Supreme Court No. 98923-1

Court of Appeals No. 79586-4-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FAWN LEFAY LITTLE SKY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court Decisions

Washington Court of Appeals Decisions

Statutes

Rules

A. IDENTITY OF PETITIONER

Fawn Little Sky, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision issued on July 20, 2020, pursuant to RAP 13.3 and RAP 13.4(b)(1), (2), & (3). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. The right to defend oneself from assault is fundamental and requires the State to disprove the accused acted in self-defense beyond a reasonable doubt. A first aggressor instruction dilutes this burden because it tells jurors the accused had no right to act in self-defense if she was the initial aggressor.

Here, the Court of Appeals agreed there was no factual basis for a first aggressor instruction. But it declined to review this error under RAP 2.5(a)(3) based on this Court's decision in *Grott.*[1] However in *Grott*, there was a factual basis for the first aggressor instruction, which made the error under those circumstances neither manifest nor of constitutional proportions. The result is not the same when, as in Ms. Little

[1] *State v. Grott*, 195 Wn.2d 256, 458 P.3d 750 (2020).

Sky's case, she was not the first aggressor and the instruction was erroneously given. This Court should grant review and hold that where there is no legal basis to give a first aggressor instruction, the error is subject to review under RAP 2.5(a)(3). RAP 13.4(b)(1) & (3).

2. Likewise, is it ineffective assistance for counsel to not object to an instruction that allows the prosecutor to avoid having to disprove self-defense based on an unsupported legal theory? RAP 13.4(b)(1) & (3).

3. Where this Court has held that opinion testimony on guilt is constitutional error, should this Court accept review of the Court of Appeals decision that applied the non-constitutional harmless error standard to the police officer's inadmissible opinion testimony that Ms. Little Sky's use of the cane met the elements of assault with a deadly weapon? RAP 13.4(b)(1) & (3).

C. STATEMENT OF THE CASE

a. Ms. Little Sky and Mr. Clown had a verbal altercation that resulted in Ms. Little Sky hitting Mr. Clown in self-defense.

Fawn Little Sky has lived with her cousin, Jerry Clown, for much of their lives. RP 215, 400. He is five years older than

her and like an older brother. RP 400. They live together in Ms. Little Sky's mother's house along with Ms. Little Sky's son, Elijah, and Ms. Little Sky's brother, Luta Martinez. RP 334-35.

Ms. Little Sky has experience with Mr. Clown's temper and his history of assaulting her female relatives. RP 463. Mr. Clown has "gotten in [her] face before," and he and Mr. Martinez threatened to fight her only a few days prior. RP 411, 463-64.

On the day of the charged assault, Ms. Little Sky noted that Mr. Clown appeared angry about a friend Ms. Little Sky brought to the house. RP 401-02, 220. When Ms. Little Sky asked Mr. Clown where her mother's car keys were, at first Mr. Clown was non-responsive. RP 407-10. Then he "started blowing up" at her. RP 411.

They argued about the keys. RP 411. Before she knew it, Mr. Clown "leapt up real fast." RP 411. Ms. Little Sky's heart was beating wildly and she felt afraid because he has threatened her in the past. RP 411. Mr. Clown then lunged out of his chair at her, struck Ms. Little Sky with his hand and pushed her. RP 412. She felt she was in danger and looked for something to defend herself with. RP 413. She grabbed Mr. Clown's cane and

swung it wildly to get him away. RP 413. She did not remember hitting him. RP 412. When she heard the sound of the cane break, she was stunned and stopped swinging it. RP 412-13, 452. This all happened in a matter of seconds. RP 413. Ms. Little Sky did not see that Mr. Clown was injured. RP 453, 455. Ms. Little Sky had bruises on her forearms and a scratch on her hand. RP 412.

Ms. Little Sky was fearful because Mr. Clown was calling to Mr. Martinez, urging him to come down and "get this F'in bitch." RP 413. Ms. Little Sky was afraid of being attacked by both of them. RP 454. Feeling unsafe, Ms. Little Sky left the house. RP 418.

b. <u>According to Mr. Clown's account of events, Ms. Little Sky attacked him in direct response to their verbal altercation.</u>

At trial, Mr. Clown said that prior to their altercation, he was sitting downstairs when Ms. Little Sky's visitor came downstairs. RP 219. Mr. Clown demanded to know, "who the fuck are you?" RP 247. Ms. Little Sky's visitor put on his shoes, smiled, and left the house. RP 219. Mr. Clown was mad. RP 220. Then Ms. Little Sky came downstairs. RP 220. She asked Mr.

