

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

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY GRUBHAM,

Appellant.

FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
BY [Signature]  
LETTY

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

The Honorable Russell Hartman, Judge

BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS.....	3
a. <u>Facts Relevant to Crime Charged</u>	
b. <u>Fact Relevant to Prosecutorial Misconduct</u>	
C. <u>ARGUMENTS</u> .....	8
1. THE STATE FAILED TO PROVE INTENT TO INFLICT GREAT BODILY HARM AND FAILED TO DISPROVE THE SELF-DEFENSE.	
2. THE FIRST AGGRESSOR INSTRUCTION DENIED APPELLANT HIS RIGHT TO ARGUE SELF DEFENSE.	
3. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE FIRST AGGRESSOR JURY INSTRUCTION AND FAILED TO OBJECT TO THE PROSECUTOR'S PREJUDICIAL CLOSING ARGUMENT.	

- a. Failure to Object to First Aggressor Instruction.
- b. Failure to Object to Prosecutor Misconduct.

4. THE PROSECUTOR COMMITTED  
PREJUDICIAL MISCONDUCT

D. CONCLUSION.....24

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>Hue v. Farmboy Spray Co.</u> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	23
<u>In re Pers. Restraint of Reed</u> , 137 Wn.App. 401, 153 P.3d 890 (2007).....	15
<u>Sintra, Inc. v. City of Seattle</u> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	23
<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984).....	9
<u>State v. Arthur</u> , 42 Wn.App. 120, 1, 708 P.2d 1230 (1985).....	11, 15, 17, 18, 19, 21, 28
<u>State v. Birnel</u> , 89 Wn.App. 459, 949 P.2d 433 (1998).....	15, 16, 17, 21
<u>State v. Brower</u> , 43 Wn.App. 893, 721 P.2d 12 (1986).....	15, 15, 17, 21
<u>State v. Case</u> , 49 Wash.2d 66, 298 P.2d 500 (1956).....	32, 33
<u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	14
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1039 (1992).....	15
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	18

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES, Continued

<u>State v. Fleming,</u> 83 Wn.App. 209, 921 P.2d 1076 (1996).....	29
<u>State v. Graves,</u> 97 Wn. App. 55, 982 P.2d 627 (1999).....	11
<u>State v. Green,</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<u>State v. Grier,</u> 150 Wn.App. 619, 208 P.3d 1221 (2009), <u>review granted</u> , 167 Wn.2d 1017 (2010).....	24, 25
<u>State v. Horton,</u> 116 Wn. App. 909, 68 P.3d 1145 (2003).....	31
<u>State v. Lynn,</u> 67 Wn. App. 339, 835 P.2d 251 (1992).....	23
<u>State v. Mannering,</u> 150 Wn.2d 277, 75 P.3d 961 (2003).....	22
<u>State v. Manthie,</u> 39 Wash.App. 815, 696 P.2d 33 (1985).....	30
<u>State v. McCullum,</u> 98 Wn.2d 484, 656 P.2d 1064 (1983).....	8, 9
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	22

## TABLE OF AUTHORITIES

	<b>Page</b>
<u>WASHINGTON CASES, Continued</u>	
<u>State v. McKenzie,</u> 157 Wash.2d 44, 134 P.3d 221 (2006).....	30
<u>State v. Pittman,</u> 134 Wn.App. 376, 166 P.3d 720 (2006).....	24
<u>State v. Riley,</u> 137 Wn.2d 904, 976 P.2d 624 (1999).....	14, 15, 19, 20, 21, 22, 26
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
<u>State v. Sargent,</u> 40 Wash.App.340, 698 P.2d 598 (1985).....	28
<u>State v. Scott,</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	13, 23
<u>State v. Stein,</u> 144 Wn.2d 236, 27 P.3d 184 (2001).....	13, 23
<u>State v. Walton,</u> 64 Wn. App. 410824 P.2d 533 (1992).....	8
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	8, 22
<u>State v. Thomas,</u> 123 Wn. App. 771, 98 P.3d 1258 (2004).....	8, 22
<u>State v. Townsend,</u> 142 Wn.2d 838, 15 P.3d 145 (2001).....	14

**TABLE OF AUTHORITIES**

**Page**

WASHINGTON CASES, Continued

State v. Walker,  
40 Wn. App. 658, 700 P.2d 1168 (1985).....11,28

State v. Ward,  
125 Wn. App. 243, 104 P.3d 670 (2004).....24

State v. Wasson,  
54 Wn. App. 156, 772 P.2d 1039,  
rev. denied 113 Wn.2d 1014 (1989).....14, 15, 16, 17, 21

