Supreme Court No. _____
Court of Appeals No. 57813-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.

COURTNEY HUMPHREY FELTON,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Courtney Felton, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Felton seeks review of the unpublished opinion of the Court of Appeals in ***State v. Felton,*** No. 57813-1-II, 2024 WL 1281419, (Slip op. March 26, 2024). A copy of the decision is attached as Appendix A at pages A-1 through A-13.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where the trial court erred in denying Mr. Felton the requested self defense jury instruction and prevented him from presenting his theory of the case in violation of the Fourteenth Amendment and article I, section 22 of the Washington Constitution?

D. STATEMENT OF THE CASE

The State charged Courtney Felton in an information filed May 11, 2021, with first degree burglary and second degree

assault. Clerk's Papers (CP) at 4-6.

The following testimony was presented at trial:

Michael Taylor and Shanerica Carter lived in a townhouse in Tacoma. RP at 197. Ms. Carter's fourteen-year-old daughter A.J. also lived there. RP at 199. Before Ms. Carter moved into the townhouse, Samantha Felton and her adult son, Aviontay, lived in the townhouse. RP at 231. They moved out and Ms. Carter began a relationship with Mr. Taylor and she later moved into the townhouse. RP at 200, 231.

Shanerica Carter and Samantha Felton were previously friends, but the friendship ended acrimoniously when Ms. Carter became involved with Michael Taylor. RP at 200, 202. In particular, Samantha Felton did not like Mr. Taylor. RP at 202. Mr. Taylor said that Samantha Felton did not seem to like him and he thought it was because "she thinks I'm white." RP at 315.

Ms. Carter was also close to Aviontay and previously close to Samantha Felton's daughter, Shavante Duke, although that relationship ended also. RP at 205. Ms. Carter said that Aviontay is a "special needs" adult. RP at 205. Ms. Carter said that

Aviontay had medical conditions and suffered from seizures. RP at 235. Ms. Carter said that three or four months prior to the incident at the townhouse on May 10, 2021, Aviontay had run away from Samantha Felton's house and went to Ms. Carter's and Mr. Taylor's townhouse. RP at 206-07.

Ms. Carter said that Aviontay had previously lived in the townhouse and that she moved in about two months after Aviontay and Samantha Felton moved out. RP at 231.

After their friendship ended, Ms. Carter said that Samantha Felton wanted a purse and a cell phone returned that she had given to Ms. Carter's daughter, A.J., and that she sent angry texts for the return of those items. RP at 209-10.

The tensions between Ms. Carter and Ms. Felton were evident at a barbeque that took place on May 7, 2021, at Ms. Carter's and Mr. Taylor's townhouse. RP at 211. The family barbeque was attended by eight to ten people. RP at 316. Samantha Felton was briefly at the barbecue to drop off Ms. Carter's daughter, A.J., so that she could attend. RP at 211. There was an argument and Ms. Carter called 911 because Ms.

Felton refused to leave the barbecue after dropping off A.J. RP at 212. Mr. Taylor testified that they called police on the non-emergency line because of aggressive text messages from Ms. Felton. RP at 318.

Three days after the barbecue—early on May 10, 2021, Mr. Taylor and Ms. Carter were woken up at approximately 3:00 a.m. by the sounds of yelling and breaking glass coming from outside the townhouse. RP at 213, 319. They looked outside and saw Samantha Felton and her daughter Shavante Duke looking up at the window and shouting, and saw that they were throwing glass bottles at the house and had damaged Ms. Carter's car with a bottle. RP at 214, 240, 241, 319, 320.

Mr. Taylor went down the stairs to the front door while on the phone with 911, and when he was halfway down the stairs the door suddenly broke open and Samantha Felton, her brother Courtney Felton, and Shavante Duke came into the townhouse. RP at 217-218, 219, 327. Ms. Carter testified that when they came into the house, Shavante Duke yelled "where is my brother?" RP at 224.

Ms. Carter testified that she did not have any information that Aviontay was missing and stated that she last saw Aviontay three or four months earlier when he had run away from Ms. Felton's house and went to the townhouse. RP at 224, 230.

