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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence presented to convict the appellant of first degree assault.

2. The trial court erred in instructing the jury on the law pertaining to the “first aggressor” exception to self-defense.

3. Error is assigned to Jury Instruction No. 18, which states:

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

4. The appellant was denied effective assistance of counsel where his trial attorney offered a jury instruction that incorrectly states the law pertaining to self-defense.

5. Error is assigned to Jury Instruction No. 15, which states:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Is there sufficient evidence to convict the appellant of second degree assault where the State failed to disprove beyond a reasonable doubt

the affirmative defense of self-defense? Assignment of Error No. 1.

2. Did the trial court err in giving the “first aggressor” jury instruction? Assignments of Error No. 2 and 3.

3. Defense counsel offered jury instructions pertaining to the law of self-defense, including WPIC 17.04, which provides that a person claiming lawful use of force must have reasonably believed that he was in danger of “great bodily harm.” Was trial counsel ineffective in offering this instruction, where case law has held that WPIC 17.04 is not an accurate statement of the law and should not be used as written? Assignments of Error No. 4 and 5.

### **C. STATEMENT OF THE CASE**

The State charged appellant Peter Petersen<sup>1</sup> by amended information filed in the Clark County Superior Court on January 31, 2007, with assault in the second degree, in violation of RCW 9A.36.021(1)(a).<sup>2</sup> Clerk’s Papers

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<sup>1</sup> The appellant is referred to as Peter in this Brief in order to easily differentiate him from Dana Petersen.

<sup>2</sup> RCW 9A.36.021 provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by

[CP] at 2. The information alleged that Peter intentionally assaulted his wife Dana Petersen and thereby inflicted substantial bodily harm. CP at 2.

The matter was tried to a jury on October 1 and 2, 2007, the Honorable Robert Lewis presiding. The prosecution and defense elicited the following testimony during the course of the trial:

Members of the Clark County Sheriff's office responded to a call at 9911 Northeast 105<sup>th</sup> Avenue in Vancouver, Washington on January 24, 2007. Report of Proceedings [RP] at 34, 37, 49. Dana Petersen called the police because she and her husband Peter "were fighting and arguing . . . ." RP at 54. She stated that it "escalated to a point where I didn't know how to put it to an end without help." RP at 54. She stated that when Peter arrived home from work, she was in bed sick. RP at 55. She testified that her five year old daughter had been sick for a few days, and that she "barely got any

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another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

sleep for two days” and that she had a headache. RP at 55. When Peter got home, she thought he was asking her to make dinner and that angered her. RP at 55. She went into the other room and began arguing with him. RP at 55. She said that the argument escalated and that she had her hands balled into fists “up against [her] head” because of her headache. RP at 55. While arguing in the kitchen with Peter, she “stepped towards him and he gave me a push back and told me to stop attacking him or something to that effect.” RP at 55. She “did it again” and he pushed her back a little harder. RP at 56. She then ran into the bedroom and locked the door. RP at 56, 81. Peter told her to stop attacking him. RP at 81. They continued to yell at each other through the closed bedroom door. RP at 56. Peter wanted to get into the bedroom to get his keys and wallet, which were on the bed. RP at 56. She did not let him into the room because she was angry at him and she thought she would get “revenge” by not letting him have his keys and wallet. RP at 56. Peter gave the door “one good hard kick” and the door frame came off and he fell into the bedroom, along with the door. RP at 57, 82. Peter stepped into the bedroom toward Dana, and then she turned around to look for some place to go in order to get away from him. RP at 57, 83. He was standing directly in front of the door, and she “went to dash out the door, and at that time we pretty much just collided right there.” RP at 57. She stated

that she believed it was Peter's hand that hit her face as she lunged forward to go through the door. RP at 58. After her face was struck she fell onto the bed. RP at 58, 84. She said that both her hands were raised when she lunged forward. RP at 84, 85. She then got the telephone to call the police. RP at 58.

An audiotape of the 911 call was played to the jury by stipulation of the parties. RP at 30-33. Exhibit 1.

When law enforcement arrived, Dana told them that Peter had punched her in the eye. RP at 72. She stated that she did not hit or attempt to hit Peter. RP at 73. She said that she exaggerated some aspects of the incident to the police at the hospital because she was mad at him. RP at 84.