State v. Weekly,  
41 Wn.2d 727, 252 P.2d 246 (1952).....30

State v. Wilson,  
125 Wn.2d 212, 883 P.2d 320 (1994).....8

State v. Wingate,  
155 Wn.2d 817, 122 P.3d 908 (2008).....15, 19

FEDERAL CASES

Jackson v. Virginia,  
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....7

Strickland v. Washington,  
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....22, 24, 27

OTHER JURISDICTIONS

Conaty v. Solem,  
422 N.W.2d 102 (1988).....27

**TABLE OF AUTHORITIES**

**Page**

STATUTES, RULES AND OTHERS

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

CrR 6.15(c).....13

RCW 9A.36.011(1)(a).....7, 8

RCW 9A.36.010(1)(a).....9, 10

A. ASSIGNMENTS OF ERROR

1. The state failed to prove intent to inflict great bodily injury.
2. The state failed to disprove self-defense.
3. Mr. Grubham was denied his right to a fair trial with the giving of a first aggressor instruction without any evidence to suggest that he was the first aggressor and without any evidence distinguishing the alleged initial act from the challenged behavior.
4. Mr. Grubham was denied his right to effective assistance of counsel when his counsel failed to object to a first aggressor instruction and failed to object to improper prosecutorial closing argument.
5. The prosecutor repeatedly committed prejudicial misconduct during closing argument by: (1) telling the jury they were not capable of determining the witnesses credibility because they did not know them; (2) by telling the jury that Mr. Grubham was the only person with a motive to lie; and (3) by telling the jury that she personally believed that Mr. Grubham was guilty of assault in the first degree.

Issues Presented on Appeal

1. Did the state fail to prove intent to inflict great bodily injury?
2. Did the state fail to disprove self-defense beyond a reasonable

doubt?

3. Did the prosecutor commit prejudicial misconduct by telling the jury that Mr. Grubham was a liar and that she knew that he was guilty?

4. Was Mr. Grubham denied his right to a fair trial and the ability to argue his theory of the case when the court permitted a first aggressor instruction without any evidence that Mr. Grubham was the first aggressor?

5. Was Mr. Grubham denied effective assistance of counsel when his attorney failed to object to the first aggressor instruction and failed to object to the prosecutor's prejudicial closing argument?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Bradley Grubham was charged by amended information with assault in the first degree while armed with a deadly weapon, and assault in the second degree. CP 7-11. Following a jury trial, Mr. Grubham was convicted of assault in the first degree with a deadly weapon and acquitted of assault in the second degree. CP 56, 57, 58. This timely appeal follows. CP 85.

2. SUBSTANTIVE FACTS

a. Facts Relevant to Crime Charged

Mr. Grubham and all of the state's witnesses, except the complainant

Mr. Phillips, known as “Rooster” testified consistently as to what occurred on July 16, 2009 in Bremerton in front of the apartments at 2213 4<sup>th</sup> Street. RP 2, 74-78, 180-184, 196, 201. Mr. Grubham has an anxiety disorder. RP 15.

Mr. Phillips is a large man who stabbed someone while in prison and had a tattoo of a Swastika engraved on his back to commemorate his stabbing another prisoner. RP 209. Mr. Grubham knew about the Swastika and knew that Mr. Phillips would hurt him in a fight. RP 210. Mr. Phillips testified that late on the night of July 16, 2009 he was spray painting a part of his truck when he saw Mr. Grubham approach their neighbors’ Mr. Bautista and Ms. Amore’s door. 26-27. Although none of his business, Mr. Phillips told Mr. Grubham not to knock on the door because Ms. Amore had a surgery earlier in the day. RP 27. Ms. Amore was up watching a movie with a friend and her three year old son. RP 73-74.

Earlier in the day, Mr. Phillips felt that Mr. Grubham had mocked him when Mr. Grubham overheard Mr. Phillips tell his girlfriend that he lost his contact lenses and Mr. Grubham trying to be humorous, said you should get a pair of glasses on a chain. RP 29, 223. Mr. Phillips yelled profanities at Mr. Grubham, the least of which was “stupid”. RP 223. When Mr. Grubham passed Mr. Phillips that night on his way to Mr. Bautista’s he said “stupid

huh?” thinking that Mr. Phillips would likely apologize for calling him names earlier in the day. RP 228-229. He did not.

