Id. Smith was worried that he only had a few bowls of weed to share and that Ron and Shawn may have been mad at him for not having any dope. Id.

Smith informed investigators Ron wanted to evict him. Smith stated he had always done his best to be good to Ron, providing him dope when he could but that he had failed to pay any rent while living there. CP 77-107, Plaintiff's Exhibit 184. Consequently, Ron had recently asked Smith to move off of his property. Smith told Ron he would have to evict him legally. Id, RP 309. Ron called the Sherriff's office on March 12th 2015, to discern what the legal process entailed. RP 342. Ron and Shawn told investigators while Ron wanted Smith to move, Ron wasn't in any hurry to evict him and Jeremy was not asked or encouraged to evict Smith. RP 669, 529.

Smith maintained to law enforcement at the scene, that Jeremy fatally injured himself when he had fallen on a broken beer bottle. RP 1171. Smith explained Jeremy had an axe and a beer bottle and had hit him over the eye with the beer bottle and at some point during the fight tripped and fallen on the broken bottle. RP 1171. Detectives did not see any defensive marks on Smith indicating he had been in an altercation, only a few droplets of blood on his hands. RP 1172, See also Supp. CP ___ (Plaintiff Ex. 91, 92 94). They also noticed that Smith appeared to be amped up and under the influence of a stimulant drug. RP 1170, 1195.

Once at the police station, Smith detailed to investigators that when Jeremy knocked on Smith's trailer the first time, Smith gave Jeremy a cigarette told him he would be down in a bit with some beers. CP 77-107, Plaintiff Exhibit 184. The second time Jeremy knocked at his trailer, Smith told Jeremy to give him twenty minutes to spend time with his old lady. The third time Jeremy returned and banged on the trailer, Chena told Smith to go out there and be a man in dealing with Jeremy. Chena thought Jeremy just wanted another cigarette. RP 1230. Smith exited the trailer fully dressed but Chena denied he took anything with him and said their voices were normal. RP 1230. Chena described Smith as a big, 45 year old man. RP 1274.

Outside the trailer, Jeremy asked Smith if he had any 'shit' and Smith told him he had called some in and it would be coming soon. . Smith said he tried to talk to Jeremy but became concerned when Jeremy took off his watch, put it in his pocket and picked up an axe. According to Smith, Jeremy then told him it was eviction time and that they always get their money. RP 1170. Smith told detectives Jeremy circled Smith's trailer twice holding an axe, picked up a shovel or rake with his other hand and was worried Jeremy was going to 'kill us.'" While standing between two vehicles parked between the trailer and driveway, Smith said Jeremy punched him in the head, then swung the axe toward him twice and then fell on the ground after trying to throw another punch. CP 77-107, Plaintiff Exhibit 184, 32, 47.

Chena testified she saw Jeremy flinch toward Smith like he was going to hit him even though Jeremy's arms remained by his side. RP 1238. According to Chena, Jeremy said it was eviction time, he needed money and told Smith 'we always get our money.'" RP 1239. Chena said she saw both Smith and Jeremy on the ground and saw Smith put his weight toward Jeremy to fight him off during a very brief altercation. RP 1243, 1270. Chena thought Jeremy slipped and fell twice in the gravel as he ran away. RP 1244. Even though Smith asked/ inferred to Chena that she saw Jeremy come after him with an axe, Chena would only say she

saw an axe in Jeremy's hands but denied seeing him come after Smith with it. RP 1270.

Smith told investigators that after Jeremy punched him, he heard a beer bottle break and Jeremy cry out when he fell on it. CP 77-107, Plaintiff Exhibit 184. At some point Smith recalled crab walking backward away from Jeremy and kicking a rock or broken beer bottle glass toward Jeremy's mid-section. Smith didn't remember grabbing a beer bottle but didn't deny that he may have grabbed it and used it to defend himself. CP 77-107, Plaintiff Exhibit 184. Smith was adamant however, that if he used it, he only used it toward Jeremy's mid-section and denied using anything to cut Jeremy or cause the neck wound. Smith speculated that Jeremy maybe broke the beer bottle or tapped it with the axe. CP 77-107, Plaintiff Exhibit 184. Smith repeatedly denied stabbing or jabbing Jeremy in the neck because he is "smart enough to never stab in the neck" and that the neck injury must have occurred accidentally when Jeremy fell. CP 77-107, Plaintiff Exhibit 184.

Smith also told detectives, consistent with Ron and Nikki's testimony, that he chased Jeremy toward Ron's trailer after the altercation because he was still in fear and worried Jeremy might pull a Chinese throwing star out of his butt. CP 77-107, Plaintiff Exhibit 184. Chena claimed Smith didn't chase Jeremy. Instead, the two of them watched as

Jeremy ran back down to Ron's trailer. Chena remembered thinking to herself, "ya you better run." RP 1248, 1343. Chena thought Jeremy slipped on the gravel and remembered seeing Jeremy fall twice while he was trying to run back to Ron's trailer. RP 1243.

After hearing screams coming from Ron's trailer Smith told Chena to go to the neighbors and call 911. RP 1343. Smith could be heard talking to Chena when she called 911 stating her man was attacked, she didn't see it but he had come after him with an axe. CP___(Pla. Exhibit 137, Chena's 911 call). After Chena called 911, she observed Smith smash and break a beer bottle toward the end of one of the vehicles parked in front of Smith's travel trailer. RP 1282, 1301.