Deputy Joseph McLoughlin of the Clark County Sheriff's Office stated that he contacted Dana after she called the police, and that she told him that Peter had punched her in the face. RP at 110, 111. He stated that she told police that Peter punched her or hit her with the back of his hand. RP at 111. Deputy McLoughlin stated that Peter told him that he had "backhanded his wife in response to her trying to hit him." RP at 114.

The defense stipulated to introduction of evidence that Dana Petersen was seen by a doctor on January 24, 2007 and that it was determined that there was a minimal fracture of the right lateral orbital wall and that it was

medically determined that there were fractures to the lateral and interior wall of the sinus. RP at 21, 127, 104. Photographs of her injuries were entered as Exhibits 2 and 16. Photographs of damage to a wall and to the door frame were admitted as Exhibits 3 and 4, respectively. The medical record of the emergency room visit was admitted as Exhibit 19.

Dana stated that she had assaulted Peter in the past and that she was put in jail for hitting him. RP at 79.

Dana and Peter have been married eleven years. RP at 54.

Peter's son, E.P., stated that he heard his parents arguing, and that his dad was outside the room, and Dana, his step-mother, was inside. RP at 50, 54. He went into his room and then heard "a popping sound." RP at 50. After that he heard his mother call the police. He stated that he did not see his father kick down the bedroom door. RP at 50.

Peter stated that he kicked the door, and the door opened and he "went flying into the room hanging on to the door handle." RP at 144. He stated that Dana spun around and as she did, he could not see her hands. RP at 144. He did not know if she had something in her hands and she was swinging her right arm. RP at 149. He stuck his left hand out to stop her and she came toward him "at a good speed." RP at 144. He stated that he "was going to push on her shoulder, but as she lifted her hand up and spun around like this,

I know I bounced off her shoulder and I hit her in the face somewhere.” RP at 145. He stated that he put his left arm out in order to defend himself when she came toward him because he “didn’t want to get hit.” RP at 145, 149.

Dana tried to call 911, and he first grabbed the telephones but gave them back to her within five seconds, at which time she called the police. RP at 146, 147.

**1. Jury Instructions.**

At the close of the evidence, both the State and the defense proposed jury instructions. CP at 6-29, 30-56. The court instructed the jury with a total of 21 instructions. CP at 65-88.

The court instructed the jury on self-defense in court’s instruction number 14. CP at 81. The court also instructed the jury that a person is entitled to act upon appearances in defending himself and that actual danger is not necessary. The instruction the court gave is a misstatement of the WPIC 17.04. CP at 82. Court’s instruction number. 15 reads:

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The appellant contends that the language “on reasonable grounds” removes the subjective element of self defense and makes the instruction to the jury wholly based upon objective grounds. The instruction also requires that the defendant believe that he is about to be injured and does not allow for the defense if it only appears that the defendant was preventing or attempting to prevent an offense against his person, even though that offense may not result in great bodily harm. WPIC 17.04.

The defense proposed an instruction based on *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999), stating:

In order to establish self-defense, finding of actual danger is not necessary.

The defendant also proposed an instruction that read:

In order to establish self-defense, finding of actual danger is not necessary. It is sufficient that defendant reasonably believed that he was in imminent danger of being assaulted.

CP at 48.

The defense also proposed an instruction based on *State v. Corn*, 95 Wn. App. 41, 975 P.2d 520 (1999). CP at 49.

The court declined to give the proposed instructions. RP at 169.

The court also gave instruction number 18, an aggressor instruction in the form of WPIC 16.04. CP at 85. The aggressor instruction stated:

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that 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.

The appellant argues that the aggressor instruction was not warranted by the facts of this case.

An instruction conference was reported. RP at 156-170.

**2. Verdict and Sentence.**

The jury found Peter guilty of second degree assault committed against a family member on October 2, 2007. RP at 215. CP at 89, 90. Judge Lewis imposed a sentence within the standard range sentence on October 25, 2007. RP at 231. CP at 101.

Timely notice of appeal was filed on November 20, 2007. CP at 112.

This appeal follows.

