Supreme Court No. 98925-7 COA No. 52405-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BLESS CHIECHI,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

UNITED STATES CASES **Page**

COURT RULES **Page**

A. IDENTITY OF PETITIONER

Petitioner, Bless Chiechi, 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

Chiechi seeks review of the unpublished opinion of the Court of Appeals in ***State v. Chiechi***, cause number 52405-8-II, filed July 21, 2020. A copy of the decision is contained in Appendix A at pages A-1 through A-13.

C. ISSUE PRESENTED FOR REVIEW

Chiechi has a Sixth Amendment right to effective assistance of counsel. Should this Court accept review where Chichi was deprived of his right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 when his attorney agreed to a "first aggressor" jury instruction?

D. STATEMENT OF THE CASE

1. Procedural history:

Cheichi appealed his conviction for first degree assault in ***State v. Chiechi***, No. 52405-8-II, 2020 WL 4194608, (Wash. Ct. App. July 21, 2020) (unpublished). The State charged Chiechi with one count of first-degree assault with a deadly weapon enhancement of Barry Bernand following an incident on August 27, 2017.

On that date, at a gathering at a house with several other people, Chiechi and another man were arguing. 2RP at 203-04. Chiechi challenged another man—Barry Bernard—to a fight and went outside and "threw punches at each other," and Bernard was holding Chiechi down, and then released Chiechi, who then ran to his house, located about a block and half away. 2RP at 207-08.

Bernard stated that while standing outside, Chiechi had returned, and when Bernard turned, Chiechi hit him twice on the left side of his head with a baseball bat. 2RP at 208. He stated that he tried to hit him a third time, which he blocked with his left arm and then was hit again on his legs, and then on the right side of his head. 2RP at 209. He stated that after that "we fought again," and that he "left because his wife was saying she was going to call the cops." 2RP at 210.

Another witness said that Bernard had 'had hold of' Chiechi as they went down the sidewalk toward Chiechi's house. 2RP at 231. He said that both of them were on ground, and then got up, and that this took place close to Chiechi's house. 2RP at 237.

Chiechi told police that Bernard started the fight and that Bernard was intoxicated, but that Chiechi was not. 3RP at 330. The officer stated that Chiechi said that he was trying to go home, and that Bernard followed him and grabbed Chiechi's hair. 3RP at 335. The officer stated that Chiechi told him that Bernard had him in a headlock until they got to the carport at

Chiechi's house, which is about a block and half from 710 South Fourth Avenue. 3RP at 335. He told the officer that he was able to get a miniature baseball bat out of his car and that he used it to hit Bernard six times. 3RP at 330, 341. Officer Gower said that Chiechi told him that he used the bat to hit Bernard once in the leg, twice on his body and three times in the head. 3RP at 330.

Chiechi said that Bernard was aggressive to him, telling him that he wanted to fight. 3RP at 382. He stated that he told the uncle of Bernard to calm him down, but he did not listen to his uncle and Chiechi then left the house to avoid fighting. 3RP at 383. Bernard followed Chiechi back to Chiechi's house, and then grabbed and pulled his hair from behind, which he wore in a ponytail at the time. 3RP at 383. Bernard held Chiechi so that he could not turn around, and then pushed him toward the grass while walking to Chiechi's house. 3RP at 384. He stated that he told Bernard to stop fighting and that he did not push him "because I didn't want to fight." 3RP at 385.

Bernard was holding his hair with one hand and then started punching him with the other hand, and as they got closer to his house--- while Bernard was still holding his hair in one hand--- Chiechi was able to reach his remote keylock to open his car, which was parked on the street, and retrieve a small metal bat from his car. 3RP at 385. Chiechi used the bat to hit Bernard on the legs. 3RP at 385-86. Bernard released his grip on

Chiechi's ponytail and left but came back about three minutes later with a two-handled metal cutter, which he used to hit Chiechi. 3RP at 386. Chiechi hit him with the bat "[t]o protect me from being injured." 3RP at 388-89. After hitting Bernard, Bernard ran toward Chiechi's car and Chiechi hit him again. 3RP at 389-90.

The State proposed a first aggressor jury instruction. Defense counsel did not object to the instruction and agreed that the instruction correctly stated the law.

Chiechi appeals his judgment and sentence and argued for the first time on appeal that the trial court erred by giving a first aggressor instruction and that counsel was ineffective by failing to object to the first aggressor instruction.