When Shaun left Ron's trailer to confirm 911 had been called to get help for Jeremy, Smith told him and Cathy that Jeremy came at him with an axe, tripped, fell and poked his neck on a broken beer bottle and that's why he is bleeding. RP 654. Smith told Shaun just to put pressure on the hole in Jeremy's neck. RP 655. Shaun was unaware Jeremy had a hole or wound in his neck at that time because the bleeding seem to be pouring out of Jeremy's throat and mouth. RP 655. Shaun then wondered what was really going on because he noticed Smith was carrying something in his hand that was reflective in the early morning light when he first exited Ron's trailer before he confronted Smith. RP 658.

Prior to Smith telling Shaun and Cathy Jeremy had fallen on the broken beer bottle and hurt himself, Nikki had confronted Smith. Smith told her Jeremy fell on an axe and that it was all Ron's fault because he was trying to evict him. RP 556, 561, 570. Yet, a short time later, Smith told investigators at the scene he knew Jeremy was cut but denied cutting him, initially stating all he could remember was kicking glass at him. Later, Smith mentioned they could have saved him if they just put pressure or a finger in the fuckers neck. CP 77-107, Plaintiff Exhibit 184. Smith understood he took another life "while by accident or not." CP 77-107, Plaintiff Exhibit 184.

Ron told investigators and testified he saw the attack from the window of his single wide trailer. RP 1585, 354; Supp. CP 55, 9). Ron said his blinds were down but he could still see through them because they were comprised of the opaque material. RP 356. Ron was keeping an eye on Jeremy because he was trying to figure out what was going on. RP 357. Ron observed Jeremy knock on Smith's trailer, Smith exit and speak to Jeremy and then walk toward a tree situated at the top of the driveway between the two trailers. RP 358. According to Ron, it seemed like Jeremy was walking backwards. *Id.* Then after a moment, Ron saw one person, he later determined was Smith, hit the other in the neck and the person hit, he later surmised was Jeremy run towards the woods across the

driveway. Id. He then saw Smith run after Jeremy and hit him three or four more times before Jeremy was able to run down the driveway to Ron's trailer. RP 360. Following that, Ron's trailer door flew open and Jeremy came in bleeding profusely and clutching his throat and bouncing all over the trailer and obviously needing help. RP 360. Ron went looking for his phone and then called 911 to report a stabbing. RP 361, Plaintiff Exhibit 25. Nikki testified she didn't think Ron could have seen anything from the trailer window but under cross examination conceded she didn't know what he may or may not have seen. RP 598, 622. Despite poor eyesight, Nikki testified she did see a shadow of a person coming toward Ron's trailer with another person behind him consistent with Ron's observations. RP 544.

When investigators walked the specific areas Ron referenced in detail at the scene, they found a blood trail consistent with his statement. The blood trail started at the top of the driveway near one of two vehicles at Smith's trailer, led away from Smith's trailer into brush and then down the driveway. RP 1504, See also, Supp. CP _____ (Plaintiff's exhibit 63, 56, 128).

Detectives also found a broken beer bottle near the tailgate of the truck parked at Smith's trailer and spots of blood further away from the area but no blood in the vicinity of the truck, on the truck, around Smith's

trailer, the axe or broken beer bottle. RP 1595-6, Supp. CP ____ (Plaintiff's Exhibits 31, 140, 60, 62, 133, 134). No other blood spots were located near or on any other piece of broken beer bottle, except for one shard that investigators found completely coated in blood. RP 1376, Supp. CP____(Plaintiff Ex. 31, 140, 60, 62, 133, 134). The medical examiner later testified if that piece of glass had been used to stab Jeremy, he would have expected some of the blood would be smeared off of the glass from the process of entering and exiting the wound and not to find the glass completely coated in the manner it was. RP 945, Supp CP ____ (Plaintiff's Ex. 60). Investigators did find an axe near Smith's trailer but it had no blood on it, the area around it appeared undisturbed and forensic testing couldn't identify if either Smith or Jeremy had touched it. RP 1473, Supp. CP ____ (Plaintiff's Ex. 32, 33, 131).

Chena gave conflicting statements following Jeremy's death. At trial, she claimed the trailer sensor light was on and she was therefore able to see Jeremy had an axe but did not raise or swing it. Instead, he flinched his body in an aggressive manner. RP 1234, 1237. Immediately following Jeremy's death however, she told detectives the sensor light at Smith's trailer was not working because it was not plugged in but that she nonetheless saw Jeremy raise an axe with both hands and then dropped it

in the area between the two vehicles parked by Smith's trailer. Chena claimed then that Jeremy then hurt himself when he fell on it. RP 1278.

In contrast to her testimony and initial statements at the scene, Chena told investigators a few days after Jeremy's death, after she was, in her words 'off the needle' for seven days, that it was Smith who broke the beer bottle, not Jeremy and that he did it *after* she called 911 and that Jeremy *never* had an axe. RP 1281, 1288. (**emphasis added.**) At trial Chena denied making parts of her second statements to investigators and inferred they misunderstood or misinterpreted her statements and that she was intimidated by the officers when she made the statement. RP 1277, 1288-89. In light of the contrasting and inconsistent statements attributed to Chena on and off the stand, four minutes of her recorded statement made to Detective Francis was played for the jury and the jury was instructed her statement was introduced for the limited purpose of bias and impeachment and could not be used for any other purpose. CP 123-157 (Instruction 8).