**D. ARGUMENT**

**1. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT THE APPELLANT OF ASSAULT IN THE SECOND DEGREE.**

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Self-defense is an affirmative defense to a charge of assault. *See State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984):

Self-defense is defined by statute as a lawful act. *See* RCW 9A.16.020(3). It is therefore impossible for one who acts in self-defense to be aware of facts or circumstances “described by a statute defining an offense”. RCW 9A.08.010(1)(b)(i). This is just another way of stating that proof of self-defense negates the knowledge element of second degree assault.

The use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3). A person’s right to use force dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622

P.2d 1240 (1980). Whether an individual acted in self-defense is typically a question for the trier of fact. *See State v. Fisher*, 23 Wn. App. 756, 759, 598 P.2d 742, *review denied*, 92 Wn.2d 1038 (1979).

When a defendant makes a claim of self-defense, he or she must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Robbins*, 138 Wn.2d 486, 495, 980 P.2d 725 (1999), *see State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (“To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.”)

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required: “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

**a. The appellant presented sufficient evidence to claim self-defense.**

At trial, the testimony of Dana and Peter established that Dana, while in the bedroom, “lunged” toward Peter with her hands raised, and that he was

unable to see whether she had anything in her hands at that time. RP at 83, 144. These facts are sufficient to cause a “reasonably cautious and prudent person in similar circumstances” to “reasonably believe he was in danger of bodily harm.” In addition, Dana acknowledged that she had previously assaulted Peter. RP at 79.

As discussed in section 2, *infra*, the facts of this case do not establish that Peter was the first aggressor. Dana lunged at him in the bedroom with her hands raised (RP at 144) and Peter’s action in raising his left arm to defend himself against her is justified in light of his subjective fear that he was going to be injured. RP at 145.

**b. The deputy prosecutor failed to meet her burden of disproving self-defense beyond a reasonable doubt.**

Since Peter established and relied on self-defense, and since he produced evidence to support his claim of self-defense, the burden shifted to the prosecution to prove the absence of self-defense beyond a reasonable doubt.

In closing argument the deputy prosecutor implied that Dana changed her story because the family was in dire financial shape and needed Peter’s income. RP at 179. The deputy prosecutor asserted that Dana changed or “minimize[d]” her testimony because “they want him home” and “they don’t

want him to be in trouble and don't want to be responsible for him being in trouble. RP at 179. The State failed to present sufficient evidence to establish beyond a reasonable doubt that Peter did not act in self defense. Since self-defense is an affirmative defense to the charge of assault, and since the State failed to prove beyond a reasonable doubt that Peter did not act in self defense, this court must vacate Peter's conviction and dismiss this case.

2. **THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT GIVING THE "FIRST AGRESSOR" INSTRUCTION.**

The court instructed the jury with the aggressor instruction that is defined in WPIC 16.04. CP at 18. The appellant argues that there was no basis for giving this instruction, that it denied him the right to have the jury consider his self-defense claim and therefore denied him the right to a fair trial.

The "aggressor doctrine" embodied in WPIC 16.04 is derived from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443, 449 (1896) ("The instructions requested by the defendants upon the subject of self-defense were not applicable to the facts of this case, where they were themselves the original aggressors, and for that reason they were properly refused by the court...")

Aggressor instructions are not favored. *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), citing *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wash.2d 1010, 797 P.2d 511 (1990). The Supreme Court has noted that

An aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

*State v. Riley*, 137 Wn.2d 904, 910 n. 1, 976 P.2d 624 (1999).

It is error to give an aggressor instruction unless the instruction is supported by credible evidence that the defendant provoked the need to act in self-defense. *Birnel*, at 473; see also *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039, review denied, 113 Wn.2d 1014, 779 P.2d 731 (1989). The aggressive behavior must be an intentional act other than the actual crime, and must be one that a jury could reasonably assume would provoke a belligerent response. *Kidd*, at 100; *Wasson*, at 159; *Birnel*, at 473. It must be more than mere words, *Riley*, *supra*, and must also be unlawful.

In the instant case, Peter said he came in contact with Dana when she lunged toward him and he put out his left arm, and that she was struck on the face when she ran into him. RP at 144. This statement does not establish the defendant as the aggressor.