The Court of Appeals affirmed the convictions, holding that the trial court correctly instructed the jury on the State's proposed first aggressor instruction because the evidence supported giving the instruction that and Chiechi was not deprived of effective assistance of counsel. Slip. op. at *1.

Chiechi now petitions this Court for discretionary review pursuant to RAP 13.4(b).

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 these issues 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. REVIEW SHOULD BE ACCEPTED AND THE CONVICTION REVERSED BECAUSE MR. CHIECHI WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO SELF-DEFENSE INSTRUCTION

The State presented evidence that Chiechi hit Bernard in self-defense. Therefore, the parties agreed the court should instruct the jury on the lawful use of force in self-defense, and the court gave the following instruction:

> It is a defense to a charge of assault in first or second degree that the force used was lawful as defined in this instruction.
>
> 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 in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other maliciousness interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 85; *State v. Chiechi*, slip op. at *2.

But the parties also agreed the court should provide a "first aggressor" instruction,

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

CP at 89; *Chiechi*, slip. op. at *2.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and *6 (2) that deficiency prejudiced the accused. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 225-26.

As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. ***State v. McFarland***, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. ***Roe v. Flores-Ortega***, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). "Reasonable conduct for an attorney includes carrying out the duty to

research the relevant law." ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (reversing where counsel proposed an incorrect self-defense instruction).

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. ***Strickland***, 466 U.S. at 694; ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694; ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. ***Thomas***, 109 Wn.2d at 226.

Here review should be accepted because Chiechi was deprived of the effective assistance of counsel with respect to self-defense instructions. Specifically, it was unreasonable to agree to a "first aggressor" instruction.

a. The "first aggressor" instruction should not have been given.

The Washington Supreme Court recently held in ***State v. Grott***, 195 Wn.2d 256, 268-69, 458 P.3d 750 (2020), that not all erroneously given aggressor instructions are errors of constitutional magnitude. An aggressor instruction is "used to explain to the jury one way in which the State may meet its burden: by proving beyond a reasonable doubt that the defendant

provoked the need to act in self-defense." *Id.* at 268. If the jury is properly instructed on self-defense, the defendant is not prevented from arguing self-defense, and because the aggressor instruction properly holds the State to its burden of proof by requiring the jury to "find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight," the giving of an instruction is not an error of constitutional magnitude. *Id.* at 268-69.

Here, trial counsel did not object to the instruction at trial. To bring this claim for the first time on appeal, Chiechi must therefore show that allowing this testimony was a manifest error affecting a constitutional right. RAP 2.5(a)(3). "Application of RAP 2.5(a)(3) depends on the answers to two questions: '(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?' " ***Grott***, 195 Wn.2d at 267 (quoting ***State v. Kalebaugh***, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences at trial. ***Grott***, 195 Wn.2d at 269. To make this determination, " 'the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.' " *Id.* (quoting ***State v. O'Hara***, 167 Wash.2d

91, 100, 217 P.3d 756 (2009).

"The use of force is lawful and justified where the defendant has a subjective, reasonable belief of imminent harm from the [alleged] victim." . ***Grott***, 195 Wn.2d at 266 (internal quotations omitted). Where there is evidence of self-defense, the state has the burden to prove the absence of self-defense beyond a reasonable doubt. *Id.*

Although "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation[,]" the first aggressor jury instruction "impacts a defendant's claim of self-defense, so courts should use care in giving an aggressor instruction." *Id.* (internal quotations omitted). In cases where a single act was the basis for the charged offense, that single aggressive act cannot support a first aggressor instruction. *Id.* at 272. "Thus, where a defendant who is charged for firing a single shot claims self-defense, that shot cannot, in itself, support a first aggressor instruction." ***Grott***, 195 Wn.2d at 272 (citing ***State v. Wasson***, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989)).

Because a first aggressor instruction potentially removes self-defense from the jury's consideration and relieves the State of its burden of proving that a defendant did not act in self-defense, the instruction should be given only "sparingly and carefully." ***State v. Bea***, 162 Wn. App. 570, 576-77, 254

P.3d 948 (2011). Indeed, there are "few situations" in which the instruction is warranted. ***State v. Arthur***, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). "[T]heories of the case can be sufficiently argued and understood by the jury without such instruction." ***State v. Riley***, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999) (citing ***Arthur***, 42 Wn. App. at 125 n. 1). To warrant a first aggressor instruction, there must be "credible evidence" that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense." ***State v. Douglas***, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005) (citing ***Riley***, 137 Wn.2d at 910-11).