Clown where her friend went, and where the keys to her mom's car were. RP 220. Mr. Clown did not say anything. RP 220.

After Ms. Little Sky searched the house, Mr. Clown finally told her he had her mother's keys. RP 221. Mr. Clown believed Ms. Little Sky to be under the influence of methamphetamine and was concerned about her driving. RP 221-22. Ms. Little Sky denied being intoxicated at the time of the altercation. RP 405.

After Mr. Clown told her she could not use her mother's car, Mr. Clown testified that he turned his back to face the television. RP 223. He said the next thing he knew, he got "hit with something" on the back of his neck. RP 224. Ms. Little Sky was swinging Mr. Clown's cane, hitting him. RP 224. Mr. Clown claimed that she was saying she hated him and wanted him to die while stabbing at him. RP 228. Mr. Clown testified that the cane broke and she then started stabbing at him with the broken top part of the cane. RP 226. Mr. Clown said he was rolling "like dogs" to avoid her hitting him. RP 226. He said this all occurred while he was sitting in his chair. RP 228.

Mr. Clown said that Mr. Martinez came running down the stairs and he pushed Ms. Little Sky out the door. RP 228. Mr. Martinez, however, stated he did not come downstairs until after he heard Ms. Little Sky slam the front door on her way out. RP 329, 331.

No other family members who were at home saw or heard the physical altercation. RP 280, 331. Mr. Martinez was upstairs in his room. RP 328. He heard a verbal altercation between Ms. Little Sky and Mr. Clown in which they were arguing about car keys. RP 305-06, 323-30. Ms. Little Sky's son, Elijah, did not hear the altercation except Mr. Clown saying vulgar things to his mom, including, "you fucking bitch." RP 278-79. Elijah did not hear his mom say much at all. RP 279.

After Ms. Little Sky left, Mr. Martinez drove Mr. Clown to the hospital. RP 242. Doctor Daniel Helzer treated Mr. Clown. RP 380. The primary injury he observed was on Mr. Clown's forearms. RP 382. He conducted an x-ray that showed Mr. Clown had fractured his forearm and the base of his thumb. RP 382. Mr. Clown complained of head and neck pain. RP 385. The doctor examined Mr. Clown's head very closely. RP 385. Mr.

Clown had no bruising, no lacerations, nor any obvious sign of injury to his head. RP 385. The doctor also closely examined Mr. Clown's neck and found no injury. RP 386.

c. The court instructed the jury on self-defense and erroneously provided a first aggressor instruction.

Ms. Little Sky asserted she acted in self-defense, and the jury was so instructed. CP 12, 34. Although there was no evidence that Ms. Little Sky created a necessity to act in self-defense, other than words, the prosecutor proposed a first aggressor instruction which the court gave. CP 37; RP 483-84. Ms. Little Sky's attorney did not object. RP 484.

In closing argument, the prosecutor argued Ms. Little Sky was not "entitled to be claiming self-defense in this case" because she was the first aggressor, and that the jury had to "[t]o get over primary aggressor" to consider Ms. Little Sky's self-defense claim. RP 532, 555. The jury convicted Ms. Little Sky of assault in the second degree. CP 44.

The Court of Appeals determined "there was no evidence from which a jury could conclude that Little Sky provoked an altercation resulting in Clown needing to defend himself with lawful force." Slip op. at 7. However, based on this Court's

decision in *Grott,* the Court of Appeals ruled Ms. Little Sky could not raise the issue for the first time on appeal. Slip op. at 8-9. However, unlike in *Grott,* where there was a dispute about whether there was a factual basis for the court to give the instruction, here there was no dispute—the State's evidence did not warrant giving the instruction. In Ms. Little Sky's case, this erroneous instruction necessarily impacted her claim of self-defense, because unlike in *Grott,* it was not a proper means by which the State was entitled to meet its burden of proof.

The Court of Appeals also determined defense counsel was not ineffective for failing to object to this instruction by weighing the facts presented at trial, failing to consider that this instruction erroneously gave a legally baseless justification for the jury to not consider Ms. Little Sky's claim of self-defense, which was prejudicial. Slip op. at 9-10.