In a statement written by Ms. Carter's sister and signed by Shanerica Carter, she said that "Samantha walked through the busted door and entered the garage like she was looking for something or someone." RP at 282. Ms. Carter acknowledged that she told the defense investigator that Ms. Duke was yelling "where's my brother?" when she entered the house, and that Samantha Felton was asking "where's my son?" when she came into the townhouse, and that they told her that they thought Aviontay was in the townhouse. RP at 289. She acknowledged on cross examination that Aviontay had run away in the past and that on May 10, 2021 they told her that Aviontay had run away and that he was in the townhouse. RP at 289-90.

Mr. Taylor said that Samantha Felton came into the house first and went into the garage, and Courtney Felton also came inside and went up the stairs. RP at 323, 350. He said that Mr.

Felton grabbed his shirt and said, "lets go" and that Mr. Taylor hit him in the face. RP at 325, 329, 346.

Ms. Carter said that she went down the stairs and Courtney Felton, Samantha Felton, and Shavante Duke were kicking and punching Mr. Taylor, and that one of them was hitting Mr. Taylor with a metal shelf bracket and that Ms. Duke was cutting him with a metal blade or knife. RP at 220.

Ms. Carter said after trying to help Mr. Taylor on the stairs, she and A.J. were chased back up the stairs and Ms. Duke pushed Ms. Carter and her daughter down at the top of the stairs. RP at 291.

Tacoma Police Officer Cory Correia arrived at the townhouse and saw broken glass bottles in front of the building and the front door was open. RP at 417, 418. She stated that Mr. Taylor came down the stairs with blood on his face and his arms "were extremely cut up." RP at 419. Mr. Taylor told police that three people broke into the house, went upstairs and threw him to the ground and all three were hitting and kicking him. RP at 429. Officer Correia said that Mr. Taylor said that Shavante Duke

started yelling at Ms. Carter and that Mr. Taylor jumped in between them after Shavante Duke pushed Ms. Carter to the ground. RP at 441.

Officer Correia said Ms. Carter told Officer Correia that she believed it was Ms. Duke who had the blade that was used to cut Mr. Taylor. RP at 429.

Officer Correia testified that while she was at the townhouse, she learned that South Sound 911 was tracking the phone taken from Mr. Taylor, and that the phone was still connected to 911. RP at 430. South Sound 911 was able to determine that the phone was still "in movement" in a vehicle in north Tacoma and that 911 personnel could hear people in the vehicle yelling and talking. RP at 430. A redacted version of the 911 call was played to the jury. RP at 376. The call included female voices and a male voice saying "I almost killed him, almost, almost died right there, and I pulled him down the stairs and somebody else—" Exhibit 1.

By "pinging" the phone that was still connected to 911 dispatch, police were able to locate the car parked near an

apartment complex. RP at 464. Police contacted Mr. Felton in the driver's seat of the car. RP at 465. Mr. Felton was searched incident to arrest and police obtained Mr. Taylor's cell phone and a piece of metal. RP at 389, 391.

Ms. Duke and Ms. Felton were located by police in an apartment. RP at 466. Police also talked to the occupants through the apartment door. RP at 466. Police dispatch was also in telephone communication with the occupants, but they refused to come out of the apartment. RP at 467. The police remained on the scene for about fifty minutes. RP at 467. Ultimately the police left without entering the apartment and neither were taken into custody. CP at 2.

The defense proposed a self-defense jury instruction for the second degree assault charge. CP at 124. Defense counsel argued that there was evidence presented at trial supporting both self defense and defense of others. RP at 489-90. The State argued that he was not entitled to a self-defense instruction because Mr. Felton was the aggressor when he grabbed Mr. Taylor, after which Mr. Taylor punched him.

The trial court did not give the proposed self-defense jury instruction requested by the defense. RP at 490-92.

The jury found Mr. Felton guilty of first degree burglary and second degree assault. 7RP at 620; CP at 165-68. The jury was unable to reach a decision regarding the deadly weapon special verdict form. CP at 169, 170.