After Smith gave his formal recorded statement asserting he may or may not have used a broken beer bottle glass to defend himself but only as to the injuries to Jeremy's mid-section and not as to the stab wound to Jeremy's neck, detectives found a 8" fixed blade knife with a 3.5" inch blade in a knife block inside Smith's trailer that had blood at the junction

of the blade and handle. RP 1375, 1454. Supp. CP ____ (Plaintiff's Ex. 54, 81, 82). Forensic testing confirmed the knife had Jeremy and Smith's DNA on it. RP 1456, 1478. Detectives confronted Smith with this information, asking him why this knife had blood on it. Smith hesitated but then claimed blood might have dripped onto the knife when he went inside the trailer to wash his hands in the sink. RP 1618. Forensic testing confirmed the knife had both Jeremy and Smith's DNA on it. RP 1456.

The medical examiner confirmed this knife, that had a small defect at the tip of the blade, came into contact with Jeremy and was consistent with all of the 9-10 stab and cut wounds found on Jeremy's body. RP 991,933, 939. The neck wound was also consistent with a twisting motion; where either the weapon itself had a defect, as the tip of this knife did or with moving person; a common finding in knife or penetrating stab wounds. RP 938, 941. Nonetheless, because of the anatomy of the skin/body in the neck region, the medical examiner could only say the fatal neck wound was consistent with the knife found but could not rule out the possibility it could have been caused by a piece of broken beer bottle glass. The remaining stab wounds and cuts to Jeremy's body and eyebrow however, were *inconsistent* with a piece of broken glass or beer bottle because they all had characteristics of a sharp side and a dull side where the knife entered, were approximately the same depth, were not life

threatening and compatible with a single edge knife wound. RP 963-4, 65-66. (*emphasis added*).

While Jeremy suffered penetrating stab wound to his left mid-back penetrating into the lung, the medical examiner opined Jeremy's death was likely caused by the neck wound given its severity in severing the carotid artery that feeds blood to the brain. RP 947. RP 952, 956, 929, 930, 932, 939. Additional stab wounds were found at Jeremy's left armpit and his left arm. RP 961. Jeremy also had several sharp force 'cutting' injuries to his eyebrow, shoulder and arm. RP 971, 975. In total, Jeremy suffered 9-10 stab wounds and cuts before he died. Seven of the wounds were oriented to Jeremy's front and three oriented to Jeremy's backside. RP 1015. Due to the clustering of the stab wounds, the medical examiner thought more probable than not, seven of the wounds were made while facing Jeremy. RP 1018. Some of the cuts looked like comma's were likely caused by a knife similar to the knife found that had a small defect at the tip of the blade. RP 991. The medical examiner dismissed Smith's claim Jeremy's neck injury could have been caused by Jeremy falling onto the beer bottle because under those circumstances, he would have expected to find a considerably deeper injury. RP 945-6. Smith had no visible injuries but claimed to have a bump on the head where he asserted

Jeremy struck him with a fist. RP 1171. Additionally, the autopsy revealed Jeremy had no offensive or defensive wounds on his hands. RP 984, 1009.

D. ARGUMENT

- 1. Smith failed to take exceptions to the trial court's approved jury instructions pursuant to 6.15 after requesting modifications of standard instructions and agreeing to remove justification from the jury's consideration of the lesser included instructions and therefore invited the error he now complains of.**

Smith argues the trial court erred in removing justifiable homicide instructions from consideration in the context of the lesser included instructions of manslaughter in the first and second degree. Smith glosses over that he requested the trial court modify standard instructions to ensure the jury not consider manslaughter in the first or second degree unless they could find the state had proven Smith was not lawfully justified in killing Jeremy beyond a reasonable doubt first. Given the modification of the instructions, Smith while initially objecting to removing justification from consideration in the context of the lesser included instruction, when the final packet of jury instructions were presented, Smith affirmatively took no exceptions, not once but twice after the trial court gave both parties a second opportunity to review

instructions and place any exceptions on the record prior to closing arguments.

CrR 6.15 (c) provides:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objections, specifying the number, paragraph and particular part of the instruction not to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

The purpose of this rule is to afford trial courts an opportunity to know and understand the objections and to correct any error contained within proposed instructions before instructing the jury. City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976), State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977).

While the record reflects the parties worked collectively to reach agreement on a set of final jury instructions, both the defense and the state requested modifications of proposed instructions. Ultimately, after full consideration of the trial court's final proposed packet of instructions, neither party formally objected to the final set of instructions when given the opportunity to do so pursuant to CrR 6.15 not just once, but twice. CrR 6.15. After the parties failed to take any exceptions, the trial court

informed the parties that if they thought of any concerns with the final instructions then proposed, they could bring it to the trial court's attention prior to instructing the jury. Neither party did. Though, part way through the reading of the instructions to the jury prior to closing argument, Smith's attorneys did alert the court of an omission and, after the jury was excused, requested a correction to the self-defense instructions unrelated to the issue raised herein. After a brief discussion, the court agreed to add an additional instruction related to self-defense. See, CP 127-157 (Instructions 19, 19(a)).

Smith agreed to modify the instructions in considering the final packet of instructions because regardless of whether the jury was instructed on justifiable homicide in context of the lesser included instruction, Smith was more interested in ensuring the jury would not consider any lesser included offense if the state could not disprove Smith was justified in acting in self-defense or defense of others in the context of deliberating on the murder in the second degree offense. Smith should therefore, not be permitted to now argue the trial court's instructions as to the lesser included charges were erroneous.

Smith agreed to remove justification from the manslaughter first and second degree offenses as a stand-alone element and affirmatively acquiesced in the trial court's decision to remove self defense

consideration from the lesser included instructions of manslaughter in the first and second degree when given two additional opportunities to make take exception to the proposed instructions. Smith's tactical decision permitted him to argue, as he wanted in closing:

If the state hasn't disproved self-defense, you're done, it's not guilty and you don't consider manslaughter, you're done.
RP 1810.