Mr. Phillips was painting on his porch ten feet from Mr. Grubham who was on Mr. Bautista’s porch when Mr. Phillips decided to return to Mr. Bautista’s porch a second time to confront Mr. Phillips about knocking on Mr. Bautista’s door. RP 45-46. Mr. Phillips denied grabbing Mr. Grubham, ripping off his shirt and throwing him off of Mr. Bautista’s porch. RP 34-35.

Mr. Grubham and Shaun Stoops, Mr. Phillips’ girlfriend’s twenty year old son who witnessed the fight saw Mr. Phillips charge Mr. Grubham on the porch, grab his shirt and rip it off as Mr. Phillips threw Mr. Grubham from the porch. RP 181, 196, 198. Mr. Stoops was the only other person to witness the beginning of the fight. Mr. Stoops heard Mr. Phillips tell Mr. Grubham not to knock on the door, then he heard a heated exchange between Mr. Phillips and Mr. Grubham followed by Mr. Phillips grabbing and throwing Mr. Grubham from the porch. RP 181, 187.

Mr. Stoops saw both men wrestling on the ground followed by Mr. Grubham yelling for Mr. Phillips to let go of his leg, while Mr. Phillip was swinging at Mr. Grubham, followed by jabbing motions from Mr. Grubham toward Mr. Phillips who said stop stabbing me. RP 182-184, 188-89. Mr.

Stoops never saw a weapon.

Ms. Amore heard knocking on her door followed by Mr. Phillips yelling at Mr. Grubham to leave them alone. RP 74. Ms. Amore heard wrestling and saw Mr. Phillips and Mr. Grubham on the ground wrestling when she called for Mr. Bautista to come and intervene. RP 75. Ms. Amore never saw a weapon. RP 75. Ms. Amore heard Mr. Grubham tell Mr. Phillips to get off of him. RP 78.

After Mr. Bautista separated the men, Mr. Grubham got up and looked startled like he might not have known what was going on. RP 88. Mr. Grubham panicked when Mr. Phillips charged him because he knew that Mr. Phillips could hurt him. RP 210, 224. Mr. Grubham's adrenaline took over when Mr. Phillips came at him the second time with what looked like a weapon in Mr. Phillips hand. RP 249. Mr. Grubham did not know what he picked up in a panic to defend himself against Mr. Phillips. RP 197.

Mr. Phillips testified contrary to the treating doctor that after he was taken to the hospital for his injuries, the doctors wanted to keep him longer, but that he wanted to go home. RP 36. Dr. Dahlgren, the treating emergency room doctor testified that Mr. Phillips wounds were not a concern, but rather the possibility of injuries that could have occurred but did not occur. RP 139.

Dr. Dahlgren discharged Mr. Phillips several hours after his coming to the hospital because he was stable and did not need further medical attention after stapling his puncture wounds and putting Band-Aids on them. RP 130, 132, 140-144.

b. Fact Relevant to Prosecutorial Misconduct.

During closing argument the prosecutor argued that the jury should not sympathize with witnesses or over emphasize their demeanor because what they say is more important. RP 268-269. The Prosecutor argued, “You can’t sit there and say I don’t think this is the type of person to lie, I don’t think this is the type of person to lie. You don’t know them, I want you to consider what they say.” Id. The prosecutor continued, “ If there is anybody here who’s got a motive to lie in this case, it’s the defendant.” Motive to be “dishonest” and “motive to claim self-defense.” RP 271. The prosecutor then argued that she could talk about “flight” when considering “options” in self-defense, but then proceeded to argue that Mr. Grubham leaving the scene was evidence of guilt, rather than self-defense. RP 272.

The prosecutor continued by informing the jury of her personal opinion that Mr. Grubham was guilty of assault in the first degree by stating “ I think that’s what he did” following her request that the jury find Mr.

Grubham guilty of assault in the first degree. . RP 285.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE INTENT TO INFLICT GREAT BODILY HARM AND FAILED TO DISPROVE THE SELF-DEFENSE.

Mr. Grubham was attacked on the porch of a friend and thrown to the ground. He tried to get away from the assailant by jabbing at him with an unidentified tool. He was unsuccessful and the friend had to separate the two men engaged in the altercation.

RCW § 9A.36.011. "Assault in the first degree provides in relevant part that, "(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. CP 43.

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, Mr. Grubham 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 he, (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 an 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.

Holding 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 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).

Mr. Grubham has an anxiety disorder and by his own testimony and that of independent state’s witness Ms. Amore, Mr. Grubham was unaware that he had a tool in his hand or that he had repeatedly jabbed at Mr. Phillips. RP 15, 88, 202. Mr. Grubham, by all witness accounts continued to scream for Mr. Phillips to let him go as he jabbed at Mr. Phillips to gain release from Mr. Phillips.

