

66331-3

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NO. 66331-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD COBB,

Appellant.

REC'D

MAY 31 2011

King County Prosecutor
Appellate Unit

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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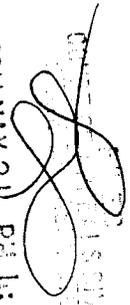
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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant a fair trial when it gave an aggressor instruction without evidentiary support. CP 65 (Instruction 23).¹

2. Defense counsel was ineffective in failing to object to the aggressor instruction.

3. The trial court failed to enter written findings of fact and conclusions of law after the hearing under CrR 3.5.

Issues Pertaining to Assignments of Error

1. Washington courts generally disfavor aggressor instructions, which should only be used if the defendant initiated violence by a separate act from the charged offense. Here, the evidence showed appellant sought out the decedent, but before any interaction could occur, he perceived the decedent reaching for a gun and shot him twice. Was it reversible error to give an aggressor instruction when there was no evidence of any separate provoking conduct by appellant?

¹ Instruction 23 reads:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you 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 65; see also 11 Washington Practice: Washington Pattern Jury Instructions -- Criminal WPIC 16.04 (3d ed. 2008).

2. Unreasonably deficient attorney performance that undermines confidence in the outcome of the trial violates a defendant's constitutional right to effective assistance of counsel. Despite the lack of any evidence of provoking conduct other than the charged offense itself, defense counsel agreed to the aggressor instruction. Was appellant's constitutional right to effective assistance of counsel violated?

3. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Edward Cobb with one count of first-degree murder while armed with a firearm and one count of unlawful possession of a firearm. CP 9-10. Cobb pled guilty to unlawful possession of a firearm. CP 74. A jury found him guilty of first-degree murder and found by special verdict that he was armed with a firearm. CP 72, 73. The court imposed concurrent standard range sentences and the consecutive 60-month firearm enhancement for a total sentence of 476 months. CP 102-04. Notice of appeal was timely filed. CP 110.

2. Substantive Facts

On July 12, 2008, large numbers of young people, among them Cobb and Chezaray Bacchus, arrived at the Kent transit center. 5RP² 74-75. Witnesses described a confrontation between members of the “Low Profiles” (LP) gang and a group known as “Little Thuggin’ Savages” (LTS). 5RP 13-14, 84-85; 6RP 150; 10RP 11, 31-32, 54-56, 73-74, 78-81. Witnesses associated with the LPs testified that, during this confrontation, Bacchus lifted his shirt to display the butt of a handgun. 10RP 11, 31-32, 54-56, 73-74, 78-81. Witnesses affiliated with LTS denied Bacchus was armed. 5RP 17; 6RP 17; 7RP 39. Police feared a fight was about to break out. 5RP 77, 85. Defense witnesses testified Bacchus said something to the effect of, “All you LP nigga’s gonna get it.” 10RP 31-32, 79-80.

Although he was a member of the LPs, Cobb’s only involvement in this confrontation was to lead his friend Leonard Warren away from it. 9RP 46; 10RP 55; 12RP 16. He had no personal dispute with Bacchus or his group. 12RP 26, 34. One young woman claimed to have overheard either Cobb or his friend Devontea Rosemon on the bus (she was not sure which) announce that it was time for “Be Fresh” (Bacchus) to get it. 7RP 25-31.

² There are 15 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 11, 2010; 2RP – Oct. 12, 2010; 3RP – Oct. 13, 2010; 4RP – Oct. 18, 2010; 5RP – Oct. 19, 2010; 6RP – Oct. 20, 2010; 7RP – Oct. 21, 2010; 8RP – Oct. 25, 2010; 9RP – Oct. 26, 2010; 10RP – Oct. 27, 2010; 11RP – Nov. 1, 2010; 12RP – Nov. 2, 2010; 13RP – Nov. 3, 2010; 14RP – Nov. 4, 2010; 15RP – Nov. 30, 2010.