In ***Grott***, the defendant had been discharged from the Marines in December 2012, possibly with post-traumatic stress disorder. Almost three years later, in August 2015, ***Grott*** accused Julian Thomas of stealing his handgun. On October 31, 2015, an intoxicated ***Grott*** angrily confronted Thomas' sister and may have threatened to kill Thomas. A short time later, a gunshot was fired into ***Grott's*** home, almost striking him. Thomas took credit for the shooting. Three months later, on February 1, 2016, ***Grott*** shot Thomas multiple times as the latter sat in his car at a convenience store. Thomas was struck nine times. A total of 48 shell casings were recovered from the scene. A loaded gun with the safety off was found underneath Thomas' body inside

his car. Id. at 261-263. ***Grott*** was convicted of murder in the second degree and seven counts of assault in the first degree. Id. at 265. Although ***Grott*** had failed to preserve the issue for appeal, the Supreme Court accepted review "in order to further clarify the law governing first aggressor instructions." ***Grott***, 195 Wn.2d at 270. The Court acknowledged that although some appellate courts have looked with disfavor on first-aggressor instructions, "[t]his court has never held that first aggressor instructions are broadly disfavored, and we do not do so today." *Id.* at 271. Such instructions "are disfavored only where they are not justified." *Id.* The ***Grott*** court emphasized that the question of whether a first-aggressor instruction should be given is a fact-specific, case-by-case determination. This counters lower court opinions that "have expressed a bright-line rule that the alleged act of first aggression cannot 'be the actual assault' with which the defendant is charged." *Id.* Instead, such a rule does not apply "where the defendant engaged in a course of aggressive conduct, rather than a single aggressive act." Id. The ***Grott*** court rejected the argument that every shot fired by ***Grott*** was part of the actual assault itself and therefore could not constitute the provoking act necessary to support giving the first-aggressor instruction; i.e., a requirement "that ***Grott*** made an intentional act before the shooting." Id. at 273 (emphasis original). Rather, the Supreme Court concluded, "***Grott***

engaged in a course of aggressive conduct, firing 48 shots over the course of several minutes and pausing to reload multiple times." Id. Even though Thomas was found with a loaded handgun underneath his body, the jury could reasonably conclude that he was reacting to the initial volley of shots from ***Grott***. If ***Grott***, having seen Thomas' reaction, continued to fire in response, self-defense was not legally available to him and the jury was properly instructed. Id. at 273-274.

Here, the events were initially as part of an on-going assault by Bernard and therefore cannot support a first-aggressor instruction. The evidence presented at trial did not established that Chiechi attempted to provoke Bernard.

In any case, the provoking act must be intentional and one that a "jury could reasonably assume would provoke a belligerent response by the victim." ***State v. Wasson***, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (citing ***Arthur***, 42 Wn. App. at 124). The provoking act must be related to the eventual assault as to which self-defense is claimed. Id. However, the provoking act cannot be the actual assault. ***Bea***, 162 Wn. App. at 577 (citing ***State v. Kidd***, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)).

Here, the testimony shows a plethora of aggressive acts by Bernard against Chiechi, first by following Chiechi outside of the house, pulling his

hair, and that they "threw punches at each other." 2RP at 207, 3RP at 383. During this attack, Chiechi was able to get to his car to get a bat and hit Bernard. 3RP at 385. Bernard left and then returned with metal shears and hit Chiechi, who then hit Bernard after being hit with the shears. 3RP at 386. The evidence shows, at best, initial mutual combat and then Chiechi hit him with a bat while still being restrained by Bernard, and then hitting Bernadrd again only after Bernard hit him with the metal shears. Accordingly, the first aggressor instruction should not have been given.

The facts of this case are different from those in ***Grott***. There, the defendant "fired several shots before [the victim] even realized ***Grott*** was there." ***Grott***, 195 Wn.2d at 273. And although the victim eventually pulled out his own gun and turned to face his attacker, this was "sometime after ***Grott*** began shooting." *Id.* "***Grott*** engaged in a course of aggressive conduct, firing 48 shots over the course of several minutes and pausing to reload multiple times." *Id.* Thus, it was proper in that case to give the jury the first aggressor instruction. *Id.* at 273-74.