The invited error doctrine "prohibits a party from setting up an error ... and then complaining about it on appeal." In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). This is a "strict rule." State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999), as amended (July 2, 1999). As noted by one court, "... when a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right." State v. Lewis, 15 Wn. App. 172, 548 P.2d 587 (1976). The doctrine applies even in the context of constitutional error¹ and in the context of violations of the right to public trial. Studd,

¹ The doctrine has been applied to constitutional claims regarding missing elements in to-convict instructions. *See, City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002) (defendant could not raise issue of essential element of obstruction of justice offense missing in to-convict instruction because he proposed the instruction); State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001) (defendant could not raise claim regarding

137 Wn. 2d at 546, 548; In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014), State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). (Even where constitutional rights are implicated; reviewing courts are precluded from reviewing instructions the defendant has proposed or where he has agreed to the wording). This rule recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The doctrine requires some affirmative action on the part of the defendant. In re Thompson, 141 Wn. 2d at 724. Generally, where the defendant takes knowing and voluntary actions to set up the error, the invited error doctrine applies; where the defendant’s actions are not voluntary, it does not. In re Thompson, 141 Wn. 2d 712 In determining whether a defendant’s actions constitute invited error, the court considers whether the defendant “affirmatively assented to the error, materially contributed to it, or benefited from it.” In re Coggin, 182 Wn. 2d at 119.

There were significant discussions and multiple proposals of jury instructions prior to the parties agreeing to a final jury instruction packet. After the state requested justification to be removed from the lesser included ‘to convict’ instructions and self-defense instruction modified to

missing knowledge element in unlawful possession of firearm to-convict instruction because he proposed an instruction that was identical to the one the court gave).

only reference murder in the second degree, Smith agreed he did not want the jury to consider self-defense in the context of manslaughter in the first or second degree.

In essence, Smith agreed an all or nothing approach to the jury's evaluation of Smith's actions. If the state proved Smith intended to kill Jeremy, he was guilty of murder in the second degree. If the jury determined Smith was not guilty of murder in the second degree because the state could not disprove Smith's actions were justified in self-defense beyond a reasonable doubt, then the jury could not consider any lesser included offenses. In contrast, if the jury determined the state had met its burden on self-defense, but did not think Smith intended to kill Jeremy when he stabbed him 8-10 times, the jury could consider the lesser included offenses of whether Smith recklessly or negligently killed Jeremy in absence of Smith's self-defense claim.

Given Smith's request to have the jury repeatedly instructed that if they determined Smith was not guilty because the state could not disprove he acted in self-defense beyond a reasonable doubt, they could not consider Smith's guilt for either lesser included offense of manslaughter in the first or second degree and given his affirmative agreement to the final instructions removing self-defense from consideration in the context of the

lesser included instructions, Smith argument should be precluded from further review. RP 1811.

Moreover, RAP 2.5(a) precludes defendants from asserting error for the first time on appeal unless the issue raised involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3), State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). A manifest error requires a showing of actual prejudice. In other words, the error alleged must have practical and identifiable consequences in the trial. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Even if an error is determined to be manifest however, it may still be subject to harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995), *as amended* (Sept. 13, 1995).

Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997), as amended (Aug. 13, 1997). Instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury and permit each party to argue its theory of the case. State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656, *rev. den.*, 133 Wn.2d 1014 (1997).

Jury instruction challenges are reviewed in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A defendant is entitled to an instruction on his theory of the case if the

evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). Failure to instruct is reversible error. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). An appellate court will “review the instructions in the same manner as a reasonable juror.” State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994).

The instructions as modified by both Smith and later the State, while not standard, ensured the jury would not consider the lesser included charges if they determined Smith was not guilty of murder in the second degree because the homicide was justified as defined in the self-defense instructions. While the murder in the second degree instructions listed justification and intent as separate elements, justification necessarily negates the element of intent and therefore was necessarily considered in the context of the jury contemplating whether the state proved beyond a reasonable doubt Smith *intended* to murder Jeremy. In doing so, the jury had to decide whether the state proved beyond a reasonable doubt Smith’s actions were not justified and that he did not act in self-defense. State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). If the state proved Smith’s actions were not justified beyond a reasonable doubt but failed to prove murder was otherwise intended, the jury could go on to consider whether the killing was reckless or negligent notwithstanding Smith’s self-defense claim. If the jury determined the state could not prove Smith’s actions

were not justified beyond a reasonable doubt, the jury was directed to enter a not guilty verdict for all the lesser included offenses without further deliberation. While failing to instruct the jury may be manifest constitutional error if it abrogates the state's burden to disprove self-defense, the instructions given in this case, while unique, did not abrogate the state's burden and consequently had no practical effect on the deliberating jury. Prior to deliberating on either of the lesser included offenses, the jury was required to deliberate on whether the state met its burden to disprove Smith's actions were justified.

2. Smith was not entitled to justifiable homicide instructions relating to the lesser included offenses of manslaughter in the first or second degree because Smith affirmatively asserted Jeremy's fatal neck wound was the result of an accident; therefore the trial court did not err when it agreed to remove this defense from lesser included instructions.

A defendant is not entitled to an instruction on an issue or theory that is not a correct statement of the law or for which there is insufficient evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994), State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986). If a trial court refuses to give a self-defense instruction based on the lack of factual evidence to support the claim of the defendant's subjective belief of imminent danger, the standard of review is abuse of discretion.