The trial court's erroneous use of an aggressor instruction stripped Peter of his ability to argue self-defense. Because of this, the conviction must be reversed. *Birnel, supra; Wasson, supra.*

3. **THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY OFFERED A JURY INSTRUCTION (WPIC 17.04) THAT INCORRECTLY STATES THE LAW PERTAINING TO SELF DEFENSE.**

At trial, the court instructed the jury regarding the law of self defense.

The jury was given WPIC 17.02, defining the lawful use of force:

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

(Court's Instruction No. 14) (emphasis added). CP at 81. This jury instruction is based on RCW 9A.16.020, which states in pertinent part:

9A.16.020. Use of force—When lawful

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary.

(Emphasis added).

The jury was also given WPIC 17.04:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

(Court's Instruction No. 15) (Emphasis added). CP at 82. This instruction was offered by defense counsel. CP at 47.

The jury was not given an instruction defining "great bodily harm," but was given instruction defining "substantial bodily harm" and "bodily injury." CP at 79 (Court's Instruction No. 12); CP at 80 (Court's Instruction No. 13).

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In a case of self defense, the

absence of self defense becomes another element of the charge that the state is required to prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). For this reason, self defense instructions that misstate the law may be challenged for the first time on appeal. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508 (2006).

Generally, under the invited error doctrine, a party cannot offer a jury instruction and then claim on appeal that the instruction is defective. However, review is not precluded where invited error is the result of ineffectiveness of counsel. *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Rodriguez*, 121 Wn. App. 180, 184, 20 P.3d 984 (2001).

**a. A criminal defendant is entitled to receive effective assistance of counsel.**

The state and the federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. VI; Wash. Const. art. I § 22; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984). To obtain relief based on ineffective

assistance of counsel, a criminal defendant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000).

To establish the first prong of the *Strickland* test, the defendant must first show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*, 109 Wn.2d at 226. Reasonable attorney conduct includes a duty to investigate the relevant law in a given case. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, *rev. denied*, 90 Wn.2d 1006, 1978 Wash. LEXIS 1263 (1978). Proposing a detrimental direction instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. *See, Aho*, 137 Wn.2d at 745-46 (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. *Thomas*, 109 Wn.2d at 229-30. However, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. *Wiggins v. Smith*, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d (2003) (in capital case, counsel's failure to investigate mitigation evidence suggested "inattention, not reasoned, strategic

judgment”). In this case, trial counsel’s submission of WPIC 17.04, in spite of existing case law detailing its inaccuracy, constituted deficient performance that fatally prejudiced Peter’s defense.

**b. Trial counsel’s offering of WPIC 17.04 was deficient performance.**

WPIC 17.04 states that a person cannot use lawful force unless he “believes in good faith and on reasonable grounds that he is in danger of great bodily harm.” It appears that the term “great bodily harm” derives from RCW 9A.16.050, which states that a person commits justifiable homicide when he has reasonable grounds to fear “great personal injury.” The Washington Supreme Court stated that “great bodily harm” is an element of first degree assault, and should not be used in instruction on self defense. *State v. Walden*, 131 Wn.2d at 475 n.3. Because “great bodily harm” is an injury more severe than “great personal injury,” the Court of Appeals stated that it was “imperative that trial courts make the correction to the standard instructions that the WPIC Committee has not yet made” by replacing the phrase “great bodily harm” with the phrase “great personal injury” in WPIC 17.04, the “act on appearance instruction.” *State v. Freeburg*, 105 Wn. App. 492, 507, 20 P.3d 984 (2001).

Of more significance here is that WPIC 17.04 sets out the standard for

self defense in deadly force cases. Where a defendant is charged with assault rather than homicide, the lawful use of force requires only a reasonable fear of injury, not “great bodily harm” or “great personal injury.” RCW 9A16.020(3); *L.B.*, 132 Wn. App. at 953. The court in *L.B.* wrote:

Where the defendant raises a defense of self-defense for use of non-deadly force, WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

While it may not be ineffective assistance of counsel to propose an instruction based on an unquestioned WPIC that is not the situation in this case, trial counsel for Peter was deficient in offering WPIC 17.04 in light of the published opinions in *Walden*, *Freeburg*, *Rodriguez*, and *L.B.*, all of which existed prior to the time of Peter’s trial. *See, Rodriguez*, 121 Wn. App. at 187 (finding no conceivable tactical reason for trial counsel’s proposal of WPIC 17.04, his actions constituted ineffective assistance of counsel). *See also, State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). In *Woods*, Division 3 held that “in light of *Walden*, *Freeburg*, and *L.B.*,” the trial attorney provided ineffective assistance of counsel by proposing WPIC 17.04. *Woods*, 156 P.3d at 314.

