

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

STATE OF WASHINGTON,

Respondent,

v.

OLIVIA LEANORA LAUIFI

Appellant.

COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY _____
DEPT. OF _____

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

The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied her right to due process by Counsel's failure to object to the first aggressor instruction because she was unable to argue her theory of the case.
2. Appellant was denied her right to effective assistance of counsel by Counsel's failure to object to the first aggressor instruction.
3. The state failed to prove all of the essential elements of assault in the first degree, specifically intent to inflict great bodily harm.

Issues Presented on Appeal

1. Was counsel ineffective for failing to object to the first aggressor instruction?
2. Was appellant denied her right to a fair trial when her attorney failed to object to the first aggressor instruction?
3. Did the state fail to prove all of the essential elements of assault in the first degree, specifically intent to inflict great bodily harm?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Olivia Lauifi was charged with one count of assault in the first degree in violation of RCW 9A.36.011(1)(a). CP 1-2. Ms. Lauifi was tried by a jury, the Honorable Frederick Fleming presiding. Ms. Lauifi was convicted as

charged. The jury entered a special verdict form finding that Ms. Lauifi was in possession of a deadly weapon at the time of the commission of the crime. CP 37-38. On July 21, 2006 Ms. Lauifi was sentenced within the standard range. CP 65-76. This timely appeal follows. CP 45-55.

2. SUBSTANTIVE FACTS

Ms. Olivia Lauifi went to the Taste of Tacoma on June 25, 2005 with several friends: Joseph Hanson, Joshua Hanson, Todd Walker and Quinton Cox. RP 195, 372, 365. The testimony differed between the state's witnesses regarding what actually transpired after Olivia and her friends arrived at the Taste of Tacoma. It is undisputed that Arthur Sims was impaled by a small pen knife. RP 18, 503. No one saw Olivia poke or stab Art with the exception of Arrogance Williams whose testimony contradicted that of all of the other civilian witnesses. RP 144-45, 171-72, 179, 192, 200, 223-24, 342, 367, 397.

Upon arrival at the Taste, Joseph Hanson saw Arthur Sims with a group and said hello. Art asked Joseph why he was with Quinton. Joseph said that Quinton was with them but he did not like Quinton. RP 382. According to Joseph both Quinton and Art are gang members of the Bloods. RP 382. Art confronted Quinton and said that Quinton was not a Blood and the situation heated up. RP 383. There was a large group with Art consisting of Bryan Thomas, Jovee Art's cousin, Laquan, Arsenio, Arrogance Williams,

Deborah and Dorothy. RP 142, 165, 176, 256-57.

According to Bryan Thomas, he went to the Taste with his group and met up with another group consisting of Olivia and Quinton and their associates. Jovee began arguing with a guy he did not know (Quinton) and then Art began arguing with Quinton as well. RP 128-134, 147, 366.

Arthur Sims is a 16 year old. Jovee is his cousin. RP 132, 162. Art testified that Jovee had a problem with Quinton who supposedly wanted to fight Jovee but Jovee said he was not going to fight him because he was a "bitch". RP 166, 185. People in Art's group called Quinton "weak". RP 167. Art did not want Jovee to fight Quinton because Jovee would have been beaten up, but Art told Jovee not to fight Quinton because he was "weak". RP 167. Then Quinton and Art began arguing. RP 168. According to Art, Olivia did not like Quinton being called weak. RP 169. Art posted up to fight Quinton, then backed down. RP 169-70. Bryan also testified that Art put his hands up to fight Quinton. RP 134, 149.

Art testified that Olivia walked up to him and stabbed him but he did not realize he was stabbed until he lifted up his shirt. Art also never saw a knife in Olivia's hand. RP 171-72, 179. Art said that no one threatened Olivia before the stabbing and that the entire group had turned away from her and walked away before the stabbing making it impossible for anyone to have

seen the stabbing. RP 192. Bryan admitted that he did not see the stabbing. RP 144. Bryan saw Ms. Lauifi holding a shirt in her hand like you hold a coat, not wrapped around her hand. RP 145. Todd Walker did not see a stabbing. RP 200. He testified that while everyone was walking away he heard someone say there was a stabbing. RP 198-99. Jovee testified that he did not see a stabbing or a knife or remember anything about the incident. RP 223-24., 298. Jovee also testified that he did not remember a girl present while Art and Quinton were arguing. RP 226-27. Art testified that he did not know he was stabbed until he lifted his shirt. RP 172. Joseph Hanson did not see the stabbing and neither did his brother Joshua. RP 367, 383, 397.