State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998). If on the other hand, the trial court determines as a matter of law, the defendant's acts were not objectively reasonable or the defense is not permitted predicated on a legal ruling, review is de novo. State v. George, 161 Wn. App. 86, 249 P.3d 202 (2011).

The parties agreed to instruct the jury on murder in the second degree, justifiable homicide as a defense to murder in the second degree and first and second degree manslaughter as lesser included offenses. See, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) (manslaughter in the first and second degree is a lesser included offense to murder in the second degree). First degree manslaughter required proof Smith recklessly caused Jeremy's death. RCW 9A.32.060. A person acts recklessly "when he or she knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c). Second degree manslaughter, in contrast, requires causing the death of another with criminal negligence. RCW 9A.32.070. "Criminal negligence occurs when a reasonable person would realize the presence of a substantial risk of harm." State v. Hughes, 106 Wn.2d 176, 190, 721 P.2d 902 (1986). See, RCW 9A.08.010(d), A person is criminally negligent or acts with criminal negligence when he fails to be aware of a

substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

Absent evidence supporting a reasonable inference that the defendant caused the victim's death *without intent to kill* but **only** with recklessness or negligence as defined within the manslaughter statute, a defendant may not be entitled to manslaughter instructions when the evidence supports the inference that defendant intentionally acted in self-defense but recklessly used more force than necessary under the circumstances. State v. Bergeson, 64 Wn. App. 366, 824 P.2d 515 (1992), see State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)(***emphasis added***). Otherwise, a defendant is permitted to essentially present a theory of imperfect self-defense in contrast to the Washington Supreme Court decision in Hughes that rejected the imperfect defense doctrine. State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986) Criminal culpability is not lessened in Washington where someone acts in self-defense based on an honest subjective belief that is objectively unreasonable. Id. Notwithstanding Hughes, if a defendant recklessly or negligently causes the death of another, *without intent to kill* but in self-defense,

manslaughter and self-defense instructions may be warranted. See, State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998).

Notwithstanding Washington's rejection of the imperfect self-defense doctrine, the state concedes justifiable homicide instructions *may* be available for both murder and manslaughter as a matter of law when the evidence is sufficient to support the factual and legal basis in light of Schaffer. RCW 9A.16.0505, State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). Since self-defense is explicitly made a "lawful" act under Washington law, *see* RCW 9A.16.020(3), RCW 9A.16.050(1), (2), State v. Hanton, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980), holding modified by State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983), it negates the element of "unlawfulness" contained within Washington's statutory definition of criminal intent. State v. McCullum, 98 Wash. 2d 484, 495, 656 P.2d 1064, 1071 (1983). Therefore, if a person acts in lawful self-defense in Washington, they cannot be acting intentionally as that term is defined in RCW 9A.08.010(1)(a).

The fact that justifiable homicide instructions *may* be available in the context of manslaughter, does not mean however, the trial court is without authority to remove this defense from the jury. If a defendant uses deadly force based on an objectively unreasonable belief he is in danger of

death or great personal injury or denies using deadly force or claims the injury was the result of an accident, then justifiable homicide instructions are not warranted.

The defendant bears the initial burden of demonstrating the defendant's reasonable belief in the need for force and that the belief was reasonable. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). The court applies both an objective and subjective test. State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). If no credible evidence appears on the record to support a claim of justifiable homicide, then the trial court must refuse to give the homicide instruction. State v. McCullum, 98 Wn.2d at 488. Review is conducted in the light most favorable to the party who requested the instruction at trial. State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000).

A person is entitled to assert self-defense when s/he reasonably believes that s/he is about to be injured and uses no more force than is necessary under the circumstances appearing to a reasonably prudent person at that time. RCW 9A.16.020(3); *see also*, Read, 147 Wn. 2d at 242–43 (to be entitled to self-defense instruction, defendant must point to evidence that he subjectively believed in good faith that he was in danger of requisite harm and that this belief, when viewed objectively, was

reasonable), State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986). In other words, there must be evidence that supports that (1) the defendant subjectively feared that he was about to be injured; (2) this belief was objectively reasonable; (3) no more force was used than was necessary; and (4) the defendant was not the aggressor. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). If any element of the defense is missing, the defendant is not entitled to an instruction on self-defense. State v. Bell, 60 Wn. App. 561, 566, 805 P.2d 815 (1991).

It has long been the law that a simple assault or battery cannot justify the taking of human life unless a reasonable person in the defendant's shoes could have reasonably believed the requisite harm would result from the simple assault. State v. Walker, 136 Wn.2d 767. The distinction between justifiable homicide instructions and self-defense, WPIC 16.02 and 17.02, is the degree of harm the defendant must perceive. Under WPIC 16.02, the defendant must have "reasonably believed that the victim intended to inflict death or great personal injury to justify the homicide. In contrast, self-defense instructions as set forth in WPIC 17.02, require the defendant to reasonably believe he was about to be injured to justify acts of force. See, State v. Cowen, 87 Wn. App. 45, 939 P.2d 1249 (1997). The critical issue in evaluating the availability of justifiable

homicide instructions is Smith's mental state not the fact the victim died.
Id.

If "there is no reasonable ground for the person attacked ... to believe that his person is in imminent danger of death or *great bodily harm*, and it appears to him that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner." State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997), State v. Walker, 136 Wash. 2d 767, 777, 966 P.2d 883, 888 (1998). "The importance of the objective portion of the inquiry cannot be underestimated. Absent a reference point of a reasonably prudent person, a defendant subjective belief would always justify the homicide." State v. Walker, 136 Wn.2d 767, 966 P.2d 883(1998), *citing*, State v. Janes, 121 Wn.2d 220, 239, 850 P.2d 495 (1993). "Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not.." Janes, 121 Wn.2d at 240 (*quoting* Susan Estrich, *Defending Women*, 88 Mich.L.Rev.1430, 1435 (1999)). The objective part of the standard "keeps the self-defense firmly rooted in the narrow concept of necessity. Janes, 121 Wn. 2d at 240.