Mr. Grubham disputes that he intended to stab Mr. Phillips. Mr. Grubham’s corroborated testimony indicated that Mr. Phillips was the aggressor, that he grabbed Mr. Grubham and threw him off the porch and that both landed on the ground and were locked together wrestling while Mr. Phillips was trying to punch Mr. Grubham. RP 181, 185, 187, 188.

Mr. Grubham knowing that Mr. Phillips had stabbed someone in prison and sported a Swastika tattoo on his back to inform the world of his deed, panicked and instinctively, Mr. Grubham grabbed for a nearby tool. He was unaware that he grabbed a tool or that he was jabbing at Mr. Phillips until after he was separated from him. Mr. Grubham did not possess the intent to inflict great bodily harm, rather he kept yelling for Mr. Phillips to let go of his leg because he wanted to get away from Mr. Phillips to protect himself. Taking the evidence in the light most favorable to the State, Mr. Grubham's repeated acts of jabbing at Mr. Phillips to get him to release his leg was insufficient to establish an intent to inflict great bodily harm.

All of the witnesses heard Mr. Grubham yell at Mr. Phillips to let go of his leg. RP 60, 78, 94, 184, 190, 201. Mr. Grubham continued to jab at Mr. Phillips to try to get Mr. Phillips to release his leg. RP 203. The evidence demonstrates that Mr. Grubham acted in self-defense to repel Mr. Phillips who would not let go of Mr. Grubham's leg. RP 60.

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 than the

“goal’ towards which the intent in “oriented” be a criminal act. As discussed, supra, self-defense is a lawful act and therefore not a crime. Thus according to the statute, Mr. Grubham’s jabbing at Mr. Phillips to get away from him was a lawful act of self-defense.

Additionally, the fact that the court permitted a first aggressor instruction eviscerated the viability of the self-defense theory. 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). Mr. Grubham met his burden of proof for the self-defense instruction and said instruction was provided. He established credible evidence tending to prove self-defense. Once Mr. Grubham 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); State v. Arthur, 42 Wn.App. 120, 125 n. 1, 708 P.2d 1230 (1985).

Moreover, there was no evidence in the instant case to establish the rigorous burden of proof beyond a reasonable doubt that Mr. Grubham intended to inflict great bodily harm. The evidence indicated that at all

times, Mr. Phillips would not release Mr. Grubham from his grip and Mr. Grubham repeatedly jabbed at Mr. Phillips to get away. Under the facts presented at trial, the state failed to prove beyond a reasonable doubt assault in the first degree. The conviction should be reversed and the matter dismissed with prejudice.

2. THE FIRST AGGRESSOR INSTRUCTION  
DENIED APPELLANT HIS RIGHT TO  
ARGUE SELF DEFENSE

One of the central issues at trial was whether Mr. Grubham intentionally stabbed Mr. Phillips or whether he acted in self-defense. Even though there was no evidence to suggest that Mr. Grubham was the first aggressor, the trial court gave the jury a first aggressor instruction. Mr. Grubham's counsel failed to object to the aggressor instruction, instruction 21, which provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon use force upon 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 or defense of another is not available as a defense.

CP 42.

The trial court committed manifest error affecting Mr. Grubham's constitutional right to due process when it gave the aggressor instruction because he was prevented from arguing his theory of self-defense and because the evidence did not support an aggressor instruction. Counsel for Mr. Grubham did not object to this instruction. CP 42. 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 his theory of the case, he is denied her constitutional right to due process of law. *Id.* In the instant case, the failure to object to the first aggressor instruction both denied Mr. Grubham his right to argue his self-defense theory and constituted ineffective assistance of counsel and therefore was constitutional error, which may be raised for the first time on appeal. ." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read

as a whole properly inform the jury of the applicable law.” State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). “It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.” Clausing, 147 Wn.2d at 627. The appellate courts will reverse the trial court's judgment if they find it committed prejudicial instructional error. See State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001). The trial court errs if it gives an aggressor instruction when there is no evidence to support that the defendant's conduct precipitated the need to use self-defense. *State v. Wasson*, 54 Wn.App. 156, 158-59, 772 P.2d 1039 113 Wn.2d 1014 (1989).

[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.

State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Because the State has the burden of disproving the defendant's self-defense claim beyond a reasonable doubt, “courts should use care in giving an aggressor instruction.” Riley, 137 Wn.2d at 910 n. 2. “ [F]ew 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.’ “ Riley, 137 Wn.2d at 910 n. 2 (quoting State v. Arthur, 42 Wn.App. 120, 125 n. 1, 708 P.2d 1230 (1985)).

