

No. 44573-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN E. GRIFFITHS, JR.,

Appellant.

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

The Honorable Chris Wickham, Judge  
Cause No. 12-1-00616-8

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the first aggressor instruction in this case was proper when it was not based on Appellant's words alone, but also on his aggressive conduct.
2. Whether the failure to catch or correct an imperfect jury instruction deprived the Appellant of effective assistance of counsel.
3. Whether the cumulative error effect applies to this case.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

C. ARGUMENT.

1. The first aggressor instruction in this case was proper because it was not based on Appellant's words alone, but on his aggressive conduct as well.

Prosecutors have long been permitted to employ various forms of first aggressor instructions when faced with a defendant who asserts that he acted in self-defense despite evidence that the defendant actually provoked the unlawful assault. See, e.g., State v. Currie, 74 Wn.2d 197, 199, 443 P.2d 808 (1968); State v. Stark,

244 P. 3d 433, 437 (2010); State v. Brower, 43 Wn. App. 893, 901-02, 721 P. 2d 12 (1986). Nevertheless, Griffiths has dug deep into dicta in an apparent effort to magnify the scale of this supposed instructional error; quoting lines from a footnote in a nearly thirty-year-old case to create an alternative judicial trend where first aggressor instructions are almost never warranted. See State v. Arthur, 42 Wn. App. 120, 125 n.1 708 P. 2d 1230 (1985). Yet the very precedents which Griffiths is relying on upheld first aggressor instructions in the cases before them. See State v. Riley, 137 Wn.2d 904, 976 P. 2d 624, 628 (1999); State v. Kidd, 57 Wn. App. 95, 100, 786 P. 2d 847 (1990).

The rule is that when “there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” Riley, 137 Wn.2d at 627. This is true even if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight. Id. at 628. Precedent suggests that a first aggressor instruction is not justified “where the alleged provocation is merely verbal.” Id. at 629. However, “If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction.” Id. at 628. Credibility

determinations “are for the trier of fact and cannot be reviewed on appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P. 2d 850 (1990).

In this case, the State elicited testimony from no less than four witnesses – including Griffiths himself – who all testified that Griffiths:

- 1) Brought his vehicle to a halt in the middle of a traffic lane in a mall parking lot during peak shopping hours. RP 55-57, 71, 180, 182-183.
- 2) Exited his vehicle, leaving his frightened children behind. RP 38, 61, 174, 178.
- 3) Removed and visibly displayed a tire iron from his vehicle, before heading directly for the victim, all the while conducting himself in an enraged and violent manner according to everyone who was there except Mr. Griffiths, who described his conduct as “tactical” during this encounter. RP 38-41, 57-60, 83-86, 186-189.

Specifically, the State’s witnesses testified that Griffiths:

Jump[ed] out of his car...with a tire iron in his hand...you could tell he was angry, and he was walking with force, I mean towards the [victim’s] car...When he got closer to the [victim’s] vehicle, he

raised the tire iron above his head....He said he was going to fucking kill [the victim]...He was yelling at [the victim].

RP 38-41. See also, RP 57-60, 83-86, 186-189.

Per the holding in Riley, “credible evidence that the defendant made the first move by drawing a weapon... supports the giving of an aggressor instruction.” Riley, 137 Wn.2d. at 628. Again, matters of credibility cannot be reviewed on appeal, and Griffith neither disputes that a tire iron constitutes a weapon when used under these circumstances, nor does he argue that the victim drew any other sort of weapon first. Therefore, the instruction was properly given and the failure to object to this instruction was not an error.

2. The failure to catch or correct an imperfect jury instruction did not deprive Griffiths of effective assistance of counsel, nor did it deprive him of his right to argue his theory of the case while properly informing the jury of the applicable law.

There is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Washington courts require that the competency of counsel must be judged from the record as a

whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522 (1967).