However, on cross-examination, she was certain the man she heard on the bus was Rosemon, not Cobb. 7RP 59. Cobb testified that when Warren and Bacchus each realized the other was armed, they backed down and Warren suggested a fistfight. 12RP 16.

Ultimately, police dispersed the gathering, and several persons affiliated with LTS made their way to a nearby Arby's restaurant. 4RP 115; 5RP 17-18, 79, 85. At Arby's, young people affiliated with LTS were hanging around, mostly outside the restaurant, but at least one had gone inside. 4RP 115-18; 5RP 18-21; 6RP 13. Bacchus was outside near the door and may have had a cell phone.³ 4RP 117-18; 5RP 20-21, 45.

Cobb and Rosemon went Arby's to arrange a fistfight between Bacchus and Warren. 12RP 71. Cobb waited outside hoping to see Bacchus' friend Salt to arrange the fight. 12RP 29-30. Salt did not come out right away, and Cobb saw Bacchus near the Arby's doorway. 12RP 34, 36. At first, Cobb did not think Bacchus noticed him. 12RP 36. But then, Bacchus made eye contact followed by a quick movement that Cobb interpreted as reaching for the gun Bacchus had displayed earlier. 12RP 36. Cobb was so surprised to see Bacchus reach for his gun, that he pulled out his own revolver and shot Bacchus. 12RP 36, 79. He testified he fired

³ A cell phone was found at the scene, but police never determined whose it was. 9RP 53-54.

quickly, with no time to aim because he did not want to risk Bacchus shooting him or Rosemon. 12RP 36-39.

Bacchus turned and stumbled through the door into the restaurant. 12RP 38-39. Cobb testified everything happened very quickly, and yet time seemed to slow down. 12RP 39. He could not see or hear anyone but Bacchus. 12RP 39-40. Cobb was not sure if he had hit Bacchus,⁴ and so, still fearing Bacchus could reappear and open fire, he followed him into the restaurant. 12RP 39. When he found Bacchus on the ground, on his back, eyes open, moving his hands, Cobb fired again, this time striking Bacchus in the head. 12RP 41-42.

Patrice Brown, who described herself as “affiliated” with Bacchus’ group, the LTS, testified she saw Cobb run from behind the Arby’s; then she heard shots and fled. 4RP 119. She heard no argument and also did not notice any silence or staring before the shots were fired. 4RP 122. Mahogany Lee, who described herself as “particularly close” to Bacchus, testified she saw someone sneaking around the corner, and when she turned around she saw Cobb on his knees holding his gun with both hands and shooting. 5RP 21-22. Between the first and second shots she heard him yell, “LP.” 5RP 25-26, 49. However, Cobb denied saying anything at the time. 12RP 43. Neutral witnesses corroborated this testimony; Arby’s

⁴ Expert medical testimony at trial showed Cobb’s first shot punctured Bacchus’ aorta and was almost certainly fatal. 9RP 75-76, 80.

employees and patrons unrelated to either group did not hear anything. 4RP 57, 72.

No weapon or sign of other bullet strikes was found at the scene. 6RP 78. However, at least one of Bacchus' friends was inside the Arby's and had the opportunity to remove a weapon before police arrived. 6RP 15. One witness who saw two people apparently trying to hide something across the street shortly after the shooting. 5RP 130-31.

Cobb fled the scene with Rosemon and changed clothes to avoid detection. 12RP 43-46. He threw away his gun, which was later found in the field where he was arrested. 12RP 20, 47. The pair were apprehended shortly after the shooting but were released after Cobb denied any involvement. 6RP 180-82; 12RP 49. Cobb told police he was at Arby's but fled upon hearing gunshots. 6RP 183-84; 7RP 4; 12RP 48. Cobb's statements to police were admitted after a hearing pursuant to CrR 3.5. 3RP 43.