Finally, the Court of Appeals found it was harmless error for the court to permit a police officer to opine that Ms. Little Sky's use of the cane constituted assault with a deadly weapon. Slip op. at 13-14. The Court of Appeals failed to apply the constitutional harmless error standard advanced by Ms. Little

Sky and as required by this Court, which would necessitate reversal of Ms. Little Sky's conviction. Slip op. at 12-14.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **This Court should accept review and clarify that *Grott* does not preclude review under RAP 2.5(a)(3) where the State's evidence does not support a first aggressor instruction. RAP 13.4(b)(1)&(3).**

This Court recently found in *Grott* that not all erroneous first aggressor instructions are necessarily errors of constitutional magnitude. *Grott*, 195 Wn.2d at 268-69. In *Grott,* there was a factual basis for giving the instruction where "the defendant engaged in a course of aggressive conduct, rather than a single aggressive act." *Id.* at 271. At a minimum, in *Grott,* there was "substantial, conflicting evidence about the timeline of the shooting and event leading up to it." *Id.* at 269-70. Where there was competing evidence, there was no "basis to conclude that the trial court should have sua sponte rejected the State's proposed first aggressor instruction." *Id.* at 270.

Grott clarified that under these circumstances, the first aggressor instruction may not relieve the State of its burden to disprove self-defense, because it "explain[ed] 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. This clarification should not apply to the circumstance in this case, where there is no legal basis to provide the first aggressor instruction.

Unlike in *Grott,* here there was no competing evidence about whether the first aggressor instruction was warranted. Viewed in the light most favorable to the State, Mr. Clown described only a verbal altercation before Ms. Little Sky hit him with the cane. RP 223-28. Based on the State's evidence, either Ms. Little Sky assaulted Mr. Clown or she acted in self-defense. There was no additional act—other than words— to establish that Ms. Little Sky's conduct precipitated the need to use self-defense. *State v. Kee*, 6 Wn. App.2d 874, 882, 431 P.3d 1080 (2018); *State v. Riley,* 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999) ("words alone do not constitute sufficient provocation"). The Court of Appeals correctly determined the State's evidence did not support giving the instruction. Slip op. at 7.

The Court of Appeals erred, however, in finding that even though there was no legal basis for giving the first aggressor instruction, the error was not one of constitutional magnitude

because "the jury instructions properly held the State to its burden of proof" even though the jury was allowed to consider, erroneously, that if Ms. Little Sky was the first aggressor, she was not entitled to act in self-defense. Slip op. at 8-9. The Court of Appeals misapplied this Court's hold in in *Grott* because here it is not the case that the instruction validly provides one way in which the State may meets 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. The error is manifest because there was no legal basis to offer the instruction—thus could have, and should have been, corrected by the trial court.

The first aggressor instruction allowed the jury to find the State met it burden through a legally unjustifiable means. Where there is no legal basis for giving the instruction, this error should be subject to review under RAP 2.5(a)(3) because the legal error is "practical and identifiable," and of constitutional magnitude because it allows the State to meet its burden based on an error or law. *Compare Grott,* 195 Wn.2d at 273.

2. **In the alternative, this Court should accept review and find that it is ineffective assistance of counsel to not object to a first aggressor instruction the court has no legal basis to give. RAP 13.4(b)(1)&(3).**

It is well-established that words alone cannot be the provoking conduct that justifies a first aggressor instruction. *Kee,* 6 Wn. App.2d at 880-81 (citing *Riley*, 137 Wn.2d at 911-12). Competent counsel would have objected to the aggressor instruction on those grounds. There was no legitimate tactic explaining counsel's performance where the erroneous aggressor instruction wrongly allowed the jury to completely bypass Ms. Little Sky's defense based on an error of law.

However, the Court of Appeals found Ms. Little Sky was not prejudiced by counsel's failure to object. Slip op. at 9. This was error because the Court failed to consider that the first aggressor instruction directly affected and undermined Ms. Little Sky's defense at trial for erroneous reasons, rather than hold the State to its burden of disproving Ms. Little Sky's right to act in self-defense..

Moreover, there is a reasonable probability the outcome of the trial would have been different because a juror could have believed Ms. Little Sky's fear was reasonable based on the

history of violence she had experienced from the male members of her household. RP 411, 463-64. Mr. Clown was upset and angry with Ms. Little Sky prior to their altercation. RP 220, 314-15, 322. The other people in the house heard Mr. Clown's aggressive words and anger towards Ms. Little Sky, but not the assault described by Mr. Clown. RP 278-79, 328.

A juror might disagree with the Court of Appeals' belief that Ms. Little Sky did not use reasonable force. Slip op. at 10. Where Mr. Clown's claimed injuries were not supported by the medical evidence presented by the State, the jury may have discredited Mr. Clown's claim about the force he claims she used. RP 385-86.

There is a reasonable probability that the jury would have found that the prosecution did not disprove Ms. Little Sky's claim of self-defense beyond a reasonable doubt. *Kyllo*, 166 Wn.2d at 862. Because counsel did not object, however, the first aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor) that Ms. Little Sky provoked the incident and was thus not entitled to claim self-

defense. Counsel was ineffective, and this was prejudicial error that this court should review pursuant to RAP 13.4(b)(1)&(3).