In his direct appeal, Mr. Felton argued that the trial court erred by refusing to give jury instructions on self-defense and defense of others. ***Felton***, slip opinion at *1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE THE TRIAL COURT DENIED MR. FELTON HIS RIGHT TO MEANINGFULLY PRESENT HIS CLAIM THAT HE ACTED IN DEFENSE OF HIMSELF AND OTHERS

An accused person's right to present a defense is constitutionally protected as one of the "minimum essentials of a fair trial." ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const, amends. VI; XIV; Const, art. I, §§ 3, 22. The right to act in self-defense as "a basic right" that is deeply rooted and "fundamental" to our concept of liberty." ***McDonald v. City of Chicago, Ill.***, ___U.S.___, 130 S. Ct. 3020, 3036-37, 177 L. Ed. 2d 894 (2010); U.S. Const, amend. XIV.

Self-defense instructions must direct the jury to evaluate the incident from the "point of view which [the defendant] had at the time of the tragedy." ***State v. Wanrow***, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977), quoting ***State v. Tribett***, 74 Wash. 124, 130, 132 P. 875 (1913). For the jury to decide what a reasonably prudent person would have done, it must evaluate all circumstances available to the defendant, "with all its pertinent sidelights as the appellant was

warranted in viewing" the situation. *Id.*

A person does not have to be in actual danger to act in lawful self-defense. ***State v. Riley***, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A person is entitled to act in self-defense based on a personal belief of imminent harm and when using a reasonable degree of force in response to that perceived threat. *Id.* The trial court may not undercut an accused person's claim of self-defense through its evidentiary rulings or instructions to the jury. ***State v. Irons***, 101 Wn. App. 174, 549-50, 4 P.3d 174 (2000). A criminal defendant is entitled to a jury instruction on self-defense when there is "some evidence" demonstrating the justifiable use of force. ***Irons***, 101 Wn. App. at 449. Failure to instruct the jury on the defendant's theory of the case is reversible error "if there was evidence to support that theory." ***State v. Fisher***, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (internal citation omitted).

Here, Division Two agreed that under the facts of this case, Mr. Felton was entitled to a self defense instruction. Slip op. at *7. Conversely, the State was also entitled to a first aggressor instruction. Division Two determined that that Mr. Felton presented "some

evidence" supporting self defense. *Felton*, slip. op. at *8. The Court noted that Mr. Taylor acknowledged that he hit Mr. Felton first and that "there was some evidence that Felton had a subjective, reasonable belief that he would suffer imminent harm." *Felton*, slip. op. at *8 (citing ***State v. Grott***, 195 Wn.2d 256, 266, 458 P.3d 750 (2020), ***Riley***, 137 Wn.2d at 909. The Court found that

> Felton was entitled to a self-defense instruction that would have allowed him to argue his theory of the case regarding the second degree assault charge—specifically that the group only entered the house to look for Aviontay and, because of their preexisting relationships, the group did not give Taylor or Carter a reason to fear imminent harm so he was only acting in self-defense when he responded to Taylor's punch.

Felton, slip. op. at *8-9.

Moreover, the Court noted that although the State was also entitled to a first-aggressor instruction, Felton was nevertheless not precluded from receiving a corresponding self-defense instruction. *Felton*, slip. op. at *9 (citing ***Riley***, 137 Wn.2d at 910, ***Grott***, 195 Wn.2d at 267).

Mr. Felton's anticipated theory of defense rested on his use of reasonable force in response to Mr. Taylor's assault on him and assaultive conduct towards Ms. Duke and Samantha Felton. It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case. ***State v. Kidd***, 57 Wn. App. 95, 99, 786 P.2d 847, 850 (1990). Mr. Felton asked the court to instruct the jury on the standard of self-defense and defense of others that applied when Mr. Taylor provoked the fight by hitting Mr. Felton shortly before the melee started. Mr. Felton sought to argue to the jury his acts constituted lawful use of force, intended to protect Samantha Felton and Ms. Duke by stopping Mr. Taylor from assaulting them during the fight inside the apartment. RP at 490. Even if the jury disbelieved Mr. Taylor and Ms. Carter, without this requested self-defense and defense of others instructions, the jury could *only* view his conduct as the first act of aggression, which is not accurate portrayal of the facts. Without the requested instruction, the jury would misconstrue his lawful defense of himself and others as making him the first aggressor.