In contrast, in ***State v. Wasson***, a fight broke out with multiple people, and the alleged victim "turned and took several rapid steps toward Mr. Wasson, whereupon Mr. Wasson shot him in the chest." ***Wasson***, 54 Wn. App. at 157. The State charged him with assault, and the trial court

instructed the jury on self-defense but also gave a first aggressor instruction. *Id.* at 157-58. Division Three reversed and remanded for retrial without an aggressor instruction. *Id.* at 161. The court explained: "there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault." Id. at 159; see also ***Grott,*** 195 Wn.2d at 272 (endorsing ***Wasson***).

An error is "manifest" under RAP 2.5(a)(3), if it is "plausible" that the asserted error had practical and identifiable consequences in the trial of the case. ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* "To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.* at 100.

Here, like in ***Wasson*** and unlike in ***Grott***, the evidence showed Bernard engaged in assaultive acts against Chiechi, who managed to get a bat and hit Bernard, whereupon Bernard returned and hit him with metal shears. Chiechi was prejudiced by the instructions. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record."

State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Although Chiechi was able to argue a theory of self-defense, he was also laboring under the first aggressor instruction, which the prosecution used to urge rejection of the self-defense claim because he was the first aggressor. 4RP at 458-59. The State argued:

> Defendant is the aggressor in that situation. It allows Mr. Bernard to use force to defend himself. Defendant can't say, well, I needed to defend myself about this person who was fighting with me, because he is the one who brought the bat him. because he is the aggressor, this isn't self defense. This is an attack with a baseball out of retaliation.
>
> 4RP at 458-59.

It was improper to give the first aggressor instruction. The Court of Appeals erred by finding that even if the first aggressor instruction was erroneously given, the error was not of constitutional magnitude.

Based on the foregoing, review should be accepted because Chiechi was deprived of his right to the effective assistance of counsel with respect to the self-defense jury instruction.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced error in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: August 20, 2020.

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 20, 2020, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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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 August 20, 2020.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 21, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BLESS CHIECHI, Appellant.	No. 52405-8-II UNPUBLISHED OPINION

SUTTON, A.C.J. — Bless Chiechi was convicted of first degree assault with a deadly weapon enhancement. He appeals his judgment and sentence and argues for the first time on appeal that the trial court erred by giving a first aggressor instruction. He argues that the improper instruction precluded him from presenting a complete defense and relieved the State of its burden of proof, which is a manifest constitutional error. Chiechi alternatively argues that his counsel was ineffective by failing to object to the first aggressor instruction. Chiechi further argues that the trial court erred by imposing two legal financial obligations (LFOs): an interest accrual provision on all LFOs and a community supervision fee.

We hold that the trial court correctly instructed the jury on the State's proposed first aggressor instruction because the evidence supported giving the instruction. We also hold that Chiechi did not receive ineffective assistance of counsel. We further hold that the trial court erred by imposing the interest accrual provision on all LFOs, but did not err by imposing the community supervision fee. We affirm Chiechi's judgment and sentence, but remand to the trial court to (1)

amend the interest accrual provision to reflect that interest shall not accrue on nonrestitution LFOs, and (2) reconsider whether Chiechi has the ability to pay the community supervision fee.

FACTS

The State charged Chiechi with one count of first degree assault with deadly weapon enhancement of Berry Bernard based on an incident on August 27, 2017, where Chiechi struck Bernard with a metal baseball bat six times. The case proceeded to a jury trial.

Bernard testified that Chiechi got into an argument with another man at a gathering they were at, became angry, and verbally threated the man. When Bernard told Chiechi to calm down, Chiechi challenged him to a fight outside. Once outside, the men threw punches and Bernard got Chiechi in a hold. Once this fight ended, Chiechi ran to his house after Bernard let him go. Shortly thereafter, Chiechi returned with a metal baseball bat to find Bernard still standing on the sidewalk outside and a second fight ensued. Chiechi called Bernard's name, Bernard turned around, and as he did Chiechi struck him in the head with the bat. Chiechi hit Bernard a total of six times with the bat.

Mike Saito, an independent witness, testified that he observed the latter portion of the first fight and the entirety of the second fight. When he observed the men outside, Bernard had a hold of Chiechi's hair. After Saito told Bernard to let Chiechi go, he did so. Chiechi ran away and retrieved the metal baseball bat from his car at his house. Chiechi and Bernard came together and Chiechi had a weapon, but Bernard did not. Saito watched Chiechi strike Bernard six times with the bat. After being struck in the head, legs, and arms, Bernard was able to take the bat away from Chiechi and throw it.