Later that evening, in apparent retaliation, Cobb himself was shot. 12RP 51. In the hospital, he again denied being involved in the Arby's shooting. 9RP 23-24. After an arrest warrant was issued, Cobb's mother arranged a three-way phone call with police to try to convince Cobb to turn himself in. 9RP 29-30. In that conversation, Cobb admitted he shot Bacchus twice after seeing him reach for his gun. 9RP 31-32. Despite the detective's

encouragement, Cobb declined to turn himself in and was arrested several weeks later. 9RP 36.

The court admitted into evidence Cobb's flirtatious letters to a young woman explaining what had happened. 12RP 4-5. He told her:

My brother Leonard & Chez[Bacchus] were beefing. Chez flashed the burner. We all were supposed to fight the police broke us up. Like a half in hour later my brother Leonard said that Chez had to get it. And since I was the oldest and I hella drunk me & dirty D [Rosemon] went looking for Salt & Chez. When we got to the Arby's Chez looked at me and Dirty. Me and Dirty saw him reaching for something. It could of be a cell phone but I wasn't going to take that chance. And that's how it all happened. It was a serious mistake but he would of tried to kill my cousin if he would of got the chance to.

9RP 47-48.

Cobb's letters also expressed great remorse:

[C]razy thing is when I was in the hospital I found out he is my cousin. Him and my dad are 1st cousins so he's my 2nd cousin. If I could take it back I would as everything. . . . And not because I'm in jail. Because one wrong choice cost a lot of pain. His mom, my mom, my girlfriend had a miscarriage for all the stress of me about to go to jail. I was so ready to have my son then for it not to happen broke my heart on everything I love.

9RP 52-53. At trial, Cobb expressed both regret and second thoughts, in hindsight, as to whether the second shot was necessary. 12RP 70. However, given what he knew of Bacchus at the time, he could not see that he had any other choice. 12RP 70.

The court instructed the jury on justifiable homicide and, with defense counsel's agreement, also gave an aggressor instruction that a person is not entitled to act in self-defense after engaging in an act that provoked the need for self-defense. CP 60-65; 12RP 86.

C. ARGUMENT

1. THE AGGRESSOR INSTRUCTION WAS IN ERROR BECAUSE THERE WAS NO EVIDENCE OF A PROVOKING ACT SEPARATE FROM THE SHOOTING ITSELF.

Cobb's jury was instructed that if it determined he was the aggressor and provoked the fight, then he could not claim to have acted in self-defense. CP 65. This aggressor instruction undercuts the affirmative defense of self-defense, which the State has the burden of disproving beyond a reasonable doubt. State v. Stark, 158 Wn. App. 952, 960, 244 P.3d 433 (2010)⁵ (quoting State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999)). Therefore, "[A]ggressor instructions are not favored," and courts should use care in giving this instruction. State v. Birmel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) overruled on other grounds as noted in State v. Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Indeed, this Court has warned, "Few situations exist necessitating an aggressor instruction." Stark, 158 Wn. App. at 960 (citing State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

⁵ The Washington Supreme Court denied review on April 26, 2011.

The party requesting an instruction bears the burden of producing at least some evidence justifying the instruction. Riley, 137 Wn.2d at 909-10. The aggressor instruction is not justified unless the State meets its burden to present evidence from which the jury could conclude the defendant provoked the fight, either by drawing a weapon or other intentional conduct reasonably likely to provoke a fight. Stark, 158 Wn. App. at 959 (citing State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008)). In this case, the burden was on the State to present some evidence that, before Bacchus apparently made a move for his gun, Cobb engaged in provoking conduct. See Stark, 158 Wn. App. at 959. The State did not meet that burden.

The court erred in giving the aggressor instruction because there was no evidence a provoking act preceded the shooting. The aggressor instruction impeded Cobb's ability to argue the defense theory, and lessened the State's burden to prove the killing was not justifiable. Stark, 158 Wn. App. at 961. The erroneous instruction cannot be harmless because without it, a rational jury could have found Cobb acted in self-defense. Finally, in agreeing to the erroneous instruction, Cobb's attorney rendered ineffective assistance.

a. The Aggressor Instruction Was Unwarranted Because Cobb Did Not Engage in Any Separate Provoking Conduct.