A medic, Mathew Short was called to the area after the stabbing. He testified that he overheard a group of Samoan girls talking and that one of them said "yeah, I stabbed him". RP 153. The only group of girls discussed at trial was Arrogance, Dorothy and Debora. RP 176, 256-57.

Over the objection of defense counsel a tape recording of an interview between Jovee and the police that took place in October was played for Jovee to refresh his memory. It did not refresh his memory, yet the judge allowed the prosecutor to read questions and answers from the interview into the record. RP 234-47. Jovee said that if he said something in October on the tape that it must have been true, but he was not advised to tell the truth and he

could not confirm or deny anything in the tape because he could not remember. RP 293- 298. During the taped interview, Jovee said he saw Olivia poke Art. RP 260.

Arrogance Williams testified that she saw Olivia take something out of her coat and poke Art. RP 342. There was no coat taken into evidence or observed by any other witness. RP 468. Arrogance also testified that Olivia had her sleeve covering her hand with the knife. RP 355. Olivia was holding Quinton's shirt the way someone holds a coat draped over their arm. RP 502-03. Arrogance testified that she was the one to lift Art's shirt after the stabbing. RP 344-45. Art testified that he lifted his own shirt after the stabbing. RP 172. Bryan Thomas testified that he lifted Art's shirt after the stabbing. RP 134.

Joseph, Joshua, Bryan, Todd, Jovee, and Art: all of the state's civilian witnesses with the exception of Arrogance, testified that everyone had started to leave and no one saw a stabbing. RP 144-45, 171-72, 179, 192, 200, 223-24, 342, 367, 397. The police interviewed Olivia for over two hours immediately following the incident. Twenty eight minutes of the over two hour interview was taped. RP 463. Detective Ronald Lewis from the Tacoma Police Department conducted the interview. RP 448. Detective Lewis did not handle any evidence directly and obtained all of his information from other

officers. RP 464. Although he could not remember what Olivia was wearing at the time of the interview, he conceded that she could not have been in jail clothing at the time of the interview because she had not been booked into jail RP 468. Lewis also testified that if there was any blood on Olivia's clothing it would have been noted in the property report and no blood was noted. RP 468. If Olivia had been wearing a coat, that too would have been taken into evidence.

Ruston police chief James Reinhold chased Olivia and Quinton down an alley and ordered them to the ground at gun point. Reinhold testified that he saw "a little movement on the corner" when Olivia was ordered to the ground. He did not see her throw a knife. RP 425. Reinhold testified that he heard some other people from the gang chasing Olivia say that she dropped a knife. Id. Reinhold did not recover a knife at the scene. Id. officer Jeremy Kunkel a Ruston officer testified that he saw a knife sitting on a trash can in the alley where Olivia was ordered to the ground. RP 481. The knife had a 2 inch blade on one side and a razor on the other side for drywall. RP 18.

William Webb a Detective with the Tacoma Police Department went to the scene where Olivia was detained to gather evidence. He testified that a bloody shirt with a hole in it and a blue pen knife were left behind. RP 415. Webb was informed that a knife had been recovered and was left on top

of a plastic bag of garbage. RP 415. Webb was not told who retrieved the knife and placed it on the garbage, although, Jeremy Kunkel testified that a female brought him a bloody shirt and dropped it in the alley and that he saw a knife on a trash container. RP 481-82.

Olivia is 24 years old. She grew up in Southern California and spent much of her youth in foster homes. She was introduced to gang culture in the foster homes and there were gangs near where her mother lived. Olivia never became a gang member but she did associate with them. RP 490-93. Olivia moved to Tacoma and attended college and began raising her small son. RP 494-45. Olivia met Quinton at her residence in Tacoma. Quinton and his family lived in the same complex as Olivia and Olivia attended college with Quinton's brother Donelle. RP 496-97.