Officer Timothy Gower testified that Chiechi told him that Bernard wanted to fight, so he went to his car, retrieved a baseball bat, and struck Bernard six times. Chiechi told Officer Gower that Bernard did not have a weapon when he was striking him with the bat. After Chiechi had struck Bernard once in the leg, twice in the body, and three times in the head—Bernard ran away. After this exchange, Bernard returned with pruning shears and swung them at him, missed, and left.

Chiechi testified that Bernard challenged him to fight. According to Chiechi, he left the house to avoid Bernard. Bernard followed him, then pulled his hair from behind while they were walking on the sidewalk. Bernard continued to hold his hair while they walked to Chiechi's house. As they got closer to his house, Bernard was holding his hair with one hand and punching him with the other. While this occurred, Chiechi was able to open his locked car door and retrieve a metal bat from inside. He then hit Bernard with the bat in the legs, causing Bernard to release his hair. Bernard left and returned with metal shears. Bernard then struck him with the metal cutter. Chiechi then warned Bernard that if he had to injure him, he would not be breaking the law because Bernard was at his house. After being hit, he struck Bernard. Bernard then ran to Chiechi's car in an effort to strike it. Chiechi then struck Bernard in the head because Bernard had struck him with the cutter and said he would damage his car.

The State proposed a first aggressor jury instruction. Defense counsel did not object to the instruction, and agreed that the instruction correctly stated the law. The trial court gave the following first aggressor jury instruction:

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

Clerk's papers (CP) at 89.

The trial court also gave the following self-defense jury instruction:

> It is a defense to a charge of assault in first or second degree that the force used was lawful as defined in this instruction.
>
> 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 in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other maliciousness interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP at 85.

In closing, Chiechi's counsel made the following arguments:

> And what [the evidence] has shown is that my client, Bless Chiechi, is the victim.
>
> . . . .
>
> Ladies and gentlemen, my client was defending himself that night. He was not the aggressor, and he did what was necessary and appropriate in that situation.
>
> . . . .

> What did Berry [Bernard] tell to Officer Gower? Well, he admitted to being the aggressor. . . . He said that he put Bless [Chiechi] in a headlock.
>
> . . . .
>
> How did the fight start? According to Berry, Bless swung at him. That's what he testified to at this trial. . . . So, basically, everyone who was present that testified, including my client, said that Berry was the aggressor, the one [who] started this[.]
>
> . . . .
>
> Ladies and gentlemen, when you look at all of this it's clear that Bless was not the aggressor . . . . What did occur is that my client was defending himself.
>
> . . . .
>
> If my client was the aggressor, where would the fight have occurred? At [the gathering]. It didn't. It happened on the way to his house.
>
> The circumstantial evidence shows that my client was not the one that wanted to get in a fight at that time. My client testifi[ed] that his hair was being pulled, that he was being attacked by this person [on the way] to his house.
>
> . . . .
>
> What is appropriate? What is necessary? Well, when examining that question, let's step back and let's go with just what the Prosecutor is going to say happened. That my client hit [Bernard] six times when he didn't have a weapon. Even in that situation, self-defense is appropriate.

Verbatim Report of Proceedings (VRP) (June 21, 2018) at 464, 467, 472, 474, 477, 478, 480.

The jury found Chiechi guilty of first degree assault with a deadly weapon enhancement.

In Chiechi's judgment and sentence, the court imposed an interest accrual provision on all LFOs and a community supervision fee, despite finding him indigent. Chiechi appeals his judgment and sentence.

ANALYSIS

I. FIRST AGGRESSOR JURY INSTRUCTION

Chiechi argues for the first time on appeal that the trial court erred by giving a first aggressor jury instruction because (1) it precluded him from presenting a complete defense and (2) it relieved the State of its burden of proof, which he claims is a manifest constitutional error under

RAP 2.5(a)(3). The State argues that the evidence supported the court's giving the instruction, and the claimed error was not manifest because it had no practical and identifiable consequence on the trial. We agree with the State.