An aggressor instruction is not justified unless there is evidence the defendant engaged in some intentional conduct, separate from the ultimate offense, that provoked a fight and the need for self-defense. See State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). To determine whether such provoking conduct occurred, courts carefully scrutinize events leading up to the offense. See, e.g., Stark, 158 Wn. App. at 960; Birnel, 89 Wn. App. at 473. Courts review de novo whether there is sufficient evidence to support an aggressor instruction. Stark, 158 Wn. App. at 959. In this case, the State presented no evidence Cobb engaged in any aggressive or provoking conduct other than the shooting itself. Therefore, the aggressor instruction was in error.

Riley shows the type of provoking conduct that could have occurred (but did not) in this situation. Riley claimed self-defense after a gang-related confrontation that began when Riley insulted Gustavo Jaramillo. 137 Wn.2d at 906. Jaramillo then threatened to shoot Riley, but did not draw his gun. Id. It was undisputed Riley was the first to draw a weapon. Id. at 907. He pointed his gun at Jaramillo and demanded Jaramillo hand over his gun. Id.

at 906. Riley testified Jaramillo was reaching for his gun when Riley shot him. Id. at 906-07.

The court held Riley engaged in provoking conduct when he drew his gun and pointed it at Jaramillo while demanding Jaramillo's gun. Id. at 909. Riley is a case where the defendant escalated an altercation by drawing his gun and, when that did not produce the desired results, claimed to have fired in self-defense. Id. Riley is not this case.

This case is more akin to State v. Kidd, 57 Wn. App. 95, 786 P.2d 847 (1990). Kidd shot two people on a bus. Id. at 97-98. He believed his life was in danger because drug dealers and gang members wrongly thought he was a police informant. Id. He testified the two victims suspiciously changed seats on the bus to correspond with his own seat changes and then one reached into his pocket as if to draw a weapon. Id. On appeal, the court held the aggressor instruction was in error because there was no evidence Kidd engaged in any provoking conduct before the shooting. Id. at 101.

As in Kidd, there was no evidence Cobb engaged in a provoking act before the shooting. The evidence showed Cobb perceived a threat, pulled his gun, and fired. The only witnesses to the moments leading up to the shooting, Patrice Brown and Mahogany Lee, did not testify to any provoking behavior. Brown saw Cobb run from behind the Arby's; then she heard

shots and fled. 4RP 119. Lee claimed she turned around to see Cobb on his knees holding his gun with both hands and shooting. 5RP 21-22. Between the first and second shots she heard him yell, “LP.” 5RP 25-26, 49. In direct contrast to Riley, there was no indication Cobb pulled out his gun before the shooting in a separate act of provocation.

Nor was there any indication Cobb initiated a fight or engaged in provoking conduct earlier at the transit center. Cobb’s only involvement in the earlier confrontation was to pull his friend Warren away. 9RP 46; 10RP 55; 12RP 16. Cobb then sought out Salt and Bacchus, intending only to arrange a fistfight between Bacchus and Warren. 12RP 71. Even if this plan was discussed, words alone cannot deprive a person of the right to act in self-defense. Riley, 137 Wn.2d at 912. The only aggressive act shown in this case was the shooting itself, which is not sufficient to warrant the aggressor instruction.

The aggressor instruction is not justified when the defendant’s only interaction with the victim was the assault or shooting that is claimed to have occurred in self-defense. See Wasson, 54 Wn. App. at 159. In Wasson, the eventual victim Reed tried to break up a fight between Wasson and another man by attacking the other man and then coming toward Wasson. Id. at 157-58. Wasson yelled at Reed to stop and shot him when he did not do so. Id. In holding that the aggressor instruction was unwarranted, the court noted,

“Mr. Wasson never initiated any act toward Mr. Reed until the final assault.” Id. at 159. Similarly, there is no evidence in this case Cobb initiated any interaction or even had any dispute with Bacchus other than the shooting itself. 7RP 59; 12RP 16.