A court abuses its discretion when it refuses to give an instruction that lets a party argue its theory of defense and is supported by "some evidence." See ***Irons***, 101 Wn. App. at 449. Furthermore, "[a] defendant in a criminal case is entitled to have the jury *fully* instructed on the defense theory of the case." ***State v. Fernandez-Medina***, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000) (emphasis added, internal citation omitted).

Contrary to the ruling by Division Two, this error was not harmless. An error is prejudicial and not harmless if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." ***State v. Smith***, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The denial of this instruction was not harmless as it prevented the defense from presenting its reasonable and supportable theory of self defense to the jury. See ***State v. Byrd***, 125 Wn.2d 707, 714-15, 887 P.2d 396 (1995) (affirming Court of Appeals decision that "instructional error" was "misleading and prejudicial").

"An instructional error is harmless only if it 'is an error which is *trivial, or formal, or merely academic*, and was not prejudicial to

the substantial rights of the party assigning it, and in no way affected the final outcome of the case."' ***State v. Walden***, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (quoting ***State v. Wanrow***, 88 Wn. 2d 221, 237, 559 P.2d 548 (1977)) (emphasis in the original).

Here, without the benefit of his theory of defense, the trial court's instructions limited Mr. Felton to arguing that he wasn't an active participant in the melee rather than argue that to the jury that he was defending himself to prevent Mr. Taylor from hitting him again or hitting the other two. RP at 588.

Mr. Felton was not permitted to convey his theory of defense to the jury even though at least "some" evidence supported it. The court's instructions, and prosecution's argument, left the jury with little choice but to find Mr. Felton was not entitled to act in self-defense or defense of another. It never knew that Mr. Felton could lawfully defend himself or others.

The error is constitutional and cannot be deemed harmless unless it is harmless beyond a reasonable doubt. ***State v. Stark***, 158 Wn.App. 952, 961 244 P.3d 433 (2010). The State cannot meet its burden of proving harmlessness, because the jury was utterly unable

to even consider the defense theory of self defense, despite "some evidence" supporting the theory. See ***Walden***, 131 Wn.2d at 473 (erroneous jury instructions were not harmless because they "may have" affected the outcome of the case).

The petitioner respectfully submits that the Division Two incorrectly decided this issue, and that the trial court erred by failing to give a self defense instruction and asks that review be accepted.

F. CONCLUSION

For the foregoing reasons, Court should accept review and should reverse the convictions and remand to the trial court.

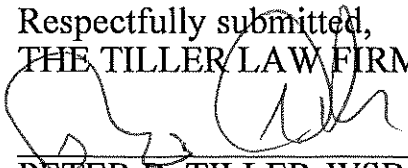
DATED: April 24, 2024.

Certification of Compliance with RAP 18.17:

This petition contains 2925 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: April 24, 2023.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned attorney for the Appellant, hereby certifies that this Petition was e-filed by JIS Link to Mr. Derek M. Byrne, Court of Appeals, Division 2, Kristie Barham, Pierce County Prosecuting Attorney's office, and mailed to Courtney Humphrey Felton, appellate pre-paid on April 24, 2024, at the Centralia Washington post office addressed as follows:

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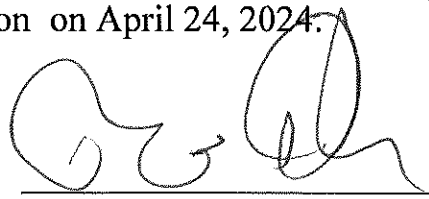
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 24, 2024.



PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 26, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COURTNEY HUMPHREY FELTON, Appellant.	No. 57813-1-II UNPUBLISHED OPINION

PRICE, J. — Courtney H. Felton appeals his conviction for second degree assault arguing that the trial court erred by refusing to give jury instructions on self-defense and defense of others.[1] Felton also argues that the trial court erred by imposing a $500 crime victim penalty assessment (VPA) and a $100 DNA collection fee as part of his sentence. We conclude the trial court erred by failing to give proper jury instructions on self-defense but the error was harmless. The superior court did not err by refusing to give a jury instruction on defense of others. Accordingly, we affirm Felton's second degree assault conviction but remand to the trial court to strike the legal financial obligations (LFOs) that are no longer authorized by the legislature.

FACTS

In the early morning hours of May 10, 2021, Felton broke into a townhouse where Michael Taylor and Shanerica Carter lived. Felton was with his sister, Samantha Felton, and Samantha's[2]

[1] Felton was also convicted of first degree burglary, but he does not appeal his first degree burglary conviction.

[2] We refer to Samantha by her first name to avoid confusion. We mean no disrespect.

adult daughter, Shavante Duke. Felton beat up Taylor while inside the townhouse. The State charged Felton with first degree burglary and second degree assault. The case proceeded to a jury trial.

Carter, Taylor, and several responding officers testified at trial. The parties had a long-established relationship because Carter and Samantha had been friends for many years. Samantha was god mother to Carter's daughter and Carter was close to all of Samantha's children. However, after Carter met Taylor, her relationship with Samantha began to deteriorate. Despite this, Samantha continued to have a good relationship with Carter's daughter.

As for the specific events on May 10, Carter testified that in the early morning hours, she was awoken by Samantha throwing glass bottles at the windows of her townhouse. After Carter woke up Taylor, the two headed down their stairs to the first floor. At that moment, Felton, Samantha, and Duke kicked in the front door. The kick broke the deadbolt and the door frame came off.

Carter testified that Felton was the first person through the broken door. He first went into the garage for a few seconds, but then started up the stairs to confront Taylor and Carter. Carter testified that Felton and Duke began punching and kicking Taylor. Duke was also hitting Taylor with a sharp metal shelving bracket. When Carter tried to help Taylor, Duke pushed her back up the stairs and onto the floor.

Taylor testified that Carter woke him up in the early morning hours because she heard a noise outside. Taylor looked out the window and saw Samantha and Duke outside. Then Taylor called 911. While Taylor was on the phone with 911, he heard banging on the front door. As Taylor began going down the stairs, "the door busted open." 4 Verbatim Rep. of Proc. (VRP)

at 323. Felton then approached Taylor on the stairs, grabbed him by the shirt, and said, "Let's go." 4 VRP at 324. Taylor testified that he thought he was going to be killed, so he hit Felton. Taylor and Felton "got into a tussle," with Taylor ending up on the floor. While Taylor was on the floor, Felton kept repeatedly punching Taylor. Taylor believed other people were hitting him as well.

On cross-examination, Taylor was asked if he got between Carter and Duke at any time during the incident. Taylor responded no, but that he had gotten between them during an earlier incident that occurred prior to May 10. Taylor was asked again if he had told the police that he jumped between Duke and Carter when they arrived after the May 10 incident. Taylor again said he was referring to the prior incident.

Officer Cory Correia, who responded to the townhouse on the early morning of May 10, also testified. On cross-examination, Officer Correia testified that Taylor had told him that morning that Duke was screaming at Carter and pushed Carter to the ground, which caused Taylor to intervene by jumping between them.

There was some dispute at trial about why Samantha, Felton, and Duke were at the townhouse on May 10—specifically, whether they were looking for Samantha's son, Aviontay. Aviontay was around 21 years old in May 2021. Aviontay was cared for by Samantha because he had special needs related to seizures.

A few months before the May 10 incident, Aviontay had run away from Samantha's home and gone to Carter's townhouse. When Aviontay arrived, Carter called Samantha, who then came and got him.

During trial, Carter maintained that she did not have any information that Samantha, Felton, and Duke were looking for Aviontay, although she did testify Duke asked where her

brother was when she came into the townhouse. On cross-examination, Carter was asked about several previous statements she had made that indicated Samantha and Duke were looking for Aviontay.