State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020) recently clarified that a proper first aggressor instruction holds the State to its burden of proof, and even if given in error, it is not a constitutional error, nor is the error manifest when the evidence is conflicting. We hold that the first aggressor instruction correctly stated the law, the evidence was conflicting, there is no manifest constitutional error, and RAP 2.5(a)(3) does not apply.

The basic legal principles underlying self-defense and first aggressor instructions are well settled. A defendant's use of force is lawful when he has a "'subjective, reasonable belief of imminent harm from the victim.'" *Grott*, 195 Wn.2d at 266 (quoting *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)). The force used may not be "more than is necessary." RCW 9A.16.020(3).

"'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 *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)). If the defendant can produce "some evidence that his or her actions occurred in circumstances amounting to self-defense," then the State must prove the absence of self-defense beyond a reasonable doubt. *Riley*, 137 Wn.2d at 909.

Generally, "'the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation.'" *Grott*, 195 Wn.2d at 266 (quoting *Riley*, 137 Wn.2d at 909). "'[T]he reason one generally cannot claim self-defense when one is an aggressor is because the

aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.'" *Grott*, 195 Wn.2d at 266 (alteration in original) (internal quotation marks omitted) (quoting *Riley*, 137 Wn.2d at 911). "'[A]n aggressor instruction impacts a defendant's claim of self-defense,' so 'courts should use care in giving an aggressor instruction.'" *Grott*, 195 Wn.2d at 266 (alteration in original) (quoting *Riley*, 137 Wn.2d at 910 n.2). "However, first aggressor instructions 'should be given where called for by the evidence.'" *Grott*, 195 Wn.2d at 266 (quoting *Riley*, 137 Wn.2d at 910 n.2).

"[N]ot all [allegedly] erroneously given first aggressor instructions are manifest errors affecting a constitutional right for purposes of RAP 2.5(a)(3)." *Grott*, 195 Wn.2d at 266-67. Rather, we evaluate unpreserved objections to first aggressor instructions "on a case-by-case basis to determine whether they may be raised for the first time on appeal." *Grott*, 195 Wn.2d at 267.

"[T]he question of whether a first aggressor instruction should be given is a highly fact-specific inquiry, such that broad, bright-line rules are rarely appropriate." *Grott*, 195 Wn.2d at 267. "Where . . . the issue on appeal is whether the evidence was sufficient to support giving a first aggressor instruction, appellate courts must carefully consider the specific evidence presented at trial in the light most favorable to the requesting party." *Grott*, 195 Wn.2d at 267. Applying that standard, we hold that the evidence in this case was sufficient to support giving a first aggressor instruction.

As discussed above, for the first time on appeal Chiechi objects to the trial court's first aggressor instruction. He agreed below that the instruction correctly stated the law, but now argues that it was not supported by the evidence.

Generally, parties must object to proposed jury instructions contemporaneously. CrR 6.15(c). However, RAP 2.5(a)(3) allows a party to object for the first time on appeal where there is a "manifest error affecting a constitutional right." The application of RAP 2.5(a)(3) depends on the answers to two questions: "(1) Has the party claiming error shown [that] the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). In this case, the answer to both questions is no.

Our Supreme Court has previously acknowledged that a first aggressor instruction "impacts a defendant's claim of self-defense." *Riley*, 137 Wn.2d at 910 n.2. "[T]his does not mean that all [allegedly] erroneously given first aggressor instructions are errors of constitutional magnitude." *Grott*, 195 Wn.2d at 268. Rather, just like with unpreserved objections to self-defense instructions, "We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). We conduct this evaluation "on a case-by-case basis." *O'Hara*, 167 Wn.2d at 104.

Our Supreme Court has recently explained that jury instructional errors constitute manifest constitutional error when they direct a verdict, shift the burden of proof to the defendant, fail to define the "'beyond a reasonable doubt'" standard, fail to require a unanimous verdict, or omit an element of the crime charged. *Grott*, 195 Wn.2d at 268 (quoting *O'Hara*, 167 Wn.2d at 100). "[F]irst aggressor instructions are used to explain to the jury *one way* in which the State *may meet* its burden: by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." *Grott*, 195 Wn.2d at 268 (emphasis added). "Because first aggressor instructions

do not actually relieve the State of its burden of proof, [allegedly] erroneously given first aggressor instructions are not necessarily errors of constitutional magnitude." *Grott*, 195 Wn.2d at 268-69.

