

62992-1

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NO. 62992-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THANH NGOC LY,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CHARLES MERTER

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u> .....	4
1. LY HAS NOT MET HIS BURDEN OF PROVING INEFFECTIVE ASSISTANCE OF COUNSEL SINCE THE FIRST AGGRESSOR INSTRUCTION WAS OFFERED BY THE PROSECUTOR AND SUPPORTED BY THE EVIDENCE AND NO PREJUDICE WAS PROVEN. ....	4
D. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 4, 5, 9

Washington State:

In re Personal Restraint of Rice, 118 Wn.2d 876,  
828 P.2d 1086 (1992)..... 5

State v. Clausing, 147 Wn.2d 620,  
56 P.3d 550 (2002)..... 6

State v. Crawford, 159 Wn.2d 86,  
147 P.3d 1288 (2006)..... 9

State v. Davis, 119 Wn.2d 657,  
835 P.2d 1039 (1992)..... 7

State v. Hughes, 106 Wn.2d 176,  
721 P.2d 902 (1986)..... 6

State v. LeFaber, 128 Wn.2d 896,  
913 P.2d 369 (1996)..... 6, 7

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995)..... 5

State v. Riley, 137 Wn.2d 904,  
976 P.2d 624 (1999)..... 7

State v. Schaler, 145 Wn. App 628,  
186 P.3d 1170 (2008)..... 6

State v. Thomas, 109 Wn.2d 222,  
743 P.2d 816 (1987)..... 5

State v. West, 139 Wn.2d 37,  
983 P.2d 617 (1999)..... 4

State v. Williams, 132 Wn.2d 248,  
937 P.2d 1052 (1997)..... 6

State v. Wingate, 123 Wn. App 415,  
98 P.3d 111 (2004), rev'd on other grounds,  
155 Wn.2d 817, 122 P.3d 908 (2005)..... 7

**A. ISSUES PRESENTED**

1. In order to establish ineffective assistance of counsel, Ly must show (1) that his attorney's performance fell below a minimum objective standard of reasonable conduct, and (2) that but for his counsel's errors, there is a reasonable probability that the results at trial would have been different. When the defense attorney offers a jury instruction that is supported by the evidence, do those decisions fall below an objective standard of reasonable conduct? Further, was there a reasonable probability that the results of the trial would have been different if the defense attorney had not offered the first aggressor instruction?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The defendant was charged with Assault in the Second Degree on July 3, 2008. The Information was amended to add a deadly weapon enhancement on October 6, 2008. A jury found the defendant guilty on December 15, 2008.

## **2. SUBSTANTIVE FACTS.**

On July 1, 2008 at 4:15am, Jorge Fortun-Cebada was at the Shell gas station located off of Dearborn in south Seattle. 2RP 88. Fortun-Cebada purchased a Coca-Cola through the service window. 2RP 89, 3RP 9. Thanh Ly approached Fortun-Cebada and accused him of taking his soda. 2RP 90.

Fortun-Cebada testified that he turned to see Ly holding a knife in his hand. 2RP 89. Brian Rupert, the Shell station sales clerk, saw Ly yelling at Fortun-Cebada and Ly start arguing and fighting with Fortun-Cebada. 3RP 12. Rupert said it looked like Fortun-Cebada was trying to defend himself against Ly. 3RP 12. Ly swung the knife at Fortun-Cebada. 2RP 104. Fortun-Cebada was able to use his backpack as a shield, and blocked knife swings from Ly. 2RP 104. Ly then cut Fortun-Cebada's left arm with the knife. 2RP 90. Rupert called 911 reporting the incident.

Rupert said the initial argument stopped when Fortun-Cebada walked away from Ly. 3RP 15. Rupert saw Ly pull something out of his bag and re-contacted Fortun-Cebada. 3RP 17. Rupert saw Ly begin swinging at Fortun-Cebada as if he had a knife in his hand. 3RP 17.

Seattle Police Officers arrived and observed Ly and Fortun-Cebada in the middle of the street. 2RP 25. Ly was swinging his arms wildly at Fortun-Cebada. 2RP 25. Fortun-Cebada was trying to back away from Ly and was holding up his backpack as if to protect himself from Ly. 2RP 25-26, 27.

Officer Simmons gave verbal commands to Fortun-Cebada and Ly to get down on the ground. 2RP 28. Fortun-Cebada complied. 2 RP 28. Ly did not. 2RP 28. Ly refused the commands and officers saw Ly holding a knife. 2 RP 30. Ly eventually threw the knife to the ground, but continued refusing the officers commands to get down on the ground and show his hands. 2 RP 30-31. Because he continued to resist, Ly was tased and taken into custody. 2RP 31.

Fortun-Cebada had a knife injury to his left forearm. 2RP 65-66. Seattle Fire Department responded and treated the injury. Officer Janes recovered the knife he saw Ly throw into the street. The knife was 7" in length with a 3.5" blade. 2RP 69.

At trial, Ly testified that when he returned to the store to get his soda that he had already purchased, Fortun-Cebada took his soda then struck Ly in the face. 3RP 37. Ly also testified that Fortun-Cebada was lunging toward him as if to obtain Ly's money. 3 RP 38.