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)).

In Mr. Grubham’s case, there was no evidence that he provoked a fight thus precipitating the need to use self-defense. Mr. Grubham’s case is like State v. Wasson, *supra*; State v. Brower, 43 Wn.App. 893, 721 P.2d 12 (1986), State v. Birnel, 89 Wn.App. 459, 949 P.2d 433 (1998), abrogated on other grounds by In re Pers. Restraint of Reed, 137 Wn.App. 401, 408, 153 P.3d 890 (2007), and Arthur, *supra*.

In both Wasson and Brower, the defendants did not interact with the victims until the defendants assaulted them. In, Wasson, 54 Wn.App. at 157-58, Wasson and his cousin were fighting; a neighbor's friend, Reed, first told them to quiet down and he then beat up Wasson's cousin while Wasson hid; Reed then took rapid steps toward Wasson and Wasson shot him. In Brower,

43 Wn.App. at 896, Richard Murphy and Frederick Martin were arguing about the cocaine in another party's possession; Brower and Murphy began to leave the apartment; Martin followed them down the stairs; Brower turned around, put his gun in Martin's stomach and told him to return to the apartment. The aggressor instruction was improper in both cases because, if the defendants were "to be perceived as the aggressor[s], it was only in terms of the assault itself." Brower, 43 Wn.App. at 902; Wasson, 54 Wn.App. at 159.

Similarly, in Birnel, Division Three held that the evidence did not support an aggressor instruction. 89 Wn.App. at 473. Rick and Mary Birnel were separated, but Rick continued to support the family financially. Birnel, 89 Wn.App. at 462. One evening while Rick was staying with the children at the family home, Mary came home in the middle of the night and Rick suspected that she was high on methamphetamine. He searched her purse and found methamphetamine. Thereafter, he sat and waited at the top of the stairs to confront her. He asked her if she was using all her money on drugs and told her to make a list of all the bills she owed. Mary responded that he had pushed her too far, went downstairs, came back with a large knife, and began attacking Rick. Birnel, 89 Wn.App. at 463. The struggle ended with Mary's

death. Birnel, 89 Wn.App. at 464. Division Three concluded that “a juror could not reasonably assume this act and these questions would provoke even a methamphetamine abuser to attack with a knife.” Birnel, 89 Wn.App. at 473.

In Mr. Grubham’s case as in Birnel, Wasson and Brower there was no precipitating act, rather the trial court confused the act of assault itself as an act of first aggression. In Birnel, the words that preceded the attack were not aggressive and the act of assault was the only act of aggression. In Wasson and Brower, the assault was the first and only act of aggression. In Mr. Grubham’s case, Mr. Grubham was attacked by Mr. Phillips. There was no act of aggression from Mr. Grubham that precipitated the fight and the only evidence of assault was from Mr. Phillips; to which MR. Grubham responded in self-defense.

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 aggressor<sup>1</sup> 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, Mr. Grubham did not precipitate the confrontation with an act of aggression. Mr. Grubham like Arthur was confronted with verbal hostilities coupled with being physically attached by Mr. Phillips. Second, there was no conflicting evidence as to whether Mr. Grubham's conduct precipitated a fight. The evidence although not entirely consistent established that Mr. Grubham went to his neighbor's to borrow something and that even though it was none of Mr. Phillips business, Mr. Phillips told Mr. Grubham to leave and then grabbed him and threw him off of his neighbors porch. Mr. Grubham's conduct did not precipitate the fight.

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<sup>1</sup> 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.

As in Arthur the confrontation began with a verbal confrontation initiated by Mr. Phillips over matters that were not his concern. Mr. Phillips verbal confrontation followed by his grabbing Mr. Grubham, ripping off his shirt and throwing him off the porch was the first act of aggression. Mr. Grubham responded in self-defense. Under the first aggressor instruction given, the jury was essentially told that because Mr. Grubham inexplicably was the first aggressor “provoked” the incident leading to the stabbing, the jury should not consider Mr. Grubham’s claim of self-defense. Under Wingate, supra and Arthur, supra, the first aggressor instruction no.21 was improper because it “effectively vitiated any claim of self-defense to be considered by the jury.” Arthur, 42 Wn. App. at 125.