3. **The Court of Appeals' failure to apply the constitutional harmless error standard to the officer's impermissible opinion testimony on the ultimate issue is contrary to this Court's and other Court of Appeals' decisions. RAP 13.4(b)(1), (2) &(3).**

It is "the jury's responsibility to determine the defendant's guilt or innocence." *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) (citing *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Accordingly, "[n]o witness, lay or expert, may testify to his or her opinion as to the guilt of a defendant, whether by direct statement or inference." *Id.*; *State v. Winborne*, 4 Wn. App.2d 147, 176, 420 P.3d 707 (2018) (citing *Black,* 109 Wn.2d at 348).

Opinion testimony "regarding a defendant's guilt is reversible error if the testimony violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. King*, 167 Wn.2d 324, 329-30, 219 P.3d 642 (2009) (citing *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)). Opinion testimony on an ultimate issue of law, such as the defendant's

guilt, is inadmissible." *State v. Allen*, 50 Wn. App. 412, 417, 749 P.2d 702 (1988).

When, as in Ms. Little Sky's case, the accused is charged with assault and the crime encompasses "the used or threatened to be used language of RCW 9A.04.110(6)," the prosecutor must prove beyond a reasonable doubt the weapon "as used" was "readily capable of causing . . . substantial bodily harm." *State v. Carlson*, 65 Wn. App. 153, 159, 828 P.2d 30 (1992). If a weapon or thing is not deadly per se as defined in RCW 9A.04.110(6), whether it is nevertheless deadly in the circumstances in which it was used, i.e., whether it is "readily capable of causing substantial bodily harm" is a question of fact. *Id.* at 159-60.

Here, Ms. Little Sky was charged with assault in the second degree against Mr. Clown by either recklessly inflicting substantial bodily harm and/or intentionally assaulting him "with a deadly weapon." CP 6. It was a question for the jury whether the cane was "readily capable of causing . . . substantial bodily harm." *Carlson*, 65 Wn. App. at 159-60; CP 25 (court's instruction on the definition of deadly weapon); CP 26 (to-convict instruction for assault in the second degree).

Here, the officer expressly testified about the cane that was used in the charged assault:

> Q. Okay. And I showed you earlier the cane depicted by photograph. I'm handing you what has been entered into evidence as State's Exhibits 1B and 1C, is that the same cane depicted in photograph Exhibit No. 2?
>
> A. Yes.
>
> Q. And in your opinion is this an item that is capable -- readily capable of causing substantial bodily harm?
>
> MR. FOLLIS: Objection to speculation, Your Honor.
>
> THE WITNESS: Yes.
>
> MR. FOLLIS: Also invades the province of the jury.
>
> MR. SIGMAR: It's an opinion on ultimate issue which should be allowed under Evidence Rule 704.
>
> THE COURT: Overruled. You may answer the question.
>
> THE WITNESS: Yes, it is.

RP 349-50.

This direct discussion of Ms. Little Sky's conduct in relation to an element of the charged crime which the officer did not witness was unhelpful to the jury, who has the same capability of assessing whether the cane, "as used" was "readily capable of causing substantial bodily harm." *Carlson*, 65 Wn. App. at 159; *Farr-Lenzini*, 93 Wn. App. at 460-65. This question

had no purpose other than to elicit an authoritative opinion from an officer without first-hand knowledge, about Ms. Little Sky's use of the cane, which was particularly prejudicial. *King*, 167 Wn.2d at 331; *Farr-Lenzini*, 93 Wn. App. at 462-63.

Improper opinion evidence on guilt is constitutional error. *State v. Quaale*, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014). The Court of Appeals found that if this was error, it was harmless error as analyzed as a non-constitutional standard, contrary to binding case law from this Court. Slip op. at 14. The Court of Appeals applied the non-constitutional harmless error standard, considering whether the "evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Slip op. a 14. The Court should have considered whether the State established beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Quaale*, 182 Wn.2d at 201-02. The State cannot meet that burden here, where this Court has recognized that a law enforcement officer's opinion testimony is especially prejudicial because the "officer's testimony often carries a special aura of reliability." *King*, 167 Wn.2d at 331. The opinion is more

troubling when, as here, it parrots the legal standard in conclusory terms. *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008).

