

NO. 44573-5-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOHN E. GRIFFITHS Jr.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Chris Wickham, Judge  
Cause No. 12-1-00616-8

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AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting Griffiths to be represented by counsel who provided ineffective assistance by failing to object to the giving of instruction 18 on the first aggressor.
02. The trial court erred in permitting Griffiths to be represented by counsel who provided ineffective assistance by failing to object to or by offering the trial court an incorrect statement of the law of self-defense in instruction 14.
03. The trial court erred in failing to dismiss Griffiths's conviction where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Griffiths was prejudiced by his counsel's failure to object to the trial court's instruction 18 on the first aggressor? [Assignment of Error No. 1].
02. Whether Griffiths was prejudiced by his counsel's failure to object to or by offering trial court's instruction 14 that was an incorrect statement of the law of self-defense? [Assignment of Error No. 2].
03. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Griffiths's convictions? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

John E. Griffiths Jr. was charged by third amended information filed in Thurston County Superior Court November 28, 2012, with assault in the second degree while armed with a deadly weapon, contrary to RCW's 9A.36.021(g) or (c), 9.94A.825 and 9.94A.533(4). [CP 25].<sup>1</sup>

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 9]. Trial to a jury commenced the following January 7, the Honorable Chris Wickham presiding. Griffiths took neither objections nor exceptions to the jury instructions. [RP 287].<sup>2</sup> The jury returned a verdict of guilty, with a special finding that Griffiths was armed with a deadly weapon during the commission of the offense. [CP 42-43].

Griffiths was sentenced within his standard range, including deadly weapon enhancement, and timely notice of this appeal followed. [CP 47-57].

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<sup>1</sup> Griffiths's initial trial on this charge ended in a hung jury. [CP 23].

<sup>2</sup> All references to the Report of Proceedings are to transcripts entitled VOLUMES I-II.

02. Substantive Facts

In the early evening of April 21, 2012 [RP 151], Griffiths drove to the Capitol Mall in Olympia to do some general shopping. [RP 174]. His three children were seated in the back of his Jeep. “They were sitting in the proper car seats. Two had boosters and the baby was in his car seat.” [RP 174]. While crossing through an intersection, Griffiths was forced to accelerate to avoid being struck by a gray Subaru that had run a stop sign. [RP 176-78]. “My daughter in the back seat and myself had both seen the vehicle, and she had actually screamed.” [RP 178]. Once in the mall parking lot, after signaling to pull into a just vacated parking spot, “a gray Subaru ... came the wrong way down the aisle and whipped into the parking spot that (Griffiths) was going to pull into.” [RP 180]. It was the “same car that just about hit (Griffiths) in the driver’s side” at the intersection. [RP 180].

Kelli Phelps, who was “in town running errands [RP 249],” observed the Subaru speeding in the mall parking lot, driving “30 miles or more. It was going very fast for the conditions.” [RP 251]. After parking and exiting her vehicle, she “heard brakes squeal, and then ... heard someone yelling for them to slow down ... that they were going too fast.” [RP 252].

The – the gentleman who got out of the Jeep was – you know, like I said, he was over and over just saying you need to slow down. You’re going too fast. You’re gonna hurt somebody. I have my kids in the car....

[RP 253].

Laura Fletcher and Rachel Hendrickson, mother and daughter, also heard Griffiths come to a screeching stop, as did Michael Kang, the driver of the Subaru. [RP 38, 55, 80]. Like Phelps, Hendrickson heard Griffiths say something to Kang about slowing down. [RP 41, 51]. Griffiths got out of his Jeep because he thought he “had a civil duty to at least speak with the young man driving the way he was.” [RP 185-86]. Yelling and carrying a tire iron down at his side, he quickly walked toward the front door of Kang’s vehicle. [RP 38-39, 58, 255]. Kang could hear Griffiths “saying something about speeding and almost hitting his kids” and saw him carrying the tire iron “about chest height. I mean, it wasn’t down on the ground; it wasn’t up in the air.” [RP 85]. Fletcher and Hendrickson heard Griffiths say he was going to kill Kang. [RP 40, 60]. Phelps was close enough that when Griffiths approached Kang, who was still sitting in his car, she could hear Kang say either “‘F’ you or ‘F’ off....” [RP 256]. After Griffiths responded by saying “do you want to come out here and say that(,)” Kang “got out of the car.” [RP 254].

According to Griffiths, Kang immediately “got right in my face.” [RP 190]. He feared Kang “would actually hurt myself and my children.” [RP 191]. He was “(t)hreatening. Eyebrows lowered, stiff mouth, very challenging.” [RP 195]. “I seen him ball up his fists.” [RP 195].

When that threat level was raised, just before I felt he could swing, I acted to prevent myself from being assaulted.

[RP 196].

Griffiths claimed he grabbed Kang’s shirt, not his neck, nevertheless admitting it was possible that part of his body came in contact with Kang’s throat or neck. [RP 196, 198, 206, 240]. “The tire iron never came past my waist.” [RP 199]. Though Phelps confirmed she never saw the tire iron raised [RP 263], Fletcher and Hendrickson said it was raised and that Griffiths grabbed Kang by the throat and pushed him against the opened door of his car, all the while maintaining his stranglehold to the point where Kang couldn’t breathe. [RP 42-44, 58, 62, 86, 90-92]. When he released Kang, who suffered red marks and slight swelling to his neck [RP 168], Griffiths got back into his Jeep and sped off. [RP 93].