By contrast, in Riley, 26-year-old Riley shot 15-year-old Gustavo Jaramillo and claimed self-defense. Riley, 137 Wn.2d at 906-07. Jaramillo and his friend Aaron Calloway stole cars and sold drugs together. In Riley, witnesses gave conflicting testimony about what happened. Riley testified that he asked Jaramillo about his gang affiliation and jokingly suggested that he was a “wanna-be”; Jaramillo took offense and told Riley he would shoot him. Riley, 137 Wn.2d at 906. Riley pointed a gun at Jaramillo and demanded the stolen gun, but Jaramillo said he did not have it; Jaramillo tried

to distract Riley by threatening that the police were coming; and then Riley shot Jaramillo because he thought he was reaching for a weapon. Riley, 137 Wn.2d at 906-07.

Calloway testified that Jaramillo was lying on the ground when Riley returned and Riley pulled out his gun as he approached, held it over Jaramillo's head, and demanded to know where Jaramillo had concealed the stolen gun. The gun was in the pocket of Jaramillo's pants and was beneath him as he lay on his side on the ground. Riley told the boys not to move, but when Jaramillo looked up, Riley shot him and took the gun. Riley, 137 Wn.2d at 907.

Under those facts, the Washington Supreme Court upheld the trial court's aggressor instruction because there was testimony that Riley drew his gun first and aimed it at Jaramillo. Riley, 137 Wn.2d at 908-09 (citations omitted). In short, an aggressor instruction is appropriate “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense.” Riley, 137 Wn.2d at 909. As long as the provoking act was not “the actual assault.” Kidd, 57 Wn.App. at 100.

Riley is distinguishable on grounds that there was no testimony suggesting that Mr. Grubham initiated the physical fight or verbal altercation. Rather, Mr. Grubham's case is on point with, and controlled by Birnel, Wasson, Brower and Arthur.

In Mr. Grubham's case, the undisputed corroborated evidence showed that Mr. Phillips was verbally aggressive with Mr. Grubham and attacked him on Mr. Bautiusta's porch, ripping off his shirt while throwing him off the porch. Moreover, Mr. Grubham's instinctive act of self-defense, grabbing for a tool to repel Mr. Phillips was the only aggressive act toward Mr. Phillips and was an act of self-defense. As such that sole act cannot support an aggressor instruction. See Wasson, 54 Wn.App. at 159; Brower, 43 Wn.App. at 902.

For this reason, his conviction should be reversed and the matter remanded for a new trial.

3. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE FIRST AGGRESSOR JURY INSTRUCTION AND FAILED TO OBJECT TO THE PROSECUTOR'S PREJUDICIAL CLOSING ARGUMENT.

Trial counsel denied Mr. Grubham his right to effective assistance of counsel when trial counsel failed to object to the first aggressor instruction, because with this instruction Mr. Grubham was effectively denied the ability to argue his self-defense theory. Riley, 137 Wn.2d at, 909.

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. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To establish a claim of ineffective assistance of counsel, Mr. Grubham must prove both that his trial attorney's representation was deficient and that the deficiency prejudiced his 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. 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).

a. Failure to Object to First Aggressor 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). 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." Stein, 144 Wn.2d at.

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 Mr. Grubham's ability to argue his self-defense theory. 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 Mr. Grubham his constitutional right to argue his 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 Mr. Grubham. Strickland, supra.

Recently in State v. Breitung, \_\_\_ P.3d \_\_\_, 2010 WL 1553572 (Wn. App. Div 2), this Court discussed in detail when trial counsel is ineffective for failing to request a lesser included offense. Breitung is factually analogous and legally on point. In Breitung, the Court therein acknowledged that under certain facts, the decision not to request a lesser included jury instruction can be considered tactical, but also can be considered too risky. Id at page 4.

The Court considers, (1) the defendant's offender score and the impact of a lesser on the offender score; (2) whether the defense theory of the case is the same for both the lesser and greater offense; and (3) the risk to the defendant of not pursuing the lesser included instruction. Breitung, \_\_\_ P.3d \_\_\_, 2010 WL 1553572, at page 4, citing, State v. Grier, 150 Wn.App. 619, 640-41, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010);); see also State v. Pittman, 134 Wn.App. 376, 387-88, 166 P.3d 720 (2006); State v. Ward, 125 Wn.App. 243, 249-51, 104 P.3d 670 (2004).

In Breitung, the difference in the defendant's offender score was

significant. An assault second conviction would be a strike for Breitung, whereas an assault fourth would be a misdemeanor. Breitung, 2010 WL 1553572, at page 4. Second, Breitung offered alternate theories; one there was no assault because Breitung did not make any threats and two, the state failed to prove all of the elements of the offense. While the Court held that this could have been acceptable trial strategy in some case, it was not in Breitung's case, because the evidence presented did not support both theories; Breitung admitted to assault in the fourth degree. The Court determined that the defense strategy was "unreasonable". Id.