Felton did not testify at trial.

Felton proposed a self-defense jury instruction for the second degree assault count. Felton's proposed instruction stated, in relevant part:

> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he 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.

Clerk's Papers at 124.

In the discussion with the trial court, Felton asserted there was evidence presented at trial supporting both self-defense and the defense of others:

> [FELTON]: Like Mr. Taylor saying he threw the first punch.
>
> [COURT]: After his door was kicked in and people came charging up the stairs.
>
> [FELTON]: Well, that's his argument but --
>
> [COURT]: That's not just the argument. That's supported by both direct and circumstantial evidence.
>
> [FELTON]: There is evidence for that. I'm not arguing like that is what [Taylor] said happened, but he says that he threw the first punch, that Mr. Felton -- the evidence shows that Samantha and [Duke] were the two people outside doing things and that's what he was concerned about. He says he threw the first punch, and that should create a situation of self-defense with Mr. Felton.
>
> Also, [Taylor] denied having said it to the officer, but the officer wrote in his report and was refreshed -- his recollection was refreshed that in the moment after -- when the first Officer Correia arrived and was talking to Mr. Taylor about what happened, before he had a chance to get his story straight, he said that he jumped -- that Mr. Taylor jumped between the two women who were screaming at each other, and Ms.

> Duke was screaming at his girlfriend, and he inserted himself between them and intervened, and then Mr. Felton removed Mr. Taylor from that situation, and so it's reasonable to think that -- well, an argument can be made that defense of others, that Mr. Felton was protecting his niece and sister from Mr. Taylor and the others inside that apartment.

5 VRP at 489-90.

The State argued that Felton was not entitled to claim self-defense because he was the aggressor when he grabbed Taylor before Taylor punched him.

The trial court rejected the proposed self-defense instruction. The trial court noted that self-defense is based on a person's right to defend themselves from an unwarranted attack but "[w]hen you break into somebody's house by kicking the door in in the middle of the night, you are not being subjected to an unwarranted attack." 5 VRP at 490. Thus, the trial court determined that Felton's proposed instruction was "unwarranted under the facts." 5 VRP at 491.

In closing argument, Felton's defense counsel argued that the growing split between Carter and Samantha provided the context for Carter's and Taylor's reactions to the incident on May 10. However, defense counsel contended there was no evidence that Felton knew anything about this ongoing and growing dispute between Carter and Samantha. Further, defense counsel argued that this dispute resulted in Taylor "ready for a fight" on the day of the incident, but Felton was only involved because he was looking for Aviontay. 6 VRP at 574.

Defense counsel also argued that there was no sinister motivation behind throwing beer bottles at the townhouse. Instead, they were only trying to wake up Carter and Taylor so they could find Aviontay.

As for the entry into the townhouse, defense counsel suggested that the door may not have been kicked in at all because there was no reliable evidence of the door being kicked in. Defense counsel claimed there was no evidence that Felton, personally, broke down the door or knew that Samantha and Duke may have entered the townhouse unlawfully.

Finally, defense counsel argued that Taylor misinterpreted Felton's "[l]et's go" statement because Taylor was on "heightened alert" and expecting a fight. 6 VRP at 585. Defense counsel argued that there was another way to interpret the statement:

> A person can say, "Let's go," to someone in the context that Mr. Taylor took it through his already heightened alert lens, or it can mean: "All right, buddy. Let's go. Let's get out of this situation. I'm pulling you out of here. You're fighting with my niece."

6 VRP at 585.

The jury found Felton guilty of first degree burglary and second degree assault. The trial court imposed a standard range sentence of 42 months' total confinement. The trial court found Felton was indigent and imposed the $500 VPA and $100 DNA collection fee.

Felton appeals.

ANALYSIS

Felton argues that the trial court erred by denying his proposed jury instructions on self-defense and defense of others. Felton also argues that the VPA and DNA collection fee should be stricken from his judgment and sentence because they are no longer authorized by statute. We affirm Felton's second degree assault conviction but remand to the trial court to strike the VPA and DNA collection fee.