Ly admitted that the knife police recovered was his. 3RP 40. He said that he pulled it out to scare Fortun-Cebada away. 3RP 40.

**C. ARGUMENT**

- 1. LY HAS NOT MET HIS BURDEN OF PROVING INEFFECTIVE ASSISTANCE OF COUNSEL SINCE THE FIRST AGGRESSOR INSTRUCTION WAS OFFERED BY THE STATE AND SUPPORTED BY THE EVIDENCE, AND NO PREJUDICE WAS PROVEN.**

Mr. Ly argues that his trial counsel was ineffective for offering a first aggressor instruction. In this case, Mr. Ly's argument fails because the instruction would have been given anyway because the prosecutor offered it and the facts clearly supported giving the instruction. Mr. Ly's argument also fails because, even if it was error for defense counsel, Mr. Ly cannot demonstrate any resulting prejudice arising from that error. Even if the defense attorney had chosen not to offer the instruction, it would have been given anyway because it was offered by the State and supported by the evidence. The result at trial would have been the same.

In order to establish ineffective assistance of counsel, the defendant must show (1) that his attorney's performance fell below a minimum objective standard of reasonable conduct, and (2) that

but for his counsel's errors, there is a reasonable probability that the results at trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to establish either prong, the court should deny the claim. Strickland, at 697; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court will "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Because the presumption runs in favor of effective representation, the defendant must show that there were no legitimate strategic or tactical reasons for his attorney's conduct. McFarland, 127 Wn.2d at 336. If defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). Here, although counsel could have chosen not to offer the first aggressor instruction, the

instruction would have been given anyway because it was offered by the State and supported by the evidence.

Jury instructions are proper if they are supported by substantial evidence, allow the parties to argue their theories of the case, and inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

However, in general, an objection to a jury instruction may not be raised by a criminal defendant for the first time on appeal, unless it involves a manifest error affecting a constitutional right. State v. Schaler, 145 Wn. App 628, 635, 186 P.3d 1170 (2008).

Each party is entitled to have the trial court instruct the jury on its theory of the case if evidence supports that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

Jury instructions on self-defense must more than adequately convey the law. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). They must make the relevant legal standard manifestly apparent to the average juror. LeFaber, at 900. A jury instruction

misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." LeFaber, at 900.

A first aggressor instruction is appropriate when "there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self defense." State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). The record must demonstrate the defendant's involvement in wrongful or unlawful conduct before he committed the charged crime. State v. Wingate, 123 Wn. App 415, 422-23, 98 P.3d 111 (2004), rev'd on other grounds, 155 Wn.2d 817, 122 P.3d 908 (2005).

A first aggressor instruction is also appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a flight. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999)(citing State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)).

A distinction should be noted: a first aggressor instruction does not determine that the defendant was the first aggressor. Rather, the instruction allows the jury ultimately to decide, beyond a reasonable doubt, whether or not the defendant was the first aggressor.

In the case at hand, there is clear evidence that Ly was the first aggressor. This is supported by Fortun-Cebada and Rupert's testimony. According to Fortun-Cebada, Ly approached Fortun-Cebada and accused him of taking his soda. 2RP 90. An argument ensued. Rupert said the initial argument stopped when Fortun-Cebada walked away from Ly. 3RP 15. Rupert saw Ly pull something out of his bag and re-contacted Fortun-Cebada. 3RP 17.

Fortun-Cebada turned to see Ly holding a knife in his hand. 2RP 89. Ly swung the knife at Fortun-Cebada. Rupert saw Ly begin swinging at Fortun-Cebada as if he had a knife in his hand. 3RP 17. 2RP 104. Fortun-Cebada was able to use his backpack as a shield, and blocked knife swings from Ly. 2RP 104. Ly then cut Fortun-Cebada's left arm with the knife. 2RP 90.

Because the trial court properly gave the first aggressor instruction originally submitted by the prosecutor, the defendant's trial attorney did not act unreasonably or provide ineffective assistance.

Furthermore, even if Mr. Ly can demonstrate that his trial counsel was deficient in failing to object to the first aggressor instruction, his ineffective assistance of counsel claim still fails because there was no resulting prejudice. In order to satisfy the

second prong of the Strickland test, the defendant must show "that counsel's deficient performance was so inadequate that there exists a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Strickland, 446 U.S. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Id. Additionally, "a defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 693) (emphasis in original). Here, Mr. Ly has not made this required showing.

The evidence supporting the first aggressor instruction was strong. (See above argument). Given the strength of the evidence presented at trial, it is unlikely that the jury would have found the defendant not guilty if the first aggressor instruction had not been given. Accordingly, Mr. Ly was not prejudiced by his counsel's decision not to object to the first aggressor instruction.

Here, Mr. Ly has failed to establish that his trial counsel's decision to offer the first aggressor instruction was deficient performance. In addition, even if trial counsel was deficient, Mr. Ly

has failed to demonstrate that he suffered any resulting prejudice.  
Accordingly, Mr. Ly's claim of ineffective assistance of counsel fails.

**D. CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm  
Mr. Ly's conviction.

DATED this 23 day of October, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kari Dady and David Koch, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. THANH NGOC LY, Cause No. 62992-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty F. Huddleston  
Name  
Done in Seattle, Washington

10/23/09  
Date

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