In determining whether the cane was a "deadly weapon," the jury had to consider the circumstances in which the cane was used, including "'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" *State v. Schilling,* 77 Wn. App. 166, 171, 889 P.2d 948 (1995) (citing *State v. Sorenson,* 6 Wn. App. 269, 273, 492 P.2d 233 (1972)). The jury could have determined that evidence of Ms. Little Sky's mental state established she did not intend to use the cane as a deadly weapon against Mr. Clown, where she felt scared, had to "scan" the room for something to defend herself with, and grabbed the cane only because it was nearby. RP 412. She swung wildly with it, and did not even remember hitting him with it, much less intending to use it as a deadly weapon. RP 412.

This competing evidence about her intended use of the cane would have led the jury to doubt the cane was used as a deadly weapon. The State cannot establish the jury would have

reached the same verdict without the officer testifying that the cane met the definition of a "deadly weapon" under these circumstances. *Quaale*, 182 Wn.2d at 202. This Court should accept review of the Court of Appeals' decision that applied the wrong standard of review for this critical determination of whether the officer's impermissible opinion testimony violated Ms. Little Sky's right to the jury's determination of guilt. RAP 13.4(b)(1), (2) & (3).

E. CONCLUSION

This Court should grant review and reverse the Court of Appeals decision that wrongly determined the trial court's erroneous first aggressor instruction was not subject to review under RAP 2.5(a)(3) and that Ms. Little Sky was not prejudiced by her counsel's failure to object to the erroneous first aggressor instruction when the State's evidence did not support giving the instruction. This Court should also grant review of the Court of Appeals decision that wrongly applied the non-constitutional harmless error standard to opinion testimony that invaded Ms. Little Sky's jury trial right. RAP 13.4(b)(1),(2)&(3).

Respectfully submitted this the 19th day of August 2020.

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

STATE OF WASHINGTON, Respondent, v. FAWN LEFAY LITTLE SKY, Appellant.	No. 79586-4-I UNPUBLISHED OPINION

VERELLEN, J. — Fawn Little Sky appeals her jury conviction for second degree assault and violation of a no-contact order. She argues that the trial court erred in (1) giving an aggressor instruction, (2) giving a to convict instruction that did not include the State's burden to disprove self-defense, and (3) permitting a police officer to give improper opinion testimony regarding the ultimate issue to be decided by the jury. She also contends that defense counsel was ineffective for failing to object to the aggressor instruction.

We affirm.

FACTS

This case arises from an incident in which Little Sky assaulted her cousin, Jerry Clown. Clown lived in a house owned by his aunt, Carol Rave, who is Little Sky's mother. Also living in the house were Little Sky's adult son, Elijah Little

Sky, and Little Sky's brother, Luta Martinez. Little Sky frequently stayed at the home even though she was prohibited from doing so by a no-contact order.

Clown suffered from chronic health issues, including hypertension, diabetes, and kidney failure. He used a cane to walk and attended kidney dialysis appointments several times a week. On the morning of November 6, 2018, Clown drove Rave's car to his appointment. When Clown returned home around 11:30 a.m., he was tired and went to sit in a recliner in the living room, facing the television. Martinez and Elijah were both still in their bedrooms.[1]

Clown heard someone coming down the stairs behind him. He turned around and saw a man he didn't know. Clown asked the man who he was, but the man just put on his shoes and left.

Little Sky came downstairs a few minutes later. She asked Clown where the man went, and Clown told her that he left. Little Sky began looking for Rave's car keys. She asked both Clown and Martinez where the car keys were. Clown ultimately told Little Sky that he had them. Little Sky demanded the keys, but Clown refused. He believed Little Sky was under the influence of methamphetamine because she was acting "[v]ery angry" and "short-tempered" and because he could smell the odor of methamphetamine.[2] Clown turned his back on Little Sky and resumed facing the television.

Clown testified he felt something hit him on the back of his neck. He turned and saw Little Sky was holding his wooden cane and swinging it. Clown

[1] We refer to Elijah Little Sky by his first name for clarity.

[2] Report of Proceedings (RP) (Feb. 5, 2019) at 223.

was unable to get out of the recliner and raised his hands to defend himself. He was hit on the hands and forearms with the cane. Clown yelled for Martinez to come help him. Little Sky continued hitting Clown with the cane until it broke into pieces. She then advanced on Clown as though to stab him with the broken cane handle, yelling "die mother fucker, handicapped, fuckin' die. I hate you. I hate you."[3] Clown rolled from side to side to avoid being stabbed. When Martinez came running down the stairs, Little Sky threw the handle at Clown and left the house. According to Martinez, Clown was crying and said that Little Sky had broken his arm.

Clown called 911, and Martinez drove Clown to the hospital. Clown told the emergency room physician that he was hit in the head with his cane and saw bright flashing lights. The physician noted obvious injuries to Clown's forearms, and x-rays showed fractures to Clown's left wrist and left thumb. The physician did not document any injuries to Clown's head or neck.