I. JURY INSTRUCTIONS

" 'Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law.' " *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). We review whether there is sufficient evidence to support a lawful use of force instruction de novo. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

A. SELF-DEFENSE

Felton argues that the trial court erred by denying his proposed jury instruction on self-defense because there was "some evidence" that he had an objective and subjective belief that he was going to suffer imminent harm. Br. of Appellant at 15. The State argues Felton was not entitled to self-defense because he was the aggressor.

We agree with Felton that, under these facts, the trial court should have given a self-defense instruction, although the State was also entitled to a first aggressor instruction. However, the trial court's error was harmless.

"The use of force is lawful and justified where the defendant has a 'subjective, reasonable belief of imminent harm from the victim.' " *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020) (quoting *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). "To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense, i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger." *Riley*, 137 Wn.2d at 909. " 'The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person

standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees.' " *Grott*, 195 Wn.2d at 266 (quoting *Riley*, 137 Wn.2d at 909). Once the defendant meets the initial burden of producing some evidence that his actions occurred in circumstances amounting to self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *Id.*

" 'However, in general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation.' " *Id.* (quoting *Riley*, 137 Wn.2d at 909). Because a first aggressor instruction " 'impacts a defendant's claim of self-defense,' " trial courts " 'should use care' " when deciding to give a first aggressor instruction. *Id.* (quoting *Riley*, 137 Wn.2d at 910 n.2). "However, first aggressor instructions 'should be given where called for by the evidence.' " *Id.* (quoting *Riley*, 137 Wn.2d at 910 n.2). A first aggressor instruction is appropriate "[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense" or "if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *Riley*, 137 Wn.2d at 909-10. "[W]hether a first aggressor instruction should be given is a highly fact-specific inquiry" and the evidence supporting a first aggressor instruction must be carefully considered in the light most favorable to the requesting party. *Grott*, 195 Wn.2d at 267.

Here, Felton presented "some evidence" supporting his claim of self-defense. Taylor testified that he punched Felton in the face before Felton began punching him. Because Taylor admitted that he punched Felton first, there was some evidence that Felton had a subjective, reasonable belief he would suffer imminent harm. *Grott*, 195 Wn.2d at 266; *Riley*, 137 Wn.2d at 909. Felton was entitled to a self-defense instruction that would have allowed him to argue his

theory of the case regarding the second degree assault charge—specifically that the group only entered the house to look for Aviontay and, because of their preexisting relationships, the group did not give Taylor or Carter a reason to fear imminent harm so he was only acting in self-defense when he responded to Taylor's punch.

Of course, there was credible evidence that Felton was the aggressor. Carter and Taylor both testified that Samantha and Duke were throwing bottles at their townhouse and that the door to the townhouse was kicked in—all during the early morning hours when Carter and Taylor were asleep. And given the time of the day and loud, destructive commotion of breaking beer bottles, Taylor immediately called 911. Further, Taylor testified that he only punched Felton after Felton confronted him on the stairs, grabbed his shirt, and said, "Let's go." Under these facts, the State would have been entitled to a first aggressor instruction.

However, just because the State was clearly entitled to a first aggressor instruction, Felton is not precluded from obtaining a jury instruction on self-defense. *See Riley*, 137 Wn.2d at 910; *Grott*, 195 Wn.2d at 267.[3] Providing a first aggressor instruction along with Felton's proposed self-defense instruction would have properly allowed both parties to argue their theories of the

[3] The State relies heavily on *State v. Craig*, 82 Wn.2d 777, 784, 514 P.2d 151 (1973), in which our Supreme Court held that the defendant was not entitled to a jury instruction on self-defense because the defendant "admittedly engaged in conduct which gave the victim good cause to believe that he was threatened with bodily harm." *Craig* is distinguishable because, there, the defendant admitted to the conduct, whereas here, the context and specific conduct leading up to the assault was contested.