Olivia went to the Taste with Quinton and the others. She was at the Taste for about an hour before the incident. She went off to talk to some friends and later met up with Todd, Quinton, and the others. When she returned to Quinton, she saw a person later identified as Jovee walk behind Quinton and posture and look at him like he wanted to hit Quinton. RP 500. Jovee saw Olivia watching him and broke off from behind Quinton.

Olivia then heard Art say that he will fight Quinton because he is weak. Art saw Olivia looking at him and yelled to her, "you're weak too

bitch, I'll fuck you up too." RP 501. Quinton moved towards Olivia and she advised him to watch his back. Id. Quinton took off his shirt and he and Art posted up to fight. While Art was taking off his shirt, the group of girls with Art, including Arrogance, walk up to Olivia and challenged her like they were going to jump her. RP 502, 516. Olivia took had a small pen knife that she took out of her pocket and waved at the girls to get them to back off. RP . RP 502. Olivia carried the knife for protection. RP 508.

While the group of girls were challenging Olivia, she saw Art approach her out of the corner of her eye. She turned toward him with her arm still extended and the knife in hand and Art walked right into the knife. RP 503. Olivia did not intend to stab Art. RP 504. Olivia had her knife out because she was afraid the girls were going to jump her and Art said he was going to fuck her up. Id. Jovee also testified that Arrogance, Deborah and Dorothy were going to fight Olivia. RP 256-57. During the taped interview immediately after the incident Olivia described the stabbing as when Art walked into the knife. RP 16-17.

The state did not present any forensic evidence connecting Olivia to the knife or the blood to Art. Neither item was examined by a forensic scientist and no one took fingerprint samples of the items taken onto evidence.

C. ARGUMENT

1. THE STATE FAILED TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF ASSAULT IN THE FIRST DEGREE: SPECIFICALLY THAT APPELLANT ACTED WITH INTENT TO INFLICT GREAT BODILY HARM.

§ 9A.36.011. "Assault in the first degree (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; ". Id.

Evidence is sufficient to support a jury verdict if, "viewing [it] in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The appellate courts review a challenge to the sufficiency of the evidence in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences. Id. The appellate courts defer to the trier of fact but will affirm only where the essential elements of the crime can be found beyond a reasonable doubt. State

v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533 (1992). Circumstantial evidence and direct evidence are equally reliable and either is sufficient to support a conviction. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the instant case, Olivia was charged under a section of the first degree assault statute which provides that a person is guilty of assault in the first degree if she, (1) with intent to inflict great bodily harm, (2) assaults another (3) with a firearm or other deadly weapon. RCW 9A.36.011(1)(a); State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Assault in the first degree includes specific intent as element. State v. Thomas, 123 Wn. App. 771, 98 P.3d 1258, 1262 (2004). Mens rea for the crime of assault in the first degree is intent to inflict great bodily harm. State v. Wilson, 125 Wn. 2d 212, 218, 883 P.2d 320 (1994).

In State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983), the Washington State Supreme Court ruled that , “[a] person acting in self-defense cannot be acting intentionally as the term is defined in RCW 9A.08.010(1)(a).” McCullum, 98 Wn. 2d at 495. McCullum was charged with murder. In explaining its ruling the Court in McCullum wrote:

There can be no intent to kill within the first degree murder statute unless a defendant kills “unlawfully”, i.e. “with the objective or purpose to accomplish a result which

constitutes a crime.” RCW 9A.08.010(1)(a). Since self-defense is explicitly made lawful” act under Washington law, see RCW 9A.16.020(3), RCW 9A.16.050(1) and (2); State v. Hanton, supra, 94 Wn.2d at 133, 614 P.2d 1280, it negates the element of “unlawfulness” contained within Washington’s statutory definition of criminal intent.

McCullum, 98 Wn.2d at 495.