Bellingham Police Officer McKenzie Roorda interviewed Clown at the hospital. Roorda testified that Clown appeared in pain and had obvious injuries to his hands and wrists. When Roorda asked Clown what happened, Clown began crying and said that Little Sky hit him from behind with his cane and he sustained the injuries by putting up his hands to protect his head.

Elijah confirmed that he could hear Little Sky yelling and upset because she wanted the car keys. He testified that Little Sky was acting impatient,

[3] Id. at 227.

aggressive, and seemed to be under the influence of something. Martinez also stated that Little Sky was cursing and screaming regarding the car keys.

Little Sky asserted she acted in self-defense. She testified Clown was irritable from dialysis and angry that she had brought a man into the house. According to Little Sky, she calmly asked Clown for the car keys, but Clown ignored her. He then told her "you ain't getting the F'in car keys."[4] The two began arguing and Clown "just stood up, like leapt up real fast."[5] Little Sky testified that Clown "lunged" at her and hit her on the side of her arm.[6] She stated that she was afraid because Clown had "threatened to fight [her] before"[7] and had a history of assaulting other female family members. Accordingly, she grabbed the first thing she saw to defend herself, which was Clown's cane. She testified that she was "swinging wildly"[8] and did not realize she hit Clown until the cane broke. Little Sky denied hitting Clown from behind. She also denied being under the influence of alcohol or drugs.

Little Sky requested the jury be instructed on self-defense. The State also requested, and the court granted, an aggressor instruction. The instruction, patterned on 11 Washington Practice: Pattern Jury Instructions Criminal § 16.04, at 256 (4th ed. 2016) (WPIC), read:

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[4] RP (Feb. 6, 2019) at 409.

[5] Id. at 411.

[6] Id. at 412.

[7] Id. at 411.

[8] Id. at 412.

> 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 force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.[9]

Defense counsel agreed to the instruction:

> As far as the State's supplemental instructions this morning, we have got a first aggressor instruction and reasonableness instruction, and I think those are both appropriate under the circumstances, and I have no objection to them.[10]

In closing argument, the State argued that Little Sky's claim of self-defense was not credible because Clown's medical issues would have prevented him from threatening Little Sky in the manner she claimed. The State also argued that Little Sky was not entitled to claim self-defense because she was the aggressor:

> [I]f you find beyond a reasonable doubt that the defendant was the aggressor and it was the defendant's acts and conduct that provoked or commenced the fight, then self-defense is not available as a defense.
>
> Jerry is sitting in his chair and he is watching television, she comes downstairs, she wants the car keys, and he says no. She instigated the entire event. She is not entitled to be claiming self-defense in this case. For those reasons, I'll ask that you find her guilty as charged.[11]

A jury convicted Little Sky of second degree assault and violation of a no-contact order.[12] Little Sky appeals.

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[9] Clerk's Papers (CP) at 37.

[10] RP (Feb. 7, 2019) at 484.

[11] Id. at 531-32.

[12] The jury acquitted Little Sky of first degree burglary.

DISCUSSION

Little Sky contends that the trial court erred in giving an aggressor instruction because the evidence did not support it. Because Little Sky failed to object to the instruction at trial, she has waived any claim of error.

We review jury instructions de novo.[13] Jury instructions are proper when they permit the parties to argue their theory of the case, do not mislead the jury, and correctly inform the jury of the applicable law, including the State's burden of proof.[14]

A defendant may claim he or she acted in self-defense where the defendant has a subjective, reasonable belief of imminent harm from the victim.[15] The amount of force used must be "not more than is necessary."[16] A defendant is entitled to a self-defense instruction when he or she meets the "'initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense.'"[17] Because self-defense negates the unlawfulness element of an assault, the State then bears the burden of disproving the defense beyond a reasonable doubt.[18]

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[13] State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

[14] State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

[15] State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010).

[16] RCW 9A.16.020(3).

[17] State v. Grott, 195 Wn.2d 256, 266, 458 P.3d 750 (2020) (quoting State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)).

[18] State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

However, a defendant may not claim self-defense when he or she initiated the fight, and thereby, the need to act in self-defense.[19] A court may give an aggressor instruction where there is credible evidence that the defendant provoked the need to act in self-defense.[20] The provoking conduct must be intentional conduct reasonably likely to elicit a belligerent response and cannot be words alone.[21] It also may not be the conduct that forms the basis for the assault.[22]

Little Sky argues that the evidence did not warrant the giving of an aggressor instruction. She argues that, at most, the evidence showed that she argued with Clown over the car keys, but that this is insufficient to establish she provoked the conflict.