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D. ARGUMENT

01. GRIFFITHS WAS PREJUDICED BY HIS  
COUNSEL'S FAILURE TO OBJECT TO  
THE TRIAL COURT'S FIRST  
AGGRESSOR INSTRUCTION.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not

required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Without objection, the trial court gave the State's proposed "first aggressor" instruction [CP 104]:

No person may, by any 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 the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

[Court's Instruction No. 18; CP 78].

Aggressor instructions are clearly not favored. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990).

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).

As noted by the Washington Supreme Court:

While an aggressor instruction should be given where called for by the evidence, 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.2, 976 P.2d 624 (1999).

It is reversible error to give the aggressor instruction where the evidence is lacking that the defendant acted intentionally to provoke an assault against the victim. State v. Wasson, 54 Wn. App. 156, 159-160, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989), (citing State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) (aggressor instruction improper where evidence lacking to show defendant was involved in wrongful or improper conduct which precipitated the charged offense).

If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. (citation omitted). The inclusion of the instruction effectively deprived him of his theory of self-defense; the jury was left to speculate as to the lawfulness of this conduct prior to the assault. (citation omitted).

Id.

In State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), the court, citing Wasson, 54 Wn. App. at 159, citing State v. Arthur, 42 Wn. App. at 124, held that “(t)he provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim.”

The record does not support the giving of the aggressor instruction in this case because Griffiths did not create the situation that led to his using physical self-defense against Kang. While there was evidence that Griffiths was initially screaming at Kang while carrying the tire iron, an aggressor instruction may not be given where words alone are the asserted provocation. State v. Riley, 137 Wn.2d at 911. This is so because an individual faced with only words is not at liberty to respond with force. Id. at 910-11. Were it otherwise, a person could respond to words with physical force and the speaker of those words would be without lawful defense. Id. at 911-12. In this context, the State failed to establish a provoking act distinct from the subsequent assault itself. Griffiths’s belligerence consisted of words, and the carrying of the tire iron cannot be considered the belligerent act entitling the State to the aggressor instruction since the provoking act cannot be the actual assault. State v. Kidd, 57 Wn. App. at 100.

Griffiths reasonably felt threatened when Kang got out of his car and got in his face, which closely followed his telling Griffiths to either “‘F’ you or ‘F’ off...” [RP 256]. Only after he saw Kang make a fist and determined he was going to swing, did Griffiths act to defend himself from the perceived ensuing assault. The aggressor instruction effectively deprived Griffiths of his ability to claim self-defense. See Wasson, 54 Wn. App. at 160. It removed the issue from the State’s proof and the jury’s consideration.

Both elements of ineffective assistance of counsel have been established. First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to object to the instruction. Having raised the defense, there can be no reason for then permitting the jury to disregard it by considering an instruction that fundamentally informed them the defense was unavailable. And there is a reasonable probability the outcome of the proceedings would have been different. There is no question that when a trial court gives an erroneous first aggressor instruction, it relieves the State of its burden of disproving a criminal defendant’s self-defense theory. State v. Stack, 158 Wn. App. 952, 960-61, 244 P.3d 433 (2010). Additionally, the instruction permitted the State in closing argument to prod the jury that “self-defense is not available as a defense.” [RP 358].

Griffiths's conviction for assault in the second degree must be reversed and remanded for retrial without the aggressor instruction.

02. GRIFFITHS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO OR BY OFFERING THE TRIAL COURT AN INCORRECT STATEMENT OF THE LAW OF SELF-DEFENSE.<sup>3</sup>

Without objection, the trial court gave the State's proposed self-defense instruction [CP 100],<sup>4</sup> which read in pertinent part:

The use of or attempt to use or offer to use force upon or toward the person of another is lawful when used or attempted or offered by a person who reasonably believes that he is about to be injured by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary. [emphasis added].

[Court's Instruction No. 14; CP 74].

Jury instructions are proper when they are supported by sufficient evidence, allow the parties to argue their respective 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). The above instruction does none of this, for it sanctions self-defense only when a person reasonably believes he or she is about to be injured by someone

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<sup>3</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel is hereby incorporated by reference.

<sup>4</sup> While the record indicates defense counsel handed the court "a defense version of WPIC 17.02"—the WPIC for this instruction—it was not made part of the record. [RP 274].

lawfully aiding a person who he or she reasonably believes is also about to be injured in either attempting or preventing an offense against that person, whoever that might be. The meaning of this is as clear as an inkblot test, has no application to this case, can't be advanced as some brilliant tactical decision and is profoundly prejudicial since it exhorts the jury to totally reject Griffiths's claim of self-defense.

03. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF GRIFFITHS'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

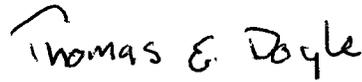
Here, for the reasons argued in the preceding sections of this brief, even if either one of the issues presented standing alone does not warrant reversal of Griffiths's conviction, the cumulative effect of the two errors materially affected the outcome of his trial and his conviction should be reversed, even if either error examined on its own would otherwise be considered harmless. When the two instructions at issue are considered in

tandem, it is inescapable that the jury was left to speculate as to the lawfulness of Griffiths's conduct based on an incorrect statement of the law. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Griffiths respectfully requests this court to reverse his conviction and remand for a new trial.

DATED this 31<sup>st</sup> day of August 2013.



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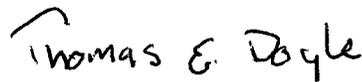
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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