Additionally, fear alone does not entitle a defendant to a self-defense instruction. State v. Kidd, 57 Wn. App. 95, 102, 786 P.2d 847

(1990). There must also be some evidence of aggressive or threatening gestures, behavior or communication by a victim before a defendant's use of force can be reasonable. Kidd, 57 Wn. App. at 102. Finally, defendant cannot also deny that s/he hit someone and then try to assert that s/he hit the person in self-defense. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); *see also*, State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) (defendant not entitled to self-defense instruction where he denied the underlying act that was the basis for the assault charges).

a. Smith may not deny inflicting the fatal stab wound, assert Jeremy's neck puncture was the result of him accidentally falling on a beer bottle and then also claim the killing was legally justified.

Even accepting the trial court's conclusion that Smith had a reasonably objective basis to respond to Jeremy's alleged aggressive 'flinch' and fist punch while wielding an axe by repeatedly stabbing Jeremy with a piece of broken glass in self-defense, justifiable homicide instructions relating to the lesser included offenses were nonetheless not warranted based on the facts of this case.

On appeal the State may argue an alternative basis supported by the record to uphold the trial court's ruling. State v. Bobic, 140 Wn.2d 250, 257–258, 996 P.2d 610 (2000). If the defense theory is inconsistent

with self-defense or if there isn't evidentiary support for it, the court's refusal to instruct on self-defense is proper. Gogolin, 45 Wn. App. at 44; *see also*, State v. Porter, 150 Wn.2d 732, 739–40, 82 P.3d 234 (2004) (defendant not entitled to lesser included instruction where the lesser crime was not based on the charged conduct). Moreover, is not error to reject an instruction when its subject matter is adequately covered in other instructions State v. Kidd, 57 Wn.App. 95, 786 P.2d 847 (1990).

While explicit evidence Smith *intended* to assault Jeremy is not necessary to support self-defense, there does need to be an evidentiary basis to support the inference Smith took the *action* that caused or resulted in the injury. Dyson, 90 Wn. App. at 952 .2d 1097 (1997). Even when the defendant fails to remember the fatal blow during an altercation, self-defense instructions may be warranted because the law doesn't require an explicit statement of intent. State v. Hendrickson, 81 Wn. App. 397, 914 P.2d 1194 (1996).

While it may be inferred from Smith's statements he intended to assault Jeremy in self-defense and that he 'may' or 'must' have taken some action by kicking or using a broken beer bottle to defend himself after Jeremy punched him, he nonetheless *affirmatively denied* taking any action during the alleged altercation that could have resulted in the fatal stab wound to the neck or using the knife that the evidence

overwhelmingly revealed was used in the attack on Jeremy. This is in contrast to Hendrickson, where the defendant admitted to using a knife to defend herself against her abusive boyfriend, but claimed she didn't intend to kill him and couldn't remember inflicting the fatal blow.

Here, Smith carefully limited his admissions to exclude any possibility his actions could be linked to the fatal neck wound that resulted in Jeremy's death. He only stated he 'may' or 'must' have used a piece of broken bottle to defend himself but only as to injuries Jeremy sustained over his mid-section. Additionally, Smith never admitted using the fixed blade knife found in his trailer that had Jeremy's blood on it and was consistent with all of Jeremy's stab wounds. Had Smith only said he was responsible for the wounds to Jeremy's mid-section and not spoken affirmatively about the fatal neck wound, he may have been entitled to justifiable homicide instructions pursuant to Hendrickson. But by stopping short, limiting his statements and affirmatively denying responsibility for the fatal neck wound stating he would never stab a dude in the neck and that Jeremy's neck wound was the result of him accidentally falling on the broken beer bottle, Smith was no longer entitled to justifiable homicide instructions on manslaughter.

While, self-defense and a claim of accident are not always mutually exclusive and may, depending on the circumstances be claimed

at the same time, there must be evidence of both to warrant a self-defense instruction. In State v. Callahan, 87 Wn. App. 925, 927-28, 930, 943 P.2d 676 (1997) for example, the defendant and a driver of another car got into a heated exchange and both cars pulled over. Id. at 928. Seeing that he was outnumbered when the other driver got out of his car along with two other men, the defendant testified he brought his handgun with him for protection. Id. The gun discharged when the other driver tried to grab the gun from the defendant. The defendant admitted that he had displayed the gun because he feared for his safety, but denied pointing it at the driver and claimed the gun accidentally went off. Id.

On review, the appellate court found the Callahan was entitled to self-defense instructions notwithstanding Callahan's claim the actual shooting was accidental. Critical in the court's analysis was evidence Callahan acted with intent to defend himself by arming himself with a weapon in response to the confrontation prior to the accidental shooting. Self-defense and accident are therefore not mutually exclusive as long as there is evidence of both.