- c. **Trial counsel’s deficient performance prejudiced the appellant and denied him a fair trial.**

Jury instructions on self defense must “more than adequately” convey the law. *Walden*, 131 Wn.2d at 473. Read as a whole, the jury instructions must make the relevant legal standard “manifestly apparent to the average juror.” *Id.* A jury instruction misstating the law of self defense amounts to an error of constitutional magnitude and is presumed prejudicial. *Id.* at 478; *LeFaber*, 128 Wn.2d at 900. As such, Peter is entitled to a new trial unless the State can prove the error was harmless beyond a reasonable doubt. *Walden*, 131 Wn.2d at 478; *State v. Caldwell*, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). An instructional error is harmless only if it can be said to be “trivial” and in no way affected the final outcome of the case. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

In *Walden*, the Court reversed the conviction and remanded the case for a new trial, based on the use of the phrase “great bodily harm” in WPIC 17.04 instead of “great personal injury.” *Walden*, 131 Wn.2d at 479. The Court held that the State had not shown the error was harmless beyond a reasonable doubt, despite the fact that other jury instructions correctly stated the law regarding self defense. *Id.* at 478-79. And as the court in *Woods* pointed out, “[if] the distinction between great bodily harm and great personal injury is significant, the distinction between great bodily harm and mere

injury is even more so.” *Woods*, 156 P.3d at 314. For this reason, the court in *Woods* declined to find the error harmless, despite the fact that “great bodily harm” was not defined for the jury. *Id.*

Here, based on WPIC 17.04, the jury was instructed that in order for Peter to act in self defense, he had to fear a danger of “great bodily harm” rather than mere injury. This was inaccurate statement of the law that reduced the burden on the State to disprove self defense. *Rodriguez*, 121 Wn. App. at 187. The defective instruction may very well have affected the final outcome of the case, and the error cannot be declared harmless.

Peter testified that when Dana lunged toward him, he “didn’t want to get hit.” RP at 145. There was a basis for the jury to believe that Peter feared he was “going to be injured,” as required in RCW 9A.16.020(3). However, Peter never claimed to be in fear of “great bodily harm” as stated in WPIC 17.04, and the jury would have been hard-pressed to reach such a conclusion.

If the jury had been properly instructed regarding self defense, there was ample basis for them to conclude that Peter’s act of raising his arm was a necessary and lawful use of force to prevent injury to himself, and that the State had not met its burden of proving the absence of self defense beyond a reasonable doubt.

Under the facts of this case, it was crucial that the correct language defining the lawful use of force be used. The incorrect jury instruction “struck at the heart” of Peter’s self defense claim. *Rodriguez*, 121 Wn. App. at 187. The error cannot be proven harmless because the jury could have found that Peter reasonably believed that he was about to be injured, even if he did not expect to suffer great bodily harm.

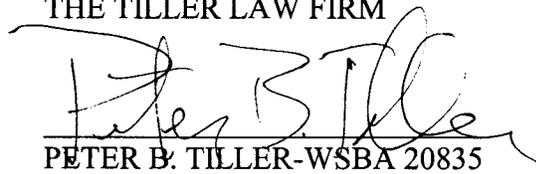
**F. CONCLUSION**

For the foregoing reasons, Peter Petersen respectfully requests that this Court reverse his conviction for second degree assault and dismiss the charge with prejudice.

DATED: April 30, 2008.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line.

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Of Attorneys for Peter Petersen

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PETER S. PETERSEN,

Appellant.

COURT OF APPEALS NO.  
37003-4-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Peter S. Petersen, Appellant, and Arthur D. Curtis, Prosecuting Attorney, by first class mail, postage pre-paid on April 30, 2008, at the Centralia, Washington post office addressed as follows:

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