In this regard, we agree with Little Sky. The State's theory of the case was that Little Sky assaulted Clown while Clown did nothing other than cover his face with his hands and arms. Little Sky's version of events was Clown initiated the conflict by striking her arm and she only hit Clown with the cane to protect herself. A jury could believe either that Little Sky assaulted Clown without provocation or that Little Sky acted in self-defense, but there was no evidence from which a jury could conclude that Little Sky provoked an altercation resulting in Clown needing to defend himself with lawful force.

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[19] Riley, 137 Wn.2d at 909-10.

[20] State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

[21] State v. Sullivan, 196 Wn. App. 277, 289-90, 383 P.3d 574 (2016); Riley, 137 Wn.2d at 912.

[22] Kidd, 57 Wn. App. at 100.

However, Little Sky did not object to the giving of the instruction. When a defendant does not object to a jury instruction below, review is precluded unless the defendant can demonstrate a "manifest error affecting a constitutional right."[23] We first determine whether the alleged error raises a constitutional interest, as compared to another form of trial error.[24] If the alleged error raises a constitutional interest, we look to whether the error is manifest. To be "manifest" requires a showing of actual prejudice.[25] "To demonstrate actual prejudice, there must be 'a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'"[26]

The Washington Supreme Court recently held in State v. Grott that not all erroneously given aggressor instructions are errors of constitutional magnitude.[27] This is because although an aggressor instruction impacts a defendant's claim of self-defense, it does not relieve the State of its burden of proof.[28] Instead, 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."[29] If the jury is properly instructed on self-defense, the defendant is not prevented from arguing self-defense, and

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[23] RAP 2.5(a)(3).

[24] State v. O'Hara, 167 Wn.2d 91, 98, 219 P.3d 756 (2009).

[25] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

[26] O'Hara, 167 Wn.2d at 99 (alteration in original) (internal quotation marks omitted) (quoting id.).

[27] 195 Wn.2d 256, 268-69, 458 P.3d 750 (2020).

[28] Id. at 268.

[29] Id.

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.[30]

Here, the trial court instructed the jury on self-defense, and Little Sky was fully able to present her theory of self-defense to the jury. Moreover, the jury instructions properly held the State to its burden of proof. Consequently, Little Sky fails to demonstrate an error of constitutional magnitude entitling her to review.

In the alternative, Little Sky contends she received ineffective assistance of counsel when defense counsel failed to object to the aggressor instruction. We disagree because Little Sky fails to show she was prejudiced by the instruction.

We review ineffective assistance claims de novo.[31] "To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant."[32] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the

[30] Id. at 268-69.

[31] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

[32] Id. (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

challenged conduct.[33] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[34] Failure on either prong defeats a claim of ineffective assistance of counsel.[35]

Based on the record, we conclude Little Sky fails to make a plausible showing she was prejudiced by the aggressor instruction. The jury was adequately instructed on self-defense including, as discussed below, the State's burden of proof. Little Sky was fully able to present her theory of self-defense. Additionally, there was overwhelming evidence Little Sky did not act in self-defense. Clown had significant medical problems, used a cane for mobility, and was exhausted from kidney dialysis. Both the hospital physician and the investigating officer observed significant defensive wounds on his hands and forearms. Clown, Martinez, and Elijah all testified that Little Sky was acting angry and aggressive, which Clown and Elijah believed to be due to her use of methamphetamine. Even if the jury had believed Little Sky's version of events, the amount of force she used—which resulted in fractures to Clown's thumb and wrist—far exceeded what was reasonable and necessary for self-defense. The State presented sufficient evidence to disprove Little Sky's claim of self-defense, and there is no reasonable probability that the outcome of the trial would have

[33] McFarland, 127 Wn.2d at 336.

[34] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[35] State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

been different had defense counsel objected to the aggressor instruction. Little Sky fails to show she received ineffective assistance of counsel.

Little Sky also contends the trial court erred in denying her request to include the State's burden to disprove self-defense in the to convict instruction for second degree assault. We disagree, as the jury instructions as a whole properly informed the jury of the State's burden of proof regarding self-defense.

The to convict instruction for second degree assault provided:

> To convict the defendant of count 2, the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 6, 2018, the defendant:
>
> (a) intentionally assaulted Jerry Clown and thereby recklessly inflicted substantial bodily harm; or
>
> (b) assaulted Jerry Clown with a deadly weapon; and
>
> (2) That this act occurred in the state of Washington.[36]

The court gave a separate instruction, patterned after WPIC 17.02, regarding Little Sky's self-defense claim:

> It is a defense to an assault that the force was lawful as defined in this instruction.
>
> . . . .
>
> 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 as to any charge in which the State must prove an assault as an element of the offense.[37]

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[36] CP at 26.

[37] CP at 34.

The trial court rejected defense counsel's request to incorporate the State's burden to disprove self-defense into the to convict instruction, stating, "I would be reluctant to change the pattern instruction on that issue in this case."[38]

In State v. Hoffman, the Washington Supreme Court held that the to convict instruction need not refer to the State's burden to prove the absence of self-defense, as long as that burden is made clear through a separate instruction.[39] Little Sky contends Hoffman is not controlling because it did not involve an aggressor instruction. She argues that the erroneous aggressor instruction confused the jury and allowed it to disregard her claim of self-defense. But it is unquestionable that the jury instructions accurately stated the law regarding the State's burden to disprove self-defense. And Little Sky does not articulate how including the State's burden in the to convict instruction would eliminate the alleged prejudice of an erroneous aggressor instruction. In essence, Little Sky is restating her challenge to the giving of the aggressor instruction, an argument we have already rejected. Little Sky fails to demonstrate any error in the to convict instruction.

Finally, Little Sky contends the trial court erred when it permitted Roorda to testify that the cane Little Sky used to hit Clown was capable of causing substantial bodily harm. She contends this constitutes an impermissible opinion

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[38] RP (Feb. 7, 2019) at 489.

[39] 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

on the ultimate issue for the jury. Even assuming the testimony was improper, any error was harmless.

During Roorda's testimony, the following exchange took place:

> STATE: Okay. And I showed you earlier the cane depicted by photograph. I'm handing you what has been entered into evidence as State's Exhibits 1B and 1C, is that the same cane depicted in photograph Exhibit No. 2?
>
> ROORDA: Yes.
>
> STATE: And in your opinion is this an item that is capable, readily capable of causing substantial bodily harm?
>
> DEFENSE: Objection to speculation, Your Honor.
>
> ROORDA: Yes.
>
> DEFENSE: Also invades the province of the jury.
>
> STATE: It's an opinion on ultimate issue which should be allowed under Evidence Rule 704.
>
> COURT: Overruled. You may answer the question.
>
> ROORDA: Yes, it is.[40]

As charged here, the State was required to prove Little Sky either intentionally assaulted Clown and recklessly inflicted substantial bodily harm or assaulted Clown with a deadly weapon.[41] The jury instructions defined "substantial bodily harm" as "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or

[40] RP at 349-50.

[41] See RCW 9A.36.021(a); (c).

impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part."[42]

We review a trial court's evidentiary rulings for abuse of discretion.[43] ER 701 allows testimony as to opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. But a witness may not offer an opinion on the guilt or veracity of the defendant because it is unfairly prejudicial and invades the exclusive province of the jury.[44]

Here, even if admitting Roorda's testimony was error, it was harmless. "Where evidence is improperly admitted, the trial court's error is harmless 'if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'"[45] The fact that the cane inflicted substantial bodily harm was not in dispute. Clown sustained fractures to his wrist and thumb. The jury was properly instructed that "a fracture of any bodily part" constituted substantial bodily harm. Because there was overwhelming evidence Clown suffered substantial bodily harm, a reasonable jury would have reached the same

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[42] CP at 24.

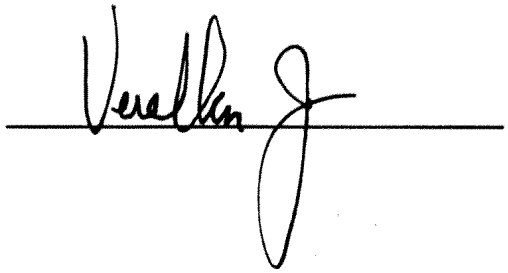
[43] State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

[44] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993)).

[45] State v. Yates, 161 Wn.2d 714, 764, 168 P.3d 359 (2007) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)), cert. denied sub nom. Yates v. Washington, 554 U.S. 922, 128 S. Ct. 2964, 171 L. Ed. 2d 893 (2008).

determination regardless of Roorda's testimony. Therefore, we hold that any error in admitting this evidence was harmless.

Affirmed.



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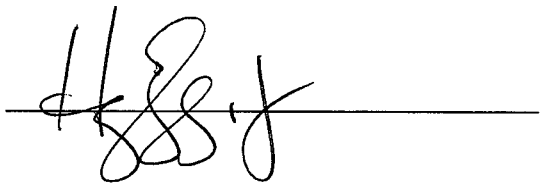

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79586-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 19, 2020
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