Further, *Craig* was decided in 1973, without the benefit of the more recent case law indicating that where there is evidence that the defendant was the aggressor, it is appropriate to give a first aggressor instruction together with a self-defense instruction, rather than to deny a requested self-defense instruction in the first place. *See Riley*, 137 Wn.2d at 910; *Grott*, 195 Wn.2d at 267.

case. The jury instructions given in this case did not allow Felton to argue his theory of the case. Therefore, the superior court erred by failing to properly instruct the jury on self-defense.

However, the failure to give an instruction can be harmless. " 'An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) (alteration in original) (quoting *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002)).

Here, there was undisputed evidence that Felton, Samantha, and Duke entered the townhouse unexpectedly and without permission, in the middle of the night, after throwing beer bottles at the house. Even though there was some evidence to support Felton's theory that they were at the house looking for Aviontay, none of the three attempted to communicate to Carter or Taylor before arriving at the house. Similarly, the only evidence actually presented—Taylor's testimony—was that after the group's uninvited, late-night entry, Felton grabbed Taylor first and made an arguably threatening statement of "[l]et's go," all before any punches were thrown. Based on all the evidence presented at trial, we are convinced beyond a reasonable doubt that the failure to instruct the jury on self-defense (with a companion first aggressor instruction) did not contribute to the verdict. No reasonable juror would have found that Felton was not the aggressor. Although the trial court should have given complete instructions on self-defense, we conclude the error was harmless. Accordingly, we affirm Felton's second degree assault conviction.

B. DEFENSE OF OTHERS

Felton also argues that the trial court erred by refusing to instruct the jury on the lawful use of force in defense of others. We disagree.

A defendant's use of force is justifiable to protect a third party from injury when: (1) the defendant would be justified in using force to defend himself or herself against the same injury being threatened against the third party, (2) under the circumstances as understood by the defendant, the third party would be justified in using force to protect himself or herself, and (3) the defendant believes that the intervention is necessary to protect the third party. *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). Further, the defendant's apprehension of danger must be reasonable under the circumstances. *Id.*

Here, the only evidence Felton argues supports his defense of others instruction was Officer Correia's testimony that Taylor had said on the night of the incident that he jumped between Duke and Carter after Duke had been screaming at Carter and pushed Carter to the ground. Even assuming this statement is true, a defense of others instruction would have been inappropriate. Duke would not have been justified in using force to protect herself from Taylor because Duke, herself, was the aggressor who pushed Carter to the ground. Further, neither Samantha, Duke, nor Felton testified, and there was no other evidence that Felton had a reasonable apprehension of danger to Duke. Taylor's alleged statement (to Officer Correia) that he jumped between Duke and Carter only suggests that Taylor may have physically put himself in between Duke and Carter. But it falls well short of being some evidence that Taylor acted in a way that created a reasonable apprehension of danger to Duke. Simply put, there was not sufficient evidence to support an

instruction on the defense of others, and the trial court did not err by refusing to give Felton's proposed instruction.

II. LFOs

Felton argues that the VPA and DNA collection fee should be stricken from his judgment and sentence because they are no longer authorized by the legislature. We agree and remand to the trial court to strike the VPA and the DNA collection fee.

Effective July 1, 2023, the VPA is no longer authorized for indigent defendants. LAWS OF 2023, ch. 449 § 1; RCW 7.68.035(4). The legislature also removed authorization for the DNA collection fee. LAWS OF 2023, ch. 449 § 4; RCW 43.43.7541. And changes to the legislation governing LFOs apply to cases on direct appeal when the change was enacted. *State v. Matamua*, __ Wn. App. 2d __, 539 P.3d 28, 39 (2023).

Because the trial court found Felton indigent, the VPA is no longer authorized by statute. And the DNA collection fee is also no longer authorized by statute. Therefore, the VPA and DNA collection fee should be stricken from Felton's judgment and sentence.

CONCLUSION

We affirm Felton's conviction for second degree assault but remand to the trial court to strike the VPA and DNA collection fee from Felton's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

GLASGOW, C.J.

VELJACIC, J.

THE TILLER LAW FIRM

April 24, 2024 - 4:47 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Courtney Humphrey Felton, Appellant
Superior Court Case Number:	21-1-01135-5

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