Noting that the “unlawfulness” element of self-defense negates the intent element of murder, the knowledge element of assault, and the recklessness element of manslaughter, the Washington State Supreme Court has held that the State bears the burden of disproving self-defense in murder, assault and manslaughter cases. McCullum, 98 Wn.2d at 494-96; State v. Acosta, 101 Wn.2d 612, 616-19, 683 P.2d 1069 (1984); State v. Hanton, 94 Wn.2d 129, 133, 614 P.2d 1280, cert. denied, 449 U.S. 1035.

Olivia disputes that she intended to stab Art. Her testimony indicated that Art was the aggressor, that he threatened to “fuck her up” and that he walked into her extended arm while she held a knife in her hand. Olivia had the small pen knife in her hand to try to ward off the group of girls and Art who had challenged her and were approaching her in a menacing manner. Olivia did not possess the intent to inflict great bodily harm. Taking the evidence in the light most favorable to the State and assuming that even if

Olivia “poked” Art with her small penknife, this was still insufficient to establish an intent to inflict great bodily harm.

The evidence demonstrates that Olivia was in a self-defense posture trying to keep track of two sets of attackers. In the process, Art walked into her knife. Art testified that he did not even know that he was stabbed. Joseph, Joshua, Bryan, Todd, Jovee, and Art: all of the state’s civilian witnesses with the exception of Arrogance, testified that everyone had started to leave and no one saw a stabbing. RP 144-45, 171-72, 179, 192, 200, 223-24, 342, 367, 397. Art and Jovee admitted that their group was aggressive toward Quinton and by association to Olivia. RP 167 Art also admitted that Olivia did not like him calling Quinton weak. RP 169. Art did not admit his threats to Olivia. RP 192. Bryan also testified that Art was going to fight Quinton. ROP 134, 149. Olivia made it clear that she was threatened by the group of girls and Art and acted in self-defense. RP 501, 502. 516.

RCW 9A.08.010 defines the required intent for assault as “ a person acts with intent or intentionally when he acts with the objective purpose to accomplish a result which constitutes a crime.” Id. The statute requires more than the ability to form goal oriented intent. The statute requires that the “goal” towards which the intent is “oriented” be a criminal act. As discussed, *supra*, self-defense is a lawful act and therefore not a crime. Thus according

to the statute, Olivia's waiving a knife to ward off attackers was a lawful act of self-defense.

The evidence in the instant case does not meet the rigorous burden of proof beyond a reasonable doubt that Olivia intended to inflict great bodily harm. The state also failed to disprove beyond a reasonable that Olivia acted in self-defense. For these reasons, the conviction must be reversed.

3 THE FIRST AGGRESSOR INSTRUCTION
DENIED APPELLANT HER RIGHT TO
ARGUE SELF DEFENSE

The appellate courts review a trial court's jury instructions under the abuse of discretion standard. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion in instructing the jury if the instructions: (1) do not permit each party to argue its theory of the case; (2) the instructions are misleading; and (3) when read as a whole, do not properly inform the trier of fact of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Reversal is required when prejudice can be shown. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error is prejudicial if it affects or presumably affects the trial outcome. Thomas, 99 Wn.2d at 104.

Jury Instruction No. 15, the first aggressor instruction is at issue. Counsel for Olivia did not object to this instruction. CrR 6.15(c) requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. Without an objection, a party may only appeal a jury instruction when constitutional error is alleged. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). When a defendant is prevented from arguing her theory of the case she is denied her constitutional right to due process of law. *Id.* In the instant case, the failure to object to the first aggressor instruction was constitutional error, therefore, this issue may be raised for the first time on appeal.

A first aggressor instruction is rarely appropriate. "An aggressor instruction is appropriate if there is *conflicting* evidence as to whether the defendant's conduct precipitated a fight." State v. Wingate, 155 Wn.2d 817, 822, 122 P.3d 908; 2005 quoting, Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999) (emphasis added) (citing State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). "Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). It has long been established that the provoking act must also be related to the eventual

assault as to which self-defense is claimed. See State v. Hawkins, 89 Wash. 449, 455, 154 P. 827 (1916).