Here, the court's first aggressor instruction and instruction on self-defense allowed Chiechi to argue his theory of the case, focusing during closing argument on the actions of Bernard, not Chiechi. The first aggressor instruction correctly held the State to its burden of proof by requiring the jury to "find beyond a reasonable doubt that [the] defendant was the aggressor, and that [the] defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." CP at 89. Thus, as in *Grott*, even if the first aggressor instruction was erroneously given, which it was not, the error is not of constitutional magnitude.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Chiechi argues that he received ineffective assistance of counsel because his trial counsel did not object to the first aggressor instruction and agreed that the instruction correctly stated the law. The State disagrees because there were legitimate trial tactics for not objecting as it allowed counsel to focus his closing argument on the actions of Bernard rather than the actions of Chiechi. We hold that Chiechi did not receive ineffective assistance of counsel.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017).

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Estes*, 188 Wn.2d at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Estes*, 188 Wn.2d at

458. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Estes*, 188 Wn.2d at 458. Reasonable probability in this context means a probability sufficient to undermine confidence in the outcome. *Estes*, 188 Wn.2d at 458.

We apply a strong presumption that defense counsel's performance was reasonable. *Estes*, 188 Wn.2d at 458. Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. *Estes*, 188 Wn.2d at 458. To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

The trial court correctly instructed the jury that the State had the burden of disproving the lawful use of force beyond a reasonable doubt. The first aggressor instruction did not shift the State's burden of proof. Because the trial court would not have granted the motion, there was no harm in the failure to object.

III. LFOs

Chiechi argues that the trial court erred by imposing an interest accrual provision on all LFOs and a community supervision fee. We agree and remand to the trial court to amend the interest accrual provision and reconsider whether Chiechi has the ability to pay the community supervision fee, a discretionary fee.

RCW 10.01.160(3) now provides that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). Similarly, RCW 9.94A.760(1) now provides that the trial court cannot order "costs" as described in RCW 10.01.160 if the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 10.01.160(2) limits costs "to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." Recent legislation also prohibits trial courts from imposing interest accrual provisions on the nonrestitution portions of LFOs on indigent defendants. RCW 10.82.090.

A. INTEREST ACCRUAL PROVISION

Chiechi argues that the trial court improperly imposed an interest accrual provision on nonrestitution LFOs. We agree.

RCW 10.82.090 differentiates between restitution and nonrestitution LFOs. As discussed above, trial courts are now prohibited from imposing an interest accrual provision on nonrestitution LFOs. RCW 10.82.090.

Here, the trial court imposed an interest accrual provision on all LFOs. Because the court erred by imposing interest on all LFOs, we remand for the court to amend the interest accrual provision to reflect that interest shall not accrue on nonrestitution LFOs.

B. COMMUNITY SUPERVISION FEE

Chiechi also argues that the trial court improperly imposed a community supervision fee. We hold that based on the court's finding that Chiechi is indigent, on remand, the court should reexamine imposition of this fee.

Here, Chiechi's community supervision fee was not imposed under any particular statute. However, RCW 9.94A.703(2)(d) governs supervision fees and states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." The supervision fee is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019).

However, the supervision fee is not a discretionary "cost" merely because it is a discretionary LFO. Rather, the supervision fee fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecutor the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the supervision fee is not a "cost" as defined under RCW 10.01.160, the statutes do not prohibit the trial court from imposing the fee based on the court's finding that Chiechi is indigent.

We note, however, that "[t]he barriers that LFOs impose on an offender's reintegration to society are well documented . . . and should not be imposed lightly merely because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs." *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). We agree that this important policy should be broadly supported. Therefore, we encourage the trial court on remand to reexamine the imposition of the supervision assessment fee on Chiechi.

CONCLUSION

We hold that trial court correctly instructed the jury on the State's proposed first aggressor instruction because the evidence supported giving the instruction. We also hold that Chiechi did not receive ineffective assistance of counsel. We further hold that the trial court erred by imposing

the interest accrual provision on all LFOs, but did not err by imposing the community supervision fee. We affirm Chiechi's judgment and sentence, but remand to the trial court to (1) amend the interest accrual provision to reflect that interest shall not accrue on nonrestitution LFOs, and (2) reconsider whether Chiechi has the ability to pay the community supervision fee.

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.

Sutton, A.C.J.
SUTTON, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Glasgow, J.
GLASGOW, J.

THE TILLER LAW FIRM

August 20, 2020 - 4:00 PM

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