Here, Smith repeatedly affirmatively denied responsibility for Jeremy's fatal stab wound to the neck. Immediately following Jeremy's death Smith told everyone Jeremy's fatal neck wound was the result of an accident; that Jeremy had fallen and poked his neck on the broken beer

bottle. While Smith later acknowledged he may have grabbed, used or kicked broken beer bottle toward Jeremy in his effort to defend himself, he vehemently denied doing anything that could have resulted in Jeremy's fatal neck wound. Smith instead insisted Jeremy suffered that injury when he fell of his own accord because as he stated "I'm smart enough to never stab a dude in the neck." CP 77-107, Plaintiff Exhibit 184. Under these circumstances, the only available defense was excusable not justifiable homicide. See, Gogolin, 45 Wn. App. 640.(Excusable, not justifiable homicide instructions appropriate when the defendant claims during an altercation that he didn't know if he touched the victim but the victim nonetheless fell back on some stairs and struck her head on a railing.) See also, State v. Brightman, 155 Wn.2d 506, 2122, 122 P.3d 150 (2005) P.2d 150 (2005).

When a trial court determines in a homicide case there is no evidence to support the required finding, justifiable or excusable homicide instructions may be removed as a defense from the jury's consideration. State v. Kerr, 14 Wn. App. 584, 544 P.2d 38 (1975). Based on the evidence presented below, this Court should find the trial court did not err removing justifiable homicide instructions relating to manslaughter when the evidence overwhelmingly demonstrates Smith did not acknowledge

taking any defensive actions, intentionally or recklessly, that resulted in the fatal wound to Jeremy's neck.

- b. The jury necessarily rejected Smith's justifiable homicide theory prior to deliberating on whether Smith was guilty of manslaughter. Moreover, the State presented overwhelming evidence demonstrating beyond any reasonable doubt Smith actions were not legally justified. Therefore, Any error in failing to reference the lesser included charges of manslaughter in the first and second degree from the justifiable homicide instructions were*

The instructions as given in this case permitted Smith to argue his theory of defense and required the jury to consider Smith's claim of justifiable homicide by determining whether the state met its burden of proving Smith was not justified in defending himself beyond a reasonable doubt, before the jury could consider the lesser included offenses. As Smith argued in closing, if the jury could not find the state proved Smith was not justified in defending himself beyond a reasonable doubt as defined in the accurate justifiable homicide instructions given, they were 'done' and were required to enter not guilty verdicts on all the charged and lesser included offenses. Additionally, even if the jury had been instructed to consider whether the State had proven Smith wasn't justified killing

Jeremy beyond a reasonable doubt in the context to the lesser included instructions, no reasonable jury could have found beyond a reasonable doubt Smith was lawfully justified in stabbing and cutting Jeremy 8-10 times during what was described as a brief altercation to ward off what amounted to a fist fight and alleged eviction. Particularly here, where Smith affirmatively denied stabbing Jeremy in the neck and claimed the fatal neck wound was the result of Jeremy falling on a broken beer bottle.

Erroneous jury instructions on self-defense are not automatically of constitutional magnitude or presumed prejudicial such that a trial is considered fundamentally unfair. State v. O'Hara, 167 Wn.2d 91, 101–103, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010) (*abrogating* State v. LeFaber, 128 Wn.2d 896, 913 P.3d 369) Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Error is harmless when “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. at 15. (*quoting* Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

To determine whether the omission of an element is harmless error; the court considers whether the omitted element was supported by uncontroverted evidence. Id. at 19, State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010) (instruction defining assault adequately informed jury of requisite element of intent omitted from ‘to convict’ instruction.) The

error alleged here can only be construed as harmless. See, State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014), 325P.3d 135(2014). *see also*, State v. Robinson, 38 Wn. App. 871, 691 P.2d 213 (1984) (first degree murder and second degree assault convictions affirmed; error in instructions on self-defense were harmless in light of overwhelming evidence of guilt.) When deciding whether an instructional error contributed to the verdict or whether it is harmless, the court must ‘thoroughly examine the record’ and may consider how the case is argued to the jury.” State v. Johnson, 116 Wn. App. 851, 857, 68 P.3d 290 (2003) (*quoting State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

The jury necessarily found Smith did not act justifiably in self-defense when it deliberated and returned a not guilty verdict on murder in the second degree. The jury instructions on justifiable homicide accurately set forth the legal standard, including the states burden to prove the absence of justification beyond a reasonable doubt in the context of the murder in the second degree instruction. Because the lawful necessity of the killing negates the *intent* element set forth in the ‘to convict’ instruction the jury was required to deliberate on whether the state proved Smith was not justified beyond a reasonable doubt when he stabbed Jeremy in deciding whether to find Smith intended to murder Smith as defined by the murder in the second degree instructions. See, State v.

Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). If the jury determined the state could not prove Smith had not acted in self-defense as defined by the justified homicide instructions, they were directed to find Smith not guilty of murder in second degree, manslaughter in the first degree and manslaughter in the second degree. If on the other hand the jury determined Smith didn't intend to kill Jeremy but the state did prove Smith's actions were not justified beyond a reasonable doubt as defined by law in the instructions beyond a reasonable doubt, the jury was permitted to deliberate on to first degree manslaughter. The jury is presumed to follow the court's instructions. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).

Additionally, if the instructions had informed the jury justifiable homicide was a lawful defense to manslaughter in the first and second degree, no reasonable jury could have concluded the state could not disprove Smith was reasonably justified in excessively stabbing Jeremy to his death. Neither party had defensive wounds indicative of a fist fight and the axe Smith claimed Jeremy wielded was not found near the truck nor had any DNA or finger prints on it which seem to corroborate Chena's second statement, that Jeremy never had an axe. Additionally, nothing in the record suggests Jeremy and Smith were angry or arguing prior to the stabbing but in fact were friendly with each other until the final moments

before the stabbing. The overwhelming evidence reveals Smith brought a knife to a fist fight, lied about it and also simultaneously claimed the fatal neck wound was an accident. Any error in not giving justifiable homicide instructions in conjunction to the manslaughter offense was harmless beyond a reasonable doubt because Smith's actions, by his own words, did not support it. Smith's conviction should be affirmed. *See, Kidd*, 57 Wn. App. at 100–01 (error regarding self-defense instructions was harmless where no reasonable jury could have found that the shootings were lawful acts of self-defense).