In Arthur, the defendant had a verbal altercation with the victim earlier in the day. Later the same day, his car accidentally collided with the victim's car. The victim approached Arthur in a threatening manner and Arthur stabbed him. Arthur, 42 Wn. App at 121. The Court determined that this evidence was insufficient to characterize the car accident as an act of aggression, even though it followed an earlier incident. Arthur, 42 Wn. App. at 122.

Under the instruction given, if the jury were to find the collision accidental, they could determine that the act constituted reckless or negligent driving. They might also conclude that this was an unlawful act which provoked the incident leading to the stabbing. According to the instruction, they would be precluded from considering Arthur's claim of self-defense. The aggressor¹ instruction here effectively vitiated any claim of self-defense to be considered by the jury.

Arthur at 124-125.

The instant case is similar to Arthur on many points. First, as in Arthur, Olivia did not precipitate the confrontation with an act of aggression. She like Arthur was confronted with verbal threats of violence coupled with

¹ The first aggressor instruction used in Arthur was also determined to be unconstitutionally vague Arthur, 42 Wn. App. at 122-24. This is not at issue in the instant case.

the group of girls and Art physically approaching her in a menacing manner. Second, there was no conflicting evidence as to whether Olivia's conduct precipitated a fight. The evidence although not entirely consistent established that Olivia was either standing next to Quinton talking or standing in the general area saying nothing. A group of girls were acting and moving aggressively towards Olivia and Art threatened to "fuck her up too". Olivia took a 2 inch pen knife out of her pocket and waived in at the group of girls to get them to back away from her.

Art apparently did not see the knife and was unaware that he had been impaled by it. Some witnesses testified that Olivia moved the knife into Art; others testified that it was impossible for anyone to see the knife because everyone had turned to leave the area; and others testified that Art walked into the knife. Under any scenario, Olivia's conduct did not precipitate the fight.

As in Arthur the confrontation began with a verbal confrontation between Jovee and Quinton with Art intervening because he believed that Jovee would lose a fight with Quinton. Even if Olivia told Art that Quinton was not "weak", this is not an act of aggression. Rather Art's moving toward her saying "I'll fuck you up too" is the first act of aggression. Olivia responded

in self-defense. Under the first aggressor instruction given, the jury was essentially told that if Olivia's waving the knife "provoked" the incident leading to the stabbing, they would be precluded from considering her claim of self-defense. Under Wingate, supra and Arthur, supra, the first aggressor instruction no.15 was improper because it "effectively vitiated any claim of self-defense to be considered by the jury." Arthur, 42 Wn. App. at 125.

Olivia's conviction should be reversed and remand for a new trial on this issue.

3. APPELLANT WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL ATTORNEY FAILED TO OBJECT TO THE FIRST AGGRESSOR JURY INSTRUCTION.

Errors of law in jury instructions are reviewed de novo; reversal is required when erroneous instructions prejudice a party. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). To establish a claim of ineffective assistance of counsel, Olivia must prove both that her trial attorney's representation was deficient and that the deficiency prejudiced her defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If the defendant meets the first burden, the second prong requires the

defendant to show only a "reasonable probability" that the outcome of the trial would have been different absent the attorney's deficient performance Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226.

Jury instruction 15 relieved the State of its burden to disprove self defense beyond a reasonable doubt. Jury instructions are sufficient if they are not misleading, properly tell the jury the applicable law, and allow both parties to argue their case theories. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662, 935 P.2d 555 (1997). If a party fails to object to an instruction below, he may raise the issue on appeal if he shows manifest constitutional error. RAP 2.5(a)(3); State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992). An instructional error is manifest "when it has practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

The Washington and United States Constitutions guarantee criminal defendants effective assistance of counsel to ensure the fairness and impartiality of criminal trials. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The appellate courts review the defendant's claim of ineffective assistance of counsel de novo. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). There is a strong presumption that counsel's representation was adequate and effective. Id; McFarland, 127 Wn.2d at 335. To show deficient performance, the defendant must present evidence of counsel's unprofessional errors. Accordingly, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To meet the second prong, a defendant must show that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335. If an appellant fails to establish either element of the ineffective assistance of counsel claim, the reviewing court need not address the other element. Hendrickson, 129 Wn.2d at 78.