Finally, the Court determined that the risk to Breitung in not pursuing the lesser offense, given the evidence at issue, left the jury highly likely to resolve its doubts in favor of convicting the defendant, rather than acquittal. Thus the failure to pursue a lesser instruction was objectively unreasonable and prejudiced Mr. Breitung because the jury was left in the untenable position of favoring conviction for believing some assault, but not assault in the second degree. Breitung, 2010 WL 1553572, at page 5, citing, Grier, 150 Wn.App. at 643. The Court in Breitung reversed and remanded for a new trial. Breitung, 2010 WL 1553572, at page 6.

In Mr. Grubham's case, applying the same three considerations to determine the reasonableness of trial counsel's failure to object to the first aggressor instruction reveals no possible legitimate trial strategy. First, Mr. Grubham was facing a third strike for the assault in the first degree. Although his offender score on the strike issue would not have altered had he been convicted of assault in the second degree, the decision not to object to the first aggressor instruction essentially removed his entire defense theory from the jury's consideration. Second, like the first criteria, the defense was consistent through out the case; that is Mr. Grubham acted in self-defense. The failure to object to the first aggressor instruction could not have been linked tactically to a defense theory. Third and finally, the risk of conviction to Mr. Grubham increased dramatically by permitting the first aggressor instruction because as stated herein, the first aggressor instruction is not compatible with self defense Riley, 137 Wn.2d at 909.

In sum, in Mr. Grubham's case, there was no possible legitimate tactical reason not to object to the first aggressor instruction. It was error which ,with reasonable probability, negatively impacted the outcome of the case. For this reason, counsel's deficient performance constitutes reversible error.

A Cases from another jurisdiction addressing the failure to request an instruction as a basis for ineffective assistance of counsel is 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 his right to a fair trial when he is not allowed to argue his theory of the case. And when his attorney fails to make proper objections, he 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 Mr. Grubham his the right to a fair trial.

To summarize, 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 in Mr. Grubham's case. 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. For these reasons the convictions should be reversed and remanded for a new trial on this issue.

b. Failure to Object to Prosecutor Misconduct.

In Mr. Grubham's case, defense counsel did not object to the prejudicial comments from the prosecutor during closing argument. This was error of a constitutional magnitude. In State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996), the Court held that, "[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Fleming, 83 Wn.App. at

213. The prosecutor argued:

[the jury] would have to find either that [the complaining witness] has lied about what occurred ... or that she was confused ..., misstat[ing] the law and misrepresent[ing] both the role of the jury and the burden of proof.

Fleming, 83 Wn.App. at 213. Such statements impermissibly misstated the role of the jury. *Id.* In the instant case, the prosecutor did the same by telling the jury it was not their job nor within their ability to evaluate the witnesses, that Mr. Grubham lied, and that he was guilty. The Court in Flemming reversed and remanded for a new trial, the same result is required for Mr. Grubham.

#### 4. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT

During closing argument the prosecutor argued that the jury should not sympathize with witnesses or over emphasize their demeanor because what they say is more important. RP 268-269. The Prosecutor argued, “You can’t sit there and say I don’t think this is the type of person to lie, I don’t think this is the type of person to lie. You don’t know them, I want you to consider what they say.” *Id.* The prosecutor continued, “ If there is anybody here who’s got a motive to lie in this case, it’s the defendant.” Motive to be “dishonest” and “motive to claim self-defense.” RP.271. The prosecutor then

argued that she could talk about “flight” when considering “options” in self-defense, but then proceeded to argue that Mr. Grubham leaving the scene was evidence of guilt, rather than self-defense. RP 272.

The prosecutor continued by informing the jury of her personal opinion that Mr. Grubham was guilty of assault in the first degree by stating “I think you should find the defendant guilty of assault in the first degree. I think that’s what he did.” RP 285. The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by stating her personal opinion about Mr. Grubham’s guilt. These improper comments were prejudicial. State v. McKenzie, 157 Wash.2d 44, 52, 134 P.3d 221 (2006).

Comments are prejudicial where "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997). Where a defendant fails to object to an improper comment, the error is considered waived unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. Brown, 132 Wn.3d at 561. To show misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wash.App. 815, 820, 696 P.2d 33 (1985)

(citing State v. Weekly, 41 Wash.2d 727, 728, 252 P.2d 246 (1952)).