3. The trial court did not abuse its discretion admitting extrinsic evidence for the limited purpose in evaluating Chena's bias and credibility when Chena gave several conflicting accounts of Smith and Jeremy's actions during the investigation and in testifying, admitted making some but not all of the reported statements and at times, claimed detectives got it wrong or that she was intimidated.

ER 613 provides:

(b) Extrinsic evidence of prior inconsistent statement of witnesses. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to a party-opponent as defined in rule 801(d)(2).

A witness may be impeached as to their credibility by a prior inconsistent statement. State v. Garland, 169 Wn. App. 869, 282 P.3d 1137 (2012). Inconsistent statements are generally introduced to show a witness is not being truthful and are admissible in considering witness credibility. *Id.* A trial court's admission of evidence pursuant to ER 613 is reviewed for abuse of discretion. Garland, 169 Wn. App. 869. A court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *Id.* A decision is manifestly unreasonable if the trial court, although applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *Id.*, *citing*, State v. Lewis, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990).

Contrary to Smith's argument, a statement does not need to directly contradict a witness testimony before a party may introduce a prior inconsistent statement for impeachment purposes. The test for inconsistency is not determined by the words or phrases themselves but rather by the whole impression or effect of what is being said or done. See, State v. Dickenson, 48 Wn. App. 457, 467, 740 P.2d 312 (1987). A material omission from one statement may also result in a statement being inconsistent for purposes of this rule. State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999).

Chena gave many different statements during the investigation, to 911 operator and at trial pertaining to critical details surrounding the circumstances of Jeremy's death and Smith's actions. During her testimony she acknowledged as much stating, in response to a question from the prosecutor to whether she recalled telling detective Francis immediately after Jeremy's death that she was not aware of any broken bottle:

I could---I don't know. It could have been right. My first statement was just....its' very cloudy to me.

RP 1284. Chena at times also claimed portions of her prior statements were not truthful and that detective Francis interpreted her statements wrong. RP 1286-7. Under these circumstances, the trial court's decision to admit an abbreviated recording of one of Chena's prior inconsistent statements, was well within the trial court's discretion. Particularly where the trial court appropriately instructed the jury it could only consider the portion of Chena's recorded statement for the limited purpose of evaluating her bias and credibility as a witness and the trial court did not have the benefit of a written transcript prior to making its decision during trial. CP 133.

4. The state presented sufficient evidence of Smith's 2003 California conviction for possession of a controlled substance for purposes of calculating his offender score.

The state has the burden of proving prior criminal history by a preponderance of the evidence. An defendant's offender score is generally calculated adding together the defendant's current offenses and the prior convictions. State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012). In determining the offender score, the court 'may rely on no more information than is admitted by the plea agreement, or admitted or acknowledged, or proved in a trial or at the time of sentencing.' RCW 9.94A.530(2).

While the best evidence of a prior conviction is a certified judgment and sentence, due process only requires "information bearing 'some minimal indicium of reliability beyond mere allegation.'" State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), disapproved of by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014) (emphasis omitted), quoting, State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999); *see also*, State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002) ("State must provide reliable evidence establishing the accuracy of the offender score calculation"). The State is permitted to use other documents of record to establish a prior conviction if it cannot obtain a certified

judgment and sentence. State v. Labarbera, 128 Wn. App. 343, 348, 115 P.3d 1038 (2005). A presentence investigation report along with a DISCIS printout are examples of such documents that together are adequate to establish a prior conviction. *Id.* Bare assertions, unsupported by evidence do not however, satisfy the state's burden.

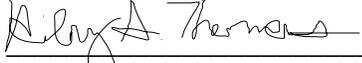
In this case, the State went to great lengths to gather Smith's criminal history, including issuing a subpoena in request for certified judgements from the State of California. RP 86. (Sentencing transcripts 8/10/2005) After failing to receive certified copies of Smith's California judgements, the State provided a variety of documents and testimony to support the inclusion of Smith's 2003 California conviction for felony possession of a controlled substance.. RP 113. Bellingham Police Officer Ben Vodopich was able to compare Smith's finger prints to the finger prints taken related to Smith's California convictions and Cassandra Keustermeyer from Washington State Department of Corrections testified she assisted the prosecutor's office in serving a subpoena for Smith's California records in trying to obtain and confirm his criminal history. RP 19, 30. Ms.Keustermeyer was able to obtain a transfer of probation request report used when Smith transferred probation from California to Washington State and using this in conjunction with discussions with Smith's probation officer and criminal history database, confirmed Smith

was convicted of felony possession of methamphetamine in California in 20013. RP 47, 63, 104, 105. This testimony, in conjunction with the finger print analysis connecting Smith to his past California crimes provided the trial court with sufficient indicia of reliability by a preponderance of evidence to support the trial court's inclusion of Smith's possession of a controlled substance felony offense in the calculation of Smith's offender score.

E. CONCLUSION

The State respectfully requests this Court affirm Smith's conviction for manslaughter in the second degree while armed with a deadly weapon.

Respectfully submitted this 18th day of October, 2016.

 #22007 for
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Attorney for Respondent
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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Legal Assistant

10/18/16

Date