In the instant case, the failure to object to the first aggressor instruction constituted deficient performance. There was no tactical reason to fail to object to an instruction that essentially vitiated Olivia's ability to argue her self-defense theory. Not only did counsel fail to object to the instruction, he actually participated in the crafting of the instruction even though there was no conflicting evidence regarding Olivia's role in the precipitation of the assault. RP 533.

The facts in the record did not support the first aggressor instruction and the first aggressor instruction negated the self-defense instructions and muddled the instructions as a whole with legal criteria that were inappropriate and confusing. This denied Olivia her constitutional right to argue her theory of the case. Scott, 110 Wn.2d at 685-86. The failure to object to the instruction cannot be fairly explained on the basis of trial strategy. The failure to object to the first aggressor instruction prejudiced Olivia. Strickland, *supra*.

A defendant is entitled to a self-defense instruction if he or she produces "some credible evidence" tending to establish self-defense. State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). Olivia met her burden of proof for the self-defense instruction and said instruction was provided. She established credible evidence tending to prove self-defense. Once Olivia offered the credible evidence, the burden then shifted to the state to prove the absence of self-defense beyond a reasonable doubt without interference from unnecessary and improper instructions. State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999); Arthur, *supra*.

Cases addressing the failure to request an instruction as a basis for ineffective assistance of counsel are persuasive in the instant case. The South Dakota Supreme Court addressed the failure to raise a self defense argument in

Conaty v. Solem, 422 N.W.2d 102 (1988). Therein the Court determined that defense counsel's failure to request a self-defense instruction satisfies the prejudicial element of Strickland. The Court in Conaty held "[t]he facts ... raise the issue of self-defense, and therefore, defense counsel should have proposed an instruction ... the failure to request a self-defense instruction constituted ineffective assistance of counsel." Conaty v. Solem, 422 N.W.2d at 105. Conaty, involved a defendant who after ordering the plaintiff to leave the apartment building, admitted to shooting three feet to the side of the plaintiff with a borrowed shot gun. The shots fired were in response to the plaintiff's prior deadly threats against the defendant and other apartment tenants. A witness testified that Conaty was "scared and shaken up, like he feared for his life." Conaty v. Solem, 422 N.W.2d at 103.

Conaty is analogous to the instant case. It stands for the proposition that a defendant is denied her right to a fair trial when she is not allowed to argue her theory of the case. And when her attorney fails to make proper objections, she is also denied her right to the effective assistance of counsel. As argued supra, at Argument 2, the giving of the first aggressor instruction denied Olivia her the right to a fair trial.

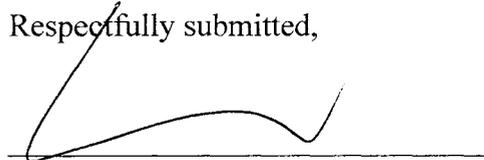
A self defense instruction is appropriate when the evidence suggests self defense by credible evidence. This does not require proof beyond a reasonable doubt, rather it merely requires the defendant to establish some evidence of self defense. State v. Walker, 40 Wn. App. at 662. There is no dispute regarding the propriety of giving the self-defense instruction. However the giving of the first aggressor instruction "essentially vitiated" the self-defense instruction. Arthur, 42 Wn. App. at 125. This was prejudicial error compounded by counsel's failure to object to this instruction. The conviction should be reversed and remanded for a new trial on this issue.

D. CONCLUSION

For the reasons stated herein, Olivia Lauifi respectfully requests this Court reverse her conviction and dismiss for insufficient evidence of intent to inflict great bodily injury. Alternatively, Ms. Lauifi requests reversal and remand for a new trial.

DATED this 24th day of February 2007..

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Olivia Lauifi, #895517 Washington Corrections Center for Women 9601 Bujacich Rd. NW Gig Harbor, WA 98332-8300 a true copy of the document to which this certificate is affixed, on February 26, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

STATE OF WASHINGTON
BY  COUNTY CLERK
07 FEB 28 PM 1:46
COURT OF APPEALS
DIVISION II