Merely bringing a firearm to a situation where a conflict is likely does not turn a person into an aggressor under the law. See Brower, 43 Wn. App. at 902. The incident in Brower began when Brower pursued a woman to Olympia because he feared she was stealing the vehicle he loaned her. Id. at 895. He and his companion both brought firearms for protection. Id. at 896. Once there, Brower’s companion argued with the woman’s friend Martin, who followed them down the stairs as they left. Id. On the stairs, Brower thought he saw a knife in Martin’s hand, so he turned suddenly, stuck his revolver in Martin’s stomach, and told him to go back inside. Id.

Even though Brower sought out this high-conflict situation and brought his firearm, the court held the evidence was insufficient to justify an aggressor instruction because Brower did not display the weapon before the assault. Id. at 902. “If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself.” Id.

Here, the prosecutor argued in closing that Cobb was unreasonable in seeking out Salt and Bacchus to arrange a fistfight and in bringing a firearm. 13RP 36-37. But whether it was prudent for Cobb to put himself in that

situation is not the question. Like Brower, Cobb did not engage in any provoking conduct beyond being in a high-conflict situation and having his firearm on his person. Like Brower, the only way Cobb can be perceived as the aggressor is in terms of the shooting itself. Under Wasson and Brower, this is insufficient. Wasson, 54 Wn. App. at 159; Brower, 43 Wn. App. at 902.

Speculation that Cobb must have done something provoking is also insufficient to warrant the aggressor instruction. See Brower, 43 Wn. App. at 902. The Brower court declared that absent any evidence, “[T]he jury was left to speculate as to the lawfulness⁶ of his conduct prior to the assault.” Id. To find provoking conduct in this case, the jury would have had to engage in similar speculation.

The court failed to use the requisite care with this disfavored instruction. See Birnel, 89 Wn. App. at 473. Cobb’s intent in seeking out Bacchus or speculation about what he may have done once he found him cannot substitute for evidence of actual provoking conduct. Id. at 902. Nor can the shooting itself be characterized as the provoking act. Kidd, 54 Wn. App. at 101. The aggressor instruction was unwarranted because there is no evidence Cobb engaged in any conduct or act that provoked Bacchus to reach for his gun. Id.

⁶ Brower discussed an earlier version of this instruction that required unlawful, rather than provoking, conduct. 43 Wn. App. at 902.

b. The Improper Aggressor Instruction Cannot Be Harmless Because It Lessened the State's Burden of Proof on the Disputed Issue of Self-Defense.

It is reversible error to give an aggressor instruction when not supported by the evidence. Wasson, 54 Wn. App. at 161; Brower, 43 Wn. App. at 901-02. The aggressor instruction provides the jury with an unjustified reason to reject the defendant's self-defense claim and relieves the State of its burden to disprove self-defense. Stark, 158 Wn. App. at 961. The jury is presumed to have relied on the instructions to structure the deliberations and cannot be assumed to have compensated for instructional error. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997); see also Stark, 158 Wn. App. at 961. Due to its impact on the State's burden to disprove self-defense, error in giving an aggressor instruction is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. Stark, 158 Wn. App. at 961 (citing Birnel, 89 Wn. App. at 47).

In assessing whether an improper aggressor instruction could be harmless beyond a reasonable doubt, courts look for evidence supporting the self-defense claim. See Stark, 158 Wn. App. at 961 (improper aggressor instruction required reversal when slayer had valid protection order against victim, who reacted violently to service of the order). Essentially, the question is, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Neder v. United States,

527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Watt, 160 Wn.2d 626, 639, 160 P.3d 640 (2007) (Washington has adopted Neder test). Translated to the aggressor instruction context, the error cannot be harmless unless no reasonable juror could have found the defendant acted in self-defense. So long as the defendant contested the issue and raised sufficient evidence, the error cannot be harmless. Neder, 527 U.S. at 19.

The reviewing court does not become a second jury. Id. Nor does it assess witness credibility. State v. Ward, 125 Wn. App. 138, 148, 104 P.3d 61 (2005) (argument on appeal that evidence of aggression was not credible “is of no avail because “[c]redibility determinations are within the sole province of the jury and are not subject to review””) (quoting State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)). The court merely asks, “whether the record contains evidence.” Neder, 527 U.S. at 19.

The aggressor instruction in this case cannot be harmless because Cobb presented sufficient evidence to place the issue of self-defense in reasonable dispute. Constitutional error is only harmless when the evidence is uncontroverted or undisputed. See Watt, 160 Wn.2d at 639-640. Watt argued she was prejudiced by improper admission of her husband’s statements. Id. at 628. On appeal, the court rejected this argument because there was other uncontroverted evidence of the elements of the crime. Id. at 640-41. Watt did not contest that methamphetamine was manufactured in

her garage. Id. at 640. Nor did she provide any evidence controverting the State's evidence that children were present. Id. The court framed the question as whether the issues affected by the erroneously admitted evidence were "reasonably subject to dispute." Id. at 639. Because they were not, the error was harmless. Id. at 640-41.

Watt stands in contrast to State v. Damon, 144 Wn.2d 686, 695, 25 P.3d 418, 33 P.3d 735 (2001), in which the court held it was not harmless error when the defendant was held in a restraint chair throughout the trial. As in this case, the only disputed issue in Damon was the defense. Id. at 693. Damon's expert testified Damon was unable to form the requisite intent due to diminished capacity; the State's experts contradicted this assertion. Id. at 689-90. The court therefore concluded the issue was reasonably in dispute. Id. at 694-95. Because the issue was disputed and rested on the jury's credibility assessment, the constitutional error was not harmless. Id. at 694-96.

Here, the jury also was required to assess credibility because the parties presented contradictory evidence. Cobb testified he saw Bacchus reach for his gun. 12RP 36. Several other witnesses confirmed Bacchus had displayed the gun in a show of force earlier in the day and may have threatened Cobb or his friend Warren or both. 10RP 11, 31-32, 54-56, 73-74, 78-81. This is evidence from which a jury could reasonably have

concluded Cobb acted in self-defense. The State's witnesses did not see a gun at the earlier confrontation. As in Damon, the defense was reasonably in dispute, and the jury was required to assess credibility. As in Damon, the constitutional error impacting the disputed defense was not harmless. 144 Wn.2d at 694-96.

The State may argue the jury would necessarily have rejected Cobb's self-defense claim because his fear of Bacchus was not reasonable. But Cobb's history with Bacchus indicated his fear *was* reasonable. See Kidd, 57 Wn. App. at 101-02. In Kidd, the erroneous aggressor instruction was held harmless because the record established beyond a reasonable doubt that Kidd's fear was unreasonable "absent any prior history or preliminary confrontation between the defendant and the victim." Id. at 102, 102 n.6. That very history, the absence of which rendered Kidd's fear unreasonable, is in evidence in this case. Given the previous confrontation in which Bacchus displayed a gun and threatened Cobb's group, a rational juror could find his fear was reasonable. See Kidd, 57 Wn. App. at 102 n.6; 10RP 11, 31-32, 54-56, 73-74, 78-81.

The Kidd court also reasonably suggests that so long as the self-defense instruction is properly given, an unsupported aggressor instruction can never be harmless. In discussing harmless error in that case, the court noted, "Indeed, Kidd was not entitled to a self-defense instruction on these

two counts.” Kidd, 57 Wn. App. at 102. The unreasonableness of Kidd’s fear shows both that the aggressor instruction was harmless and that the self-defense instruction was not warranted in the first place. Id. Here, the evidence Bacchus displayed a gun at the transit center supports the trial court’s assessment that Cobb presented sufficient evidence to instruct the jury on justifiable homicide. See Kidd, 57 Wn. App. at 102 n.6; 10RP 11, 31-32, 54-56, 73-74, 78-81. Since Cobb’s claim that he acted justifiably in self-defense was reasonably in dispute, the error in undercutting his defense with an improper aggressor instruction cannot be harmless beyond a reasonable doubt. Damon, 144 Wn.2d at 694-96.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN ACQUIESCING TO THIS CONSTITUTIONAL ERROR.

The State may argue this error was invited when counsel agreed to the aggressor instruction. If this Court finds that acquiescence constituted invited error, reversal is required because counsel’s deficient performance prejudiced Cobb and he was denied his constitutional right to effective assistance of counsel.

The Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee every accused person the right to the effective assistance of counsel. 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). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003) (citing State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)).

The court and attorneys in this case appeared to agree the aggressor instruction was appropriate based on the evidence that Cobb intentionally sought out Bacchus to arrange a fistfight. 12RP 86. This plan is not conduct justifying an aggressor instruction, as discussed above. See argument section C.1.a, supra. Defense counsel should have been aware that, to justify an aggressor instruction, there must be a separate, provoking act. Bush v. O'Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (1990) (attorney "unquestionably" has duty to investigate applicable law); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations"). Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Defense counsel was unreasonably deficient in failing to recognize the absence of any aggressive conduct warranting the aggressor instruction.

Agreeing to the unsupported aggressor instruction cannot be characterized as valid defense strategy or tactics. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But the aggressor instruction not only did nothing to advance the defense theory, it actually undermined Cobb's defense and assisted the State in arguing its case. See Stark, 158 Wn. App. at 961. There was no possible strategic reason to agree to this erroneous instruction.

Under the second prong of the Strickland test for ineffective assistance, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Given the lack of evidence supporting the aggressor instruction, as discussed above, it is likely the court would not have given the instruction if defense counsel had not agreed. The court stated that the important consideration was that there be some evidence. 12RP 85. Defense counsel appeared inexplicably concerned only that the aggressor instruction be based on Cobb's letter and not on his testimony. 12RP 85. If counsel had performed competently by citing the applicable law requiring evidence of provoking conduct before the shooting, the court would likely not have given this

disfavored instruction. There is at least a reasonable probability the outcome of the trial would have been different because, as discussed above, a reasonable jury could have concluded Cobb's fear was reasonable. See argument section C.1.b., supra.

Moreover, the jury was not instructed on the niceties of first aggressor law, that there must be some provoking act prior to and separate from the shooting itself. Therefore, the jury could have concluded Cobb was the aggressor simply because he shot first or because he planned to arrange a fistfight. Thus, the instruction deprived Cobb of his defense even if the jury believed him.

Cobb was prejudiced because this disfavored instruction undermined his affirmative defense. There could be no strategic reason to agree to a disfavored instruction that instructed the jury it could reject the defense theory on impermissible grounds. A reasonable probability exists the jury would have accepted Cobb's justifiable homicide claim without the erroneous aggressor instruction. Reversal is therefore also required based on ineffective assistance of counsel.

3. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CRR 3.5.

After a CrR 3.5 hearing, the court ruled Cobb's statements to police were admissible. 3RP 43. The court, however, failed to enter written

findings or conclusions as required by CrR 3.5. That court rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required following a CrR 3.5 hearing. The court below rendered an oral decision following the hearing, but no written findings of fact and conclusions of law have been entered as of this date. A trial court's oral decision is "no more than a verbal expression of [its] informal opinion at the time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescoek, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5

hearings. See Smith, 68 Wn. App. at 205 (“We agree that the State’s obligation is similar under both CrR 3.5 and CrR 3.6”). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is an appropriate remedy. Id.

D. CONCLUSION

For the foregoing reasons, this Court should reverse Cobb’s conviction and remand for a new trial.

DATED this 31st day of May, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


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Office ID No. 91051
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 66306-2-1
)	
EDWARD COBB,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MAY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD COBB
DOC NO. 346080
WASHINGTON STATE CORRECTIONS CENTER
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2011.

x Patrick Mayovsky

CORRECTIONAL INSTITUTIONS
STATE OF WASHINGTON
2011 MAY 31 12:14:17