The record as a whole confirms that Griffiths was effectively represented. The fact that a self defense instruction was given to the jury at all is a testament to that effective representation, because the State actually moved at trial to withhold any self-defense instruction following testimony from Griffiths which seemed to simultaneously suggest that he assaulted the victim in self-defense and that he didn't actually assault the victim at all. RP 212-214. The motion was effectively resisted by defense counsel and denied. RP 213-14.

"Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law." Riley, 137 Wn.2d at 909. Errors related to self-defense instructions are subject to harmless error analysis. State v. Kidd, 57 Wn. App. 95, 101, 786 P. 2d 847 (1990). An instructional error is harmless if it "is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Walden, 131 Wn.2d 469, 478, 932 P. 2d 1237 (1997).

Griffith cites one paragraph in Jury Instruction No. 14, which appears to be taken directly from WPIC 17.02, to argue that the jury was not properly instructed on the law. CP 74. The language of this solitary paragraph is admittedly confusing, and appears to have been taken directly from the WPIC without being tailored to the facts of this case. Strangely, neither the State, defense counsel, nor the Court, discovered this error – even when the instructions were read to the jury. However, the remaining portion of the instruction is clear enough:

The person using or offering to use 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 or attempted or offered to be 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 as to Assault in the Second Degree.

CP 74.

Instruction No. 15 informed the jury that:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, 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.

CP 75.

Furthermore, Instruction No. 17 clarifies any confusion resulting from Instruction No. 14:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

CP 77.

These instructions allowed defense counsel to proceed with the theory of his case, which essentially was that everything Griffiths did was done in self-defense. RP 336-338. If the jury was still confused, they did not bother to say so. They submitted no less than three questions to the Court requesting clarification from the language in instructions No. 11 and No. 19, but apparently were not thrown off by the erroneous No. 14. See CP 39, 40, 41.

Therefore, the misstated instruction – on its face and in conjunction with the record – is a harmless error.

3. The cumulative error doctrine does not apply here, as there was only one real error at trial and its effect was harmless.

The application of the cumulative error doctrine is limited to instances where there have been several trial errors that – standing alone – may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. See, e.g., 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)(three instructional errors and the prosecutor’s remarks during *voire dire* required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P. 2d 1250 (1992)(reversal required because (1) a witness impermissibly suggested the victim’s story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant’s identity from the victim’s mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P. 2d 730 (1970) (reversing conviction because (1) court’s severe rebuke of the defendant’s attorney in the presence of the jury, (2) court’s refusal of the

testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In Griffiths' case, the cumulative error doctrine is inapplicable. Here the Court is not asked to consider an accumulation of several errors. Rather, the Court is confronted with only one real error that had no effect on the outcome of the trial. As previously explained, it was not error to submit a first aggressor instruction to the jury, and it was harmless error to submit a WPIC to the jury that was not tailored to the facts of this case. Therefore, the cumulative error doctrine is inapplicable to the facts of this case.

#### D. CONCLUSION.

Credible evidence that the defendant made the first move by drawing a weapon supports the giving of an aggressor instruction. Appellant neither disputes that a tire iron constitutes a weapon when used under these circumstances, nor does he argue that the victim drew any other sort of weapon first. Therefore, the inclusion of a first aggressor instruction was proper and the failure to object to this instruction was not an error.

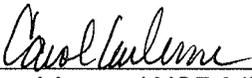
The jury instructions – imperfect though they admittedly were – nevertheless allowed defense counsel to proceed with the theory

of his case. If the jurors were still confused concerning the law of self-defense, they did not ask for additional guidance, despite requesting clarification on three other points of law during their deliberations. The identified instructional error can therefore rightly be described as harmless.

Finally, the cumulative error doctrine is inapplicable to the facts of this case, because the Court is not asked to consider an accumulation of several errors, but rather only one error that had no effect on the outcome of the trial.

On this basis, the State respectfully asks this Court to affirm both Mr. Griffiths' conviction for Assault in the Second Degree while armed with a deadly weapon.

Respectfully submitted this 9<sup>th</sup> day of October, 2013.

  
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# THURSTON COUNTY PROSECUTOR

**October 09, 2013 - 11:20 AM**

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