In Mr. Grubham's case, the prosecutor's comments were flagrant and ill-intentioned. She began her argument by informing the jury that they could not rely on their common sense and perceptions of the witnesses to assess the witnesses' credibility, but rather were required to just listen to their statements. This set the stage; the prosecutor alone in the "know" informing the jury of her personal opinion that Mr. Grubham was a liar, that the witnesses' statements were true, thus vouching for their credibility and finally stating that she personally believed that Mr. Grubham was guilty of assault in the first degree. RP 268-285. The prosecutor successfully told the jury what to do in the jury room; follow her orders and find Mr. Grubham guilty.

In State v. Horton, 116 Wash.App. 909, 68 P.3d 1145 (2003), the prosecutor stated, "Then you have the defendant. The manner in which he testified, the State believes, this prosecutor believes, that he got up there and lied." Horton, 116 Wash.App. at 921, 68 P.3d 1145. This court held that the statement was error and prejudicial because by expressing a personal opinion, the prosecutor exacerbated an erroneous evidentiary ruling. Horton, 116 Wash.App. at 921, 68 P.3d 1145. Horton is on point. As in Horton, the prosecutor in Mr. Grubham's case expressed her personal opinion. This was

reversible error

State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985) is also on point. In Sargent, the prosecutor repeatedly stated that he "believe[d]" a particular witness. Sargent, 40 Wash.App. at 343, 698 P.2d 598. This court held the comments were prejudicial error because they (1) bolstered the credibility of the only witness directly linking Sargent to the crime and (2) the comments could not have been cured with an appropriate instruction. Sargent, 40 Wash.App. at 345, 698 P.2d 598. The prosecutor's comments in this case equally as egregious. The prosecutor in this case as in Sargent expressed her personal opinion. As in Sargent, an instruction could not have cured the prejudice.

State v. Case, 49 Wash.2d 66, 68, 298 P.2d 500 (1956) is also on point. Therein the prosecutor expressed his personal opinion:

'I doubt in my mind that anyone at this point has any question in their mind about the guilt or innocence of this man. I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me, I mean, that is my opinion about what this evidence shows and how clearly this evidence indicates that this girl has been violated.

Case, 49 Wn.2d at 68. The prosecutor also called the defense witnesses his

“herd”. The Court held that the prosecutor’s comments were flagrant, ill-intentioned and no objection could have cured the prejudice. The case was remanded for a new trial Case, 49 Wn.2d at 70, 76.

Case is on point. In both cases, the prosecutor set the stage by telling the jury that she knew the character and quality of the witnesses: in Case, they were a “herd”, in Mr. Grubham’s case, the state’s witnesses were credible to their “word”. In both cases, the prosecutors expressed their personal opinions; they did not couch their plea for conviction in terms of the evidence but presented their personal opinions. As in Case, the prosecutor committed reversible error by informing the jury that she believed Mr. Grubham was guilty. Similarly, the error was compounded by the prosecutor essentially telling the jury not to consider anything but the witnesses’ words because the jury was not capable of such and then telling them that the only person with a motive to lie was Mr. Grubham. No curative instruction could have cured the error. Case, supra.

A break down of the prosecutor’s argument into an algorithm displays the irreversibly prejudicial impact of the remarks. In essence the prosecutor argued:

1. You must only consider the witnesses words as the truth because you

do not know them and are incapable of evaluating their demeanor (“You can’t sit there and say I don’t think this is the type of person to lie, I don’t think this is the type of person to lie. You don’t know them, I want you to consider what they say.”).

2. The defendant is the only person who has lied here - his words are not to be believed (“If there is anybody here who’s got a motive to lie in this case, it’s the defendant.” Motive to be “dishonest” and “motive to claim self-defense.”) RP 271.

3. Mr. Grubham is guilty because he left the scene. RP 272.

4. “I think you should find the defendant guilty of assault in the first degree. I think that’s what he did.” RP 285.

The summation of the argument provides that as presented, the prosecutor was the only person who knew the truth about the case, the witnesses and Mr. Grubham and the truth was that Mr. Grubham was guilty. The prosecutor’s remarks were flagrant and ill-intentioned and incurable with a curative instruction. The convictions should be reversed and the matter remanded for a new trial.

#### D. CONCLUSION

Mr. Grubham respectfully requests this Court reverse and dismiss the

charges for lack of sufficient evidence, and in the alternative remand for a new trial.

DATED this 23rd day of April 2010.

Respectfully submitted,



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LISE ELLNER  
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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 Bradley Grubham DOC# 300531 Stafford Creek Corrections Center PO Box 1867 Aberdeen, WA 98520 on April 23, 2010 by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature