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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ABDOUL HAKOU KAFANDO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson, Judge

No. 16-1-04456-7

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. DID THE STATE PROVE BEYOND A REASONABLE DOUBT THE ABSENCE OF SELF-DEFENSE WHEN THE DEFENDANT DID NOT REASONABLY BELIEVE HE WAS ABOUT TO BE INJURED, USED FORCE WHICH WAS UNNECESSARY, AND WAS THE AGGRESSOR?
2. DID THE TRIAL COURT PROPERLY INFORM THE JURY OF THE STATE'S BURDEN OF PROVING THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT WHEN THE INSTRUCTIONS ARE TAKEN AS A WHOLE?
3. WAS DEFENSE COUNSEL EFFECTIVE IN AGREEING TO THE ANSWER TO THE JURY'S QUESTION ABOUT UNANIMITY WHICH ACCURATELY STATED THE LAW?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 9, 2016, the Pierce County Prosecuting Attorney charged appellant, Abdoul Hakou Kafando, hereinafter "defendant," with Assault in the First Degree. CP 3; RCW 9A.36.011(1). Trial commenced before the Honorable Garold Johnson in Pierce County Superior Court on June 2, 2017. At trial, defendant claimed he acted in self-defense. The jury received instructions on self-defense that read as follows:

Instruction No. 17

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 as to this charge.

Instruction No. 18

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to the effect the lawful purpose intended.

Instruction No. 19

No person may, by intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense 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 is not available as a defense.

CP 70-72.

On deliberation, the jury submitted the following questions relevant to this appeal:

QUESTION: Do we have to be 100% in agreement to say that it was or was not self defense (ie. Instruction 17)?

ANSWER: yes.

CP 88.

QUESTION: How do we define "prudent," as in a "reasonably prudent person" (Instruction 17)?

ANSWER: The jury instruction must be taken as a whole. All words are to be understood in that context. No further definition will be given.

CP 89.

The jury found defendant guilty of Assault in the Second Degree with family member and deadly weapon enhancements. RP 448-9. Prior to sentencing, defendant moved for substituted counsel, arrest of judgement and a new trial. CP 99. Defendant's motion was denied for untimeliness and a failure to state the underlying basis for the claims. CP 251-4. The court also rejected the motion for a new trial, which alleged prosecutorial misconduct and ineffective assistance of counsel, on the merits. *Id.*; RP 484. Defendant was sentenced to 18 months in confinement. CP 190. Defendant timely appealed. CP 250.

2. FACTS

On November 5, 2016, a domestic dispute broke out between the defendant and his wife, Yasha Bolton. RP 295, 296. The couple lived

together in an apartment with Bolton's three daughters. RP 295. Along with two of Bolton's friends, all of them were at the apartment of the night of November 6th, when the couple began arguing. RP 296. Defendant's demeanor was "belligerent." *Id.* When defendant started yelling at Bolton's friend, Bolton led defendant to their bedroom and attempted to calm him down. RP 296. Defendant angrily yelled at Bolton. *Id.*

When Bolton put her hand on defendant's chest, defendant grabbed her hand, pulled it behind her back, and pushed her up against the wall. RP 297. Defendant then stormed out of the apartment. *Id.* Bolton locked the door behind the defendant. *Id.* However, defendant remained outside of the apartment for what Bolton testified seemed like hours, banging on the door and demanding to be let back in. RP 298. Bolton and her daughters were terrified of the defendant. *Id.* Eventually, Bolton threw defendant's car keys out the door of the apartment and defendant left. *Id.*

The next morning, November 6, 2016, Bolton's brother, Alto Powell, was visiting his sister at the apartment when defendant returned. RP 299. Bolton had told Powell about the incident the night before. *Id.* Powell opened the door, telling defendant to "put your hands on me like you did my sister." RP 301. A physical scuffle between Powell and defendant broke out. RP 303. Defendant was making an audio recording on his cell phone during the fight. RP 302. The audio recording captured

women's voices in the background. *Id.* Bolton was shouting "don't hit him," and then, "stop." *Id.*

A day after the fight between defendant and Powell, Bolton obtained a protection order against defendant and began removing defendant's name from their joint accounts. RP 304-5. Defendant received notifications of the account changes on his cell phone. RP 305. On November 8, Bolton had not yet served defendant with the order when the defendant texted her that he was going to the apartment to gather his belongings. *Id.* Although Bolton told him not to go to the apartment at that time, defendant texted back, "I'm going to fucking come in the house." *Id.* Bolton was at work at the time. Bolton's daughters, who were scared of the defendant, were alone at the apartment. RP 309. Bolton called Powell and asked him to go serve defendant with the protection order. RP 310. Bolton also called 911 for protection out of fear of the defendant based on the recent incidents. RP 309.

Powell and his girlfriend, Alexa Rodriguez, drove to the apartment complex. RP 273. When they arrived, defendant was packing his car in the parking lot in front of a friend's apartment. RP 274. Rodriguez waited in the car while Powell approached defendant with the protection order. *Id.* As he handed defendant the order, Powell said, "I'm over the other day. I'm not trying to fight with you. I just want you to get your stuff and leave.

You're scaring my nieces. Just get the rest of your stuff and go." RP 275. Defendant became angry and started cursing at Powell. *Id.* Defendant took the protection order, but said, "eff those papers. I don't want to take them." *Id.*

Powell turned to leave, and began walking back to his car. Defendant continued yelling expletives at Powell, using racial slurs, and threatening to "beat [Powell's] ass." RP 276. Powell turned around to ask defendant, "what are you talking about?" *Id.* Defendant then lunged forward and stabbed Powell in his abdomen with a large serrated kitchen knife. *Id.*; RP 249. Meanwhile, from the car, Rodriguez had been video recording the men using her cell phone, in case the defendant refused service of the protection order. RP 335. The video recording showed Powell, unarmed, with his hands at his sides, when the defendant aggressively lunged forward and stabbed him. CP 56; RP 338, 348. In a panic, Rodriguez dropped her phone and turned her focus to aiding Powell. RP 339. The recording ends. *Id.*

As Powell started back for Rodriguez's car, defendant yelled that he was going to kill Powell. RP 279. Defendant then ran toward the car, angrily jabbing the knife into the open car window where Rodriguez sat in fear. RP 276, 341. Defendant left the scene and Rodriguez drove Powell to

the hospital. RP 279. Powell's stab wound was treated with stitches and left him with a scar that still causes him pain. RP 280.

After stabbing Powell, defendant got in his car and drove out of and away from the apartments down West Ridge Drive, and turning right to drive up 19th Street, where he encountered an approaching police officer. RP 239. Defendant told the officer he stabbed Powell out of fear because Powell had beat him up days earlier. RP 243. Defendant falsely told the officer he stabbed Powell with a pocketknife. *Id.* Defendant told police the knife he used was in his car. *Id.* Police found a larger serrated kitchen knife in defendant's car. RP 249.

Initially, defendant did not say Powell assaulted him that day. RP 243. Defendant then changed his story, claiming Powell ran at him and punched him once before he stabbed Powell. RP 243. Defendant changed his story again, saying Powell punched him in the stomach three times before defendant stabbed Powell, all of which is conclusively disproven by the video recording. RP 244. In fact, Powell was standing with his arms at his side a few feet away from defendant, not moving toward defendant when unprovoked, defendant stabbed him. RP 344. Defendant was arrested and charged with the above listed offenses. CP 3.

C. ARGUMENT.

1. VIEWING THE EVIDENCE IN THE LIGHT MORE FAVORABLE TO THE STATE, THE STATE PROVED BEYOND A REASONABLE DOUBT THE ABSENCE OF SELF-DEFENSE WHEN THE DEFENDANT HAD AN UNREASONABLE BELIEF, USED UNREASONABLE FORCE, AND WAS THE AGGRESSOR.

Evidence is sufficient to support a conviction if any rational trier of fact, when viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A defendant seeking review of the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact to resolve conflicting testimony, evaluate the credibility of witnesses, and generally weigh the persuasiveness of the evidence. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996); *State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004).

Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). Initially, the defendant bears the initial burden of

providing some evidence of self-defense in order to receive a jury instruction for self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Upon production of some evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Id.*; *State v. Bolar*, 118 Wn. App. 490, 509, 78 P.3d 1012 (2003).

Self-defense is evaluated from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees, incorporating both subjective and objective perspectives. *State v. Wanrow*, 88 Wn.2d 221, 235, 559 P.2d 548 (1977); *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). By considering the defendant's perceptions and the circumstances surrounding the act, the jury is able to determine the "degree of force which...a reasonable person in the same situation...seeing what he sees and knowing what he knows, then would believe to be necessary." *Id.*, quoting *State v. Dunning*, 8 Wn. App. 340, 342, 506 P.2d 321 (1973).

A claim of self-defense requires that the defendant had a reasonable fear of imminent injury. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002), (*citing* RCW 9A.16.050(1)); CP 79-83. The next element bars force which is more than reasonably necessary. *Walden*, 131 Wn.2d at 474. Additionally, self-defense is not available to an aggressor. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624, 627 (1999). Because each of the

foregoing elements are necessary for self-defense, it follows that self-defense is successfully disproved if any one of the three elements is negated.

- a. The defendant did not have a reasonable belief which justified his use of force where he was not about to be injured.

Washington courts have long adhered to the rule that the need for self-defense must be based on reasonable belief of imminent bodily harm from the victim. *State v. Studd*, 137 Wn.2d 533, 545, 973 P.2d 1049, (1999), as amended (July 2, 1999); *see also*, *State v. Miller*, 141 Wn. 104, 105, 250 P. 645 (1926); *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979). Evidence of aggressive or threatening behavior, gestures, or communication by the victim before defendant's use of force is required to show that the defendant had reasonable grounds to believe he was about to be injured. *See e.g.*, *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984); *State v. Walker*, 40 Wn. App. 658, 664, 700 P.2d 1168 (1985). In *Walker*, although the defendant feared her husband because of prior abuse, her belief that he was about to injure her before she stabbed him was unreasonable because he was several feet away, unarmed, and made no threatening comments or gestures. 40 Wn. App. at 662–63.

Viewing the evidence in the light most favorable to the State, the defendant did not think Powell was about to injure him when he turned

around, just because Powell won the previous fight. *See* Appellant's Brief 10. Powell demonstrated a clear intent: to serve the protection order and then leave. RP 275. When Powell approached defendant, he had only the protection order in hand, saying, "I'm over the other day. I'm not trying to fight with you. I just want you to get your stuff and leave. You're scaring my nieces...Just get the rest of your stuff and go." *Id.* Powell was indisputably over the animosity from the other day. Powell was unarmed and made no aggressive gestures or comments. RP 338, 343-344. Powell promptly gave defendant the protection order, then attempted to leave. RP 276.

When defendant took the protection order, he became angry, saying "eff your papers, I don't want to take them." RP 275. As Powell attempted to leave, defendant escalated the situation, yelling at Powell, cursing him out, using racial slurs, and threatening to 'beat [Powell's] ass.'" RP 275-276. Powell turned around, with his hands at his sides, to ask the defendant, "what are you talking about?" RP 276, 342. Powell did not angrily move toward the defendant. RP 343-344. Then, unprovoked, defendant lunged at Powell, stabbing him in the abdomen with a large serrated knife. RP 276, 344.

This situation is similar to *Walker*, where the defendant's belief about imminent harm was unreasonable withstanding alleged prior

assaults, because Powell was unarmed, with his hands at his sides, and made no threatening or aggressive movements or comments before the defendant stabbed him. *Walker*, 40 Wn. App. at 662–63; RP 338, 342–344. Powell merely turned around to hear what defendant was ranting about as he shouted profane threats at Powell, who was walking back to the car to leave. RP 276, 344. The record shows Powell’s intent was simply to serve the protection order and leave. *Id.* Defendant was not entitled to use self-defense where he was not in fear of imminent injury. *Studd*, 137 Wn.2d at 545.

The record does not support an inference of fear on the part of the defendant when he stabbed Powell but alternatively, it shows he was angry about the fight that occurred days earlier and stabbed Powell out of revenge. The right of self-defense does not permit action done in retaliation or revenge. *Studd*, 137 Wn.2d at 550. Although Bolton asked defendant to wait until she was home to come back to the apartment, he refused, sending an aggressive text back that he was “going to fucking come in the house.” RP 305. If the defendant was still shaken up from the encounter with Powell days earlier as he wrongly claims, it would be peculiar that he assertively states he wants to return to Bolton’s residence, when defendant knows that Bolton seeks out Powell’s help in this type of situation.

When defendant stabbed Powell, he was angry. RP 275, 279. After stabbing Powell, defendant angrily yelled at him, threatening to kill Powell. RP 279, 340. The explicit language defendant directed at Powell throughout the incident does not suggest he was afraid of Powell but rather shows defendant was still pointedly angry at Powell as a result of the fight that occurred between them days earlier. *Id.* Defendant remained at the scene after stabbing Powell, approaching, with the knife in hand, the car where a scared Rodriguez sat inside, an act that suggests he was never in fear of Powell, and on the contrary, was still angry, intending to instill fear in Powell and Rodriguez and commit unreasonable acts of violence against them. RP 279, 341, 343. A reasonable juror, considering all the facts in the light most favorable of the State, easily could have found the absence of self-defense where the defendant's use of force was motivated by revenge rather than fear of imminent injury.

- b. The force defendant used was unreasonable where it went beyond what was necessary.

“Self-defense finds its basis in necessity and generally ends with the cessation of the exigent circumstance which gave rise to the defensive act.” *In re Faircloth*, 177 Wn. App. 161, 169, 311 P.3d 47 (2013); *see also, Janes*, 121 Wn.2d at 237. Self-defense is reasonable when the defendant has no reasonably effective alternative to the use of force and the amount of force used does not go beyond what is necessary. CP 71.

There is no duty to retreat when a person is assaulted in a place where he has a right to be. *Studd*, 137 Wn.2d at 549; *Matter of Harvey*, 3 Wn. App.2d 204, 215, 415 P.3d 253, 260 (2018). Retreat should not be considered a reasonable effective alternative to the use of force in self-defense. *Id.*

Even if defendant did believe he was about to be injured, the force he responded with was not reasonable. CP 70. The defendant was not entitled to defend himself with force that was more than necessary. *Walden*, 131 Wn.2d at 474, CP 70. Powell was unarmed, not moving toward defendant, and had his hands at his sides when defendant stabbed him. RP 279, 342-344. Although the two men had fought days earlier, the altercation only involved fist fighting. RP 272. The force defendant used on Powell resulted in permanent disfigurement and ongoing pain. RP 280. It was unreasonable to use a large serrated knife to permanently disfigure someone who was unarmed, with his hands at his sides, who had only confronted the defendant with fists days earlier, and who was trying to leave the situation when defendant started yelling threats and profanities at him. RP 249, 279, 344.

- c. Defendant was not entitled to self-defense when he acted out of revenge as the first aggressor and remained the aggressor thereafter.

If a defendant is the first aggressor, he cannot lawfully use self-defense unless he retreats. *Harvey*, 3 Wn. App.2d at 220. “[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.” *Harvey*, 3 Wn. App.2d at 220; *Riley*, 137 Wn.2d at 909. A “victim” faced with only words is not entitled to respond with force. *Riley*, 137 Wn.2d at 911; *McDonald v. State*, 764 P.2d 202, 205 (Okla.Crim.App.1988); *State v. Bogie*, 125 Vt. 414, 417, 217 A.2d 51 (1966).

Defendant was the initial aggressor and remained the aggressor thereafter. Although Powell turned toward defendant and said “what are you talking about?” before defendant stabbed him, those words alone do not constitute sufficient provocation to make Powell the aggressor. *Riley*, 137 Wn.2d at 911, RP 276. Powell was unarmed with his hands at his side and made no threatening gestures or comments that should have reasonably provoked defendant’s use of force. *Walker*, 40 Wn. App. at

662-63, RP 342-344. Since Powell was not aggressive before the defendant stabbed him, the defendant unarguably was the first aggressor and was not entitled to self-defense unless he withdrew from further action.

After initially stabbing Powell, defendant had the opportunity to withdraw. Nonetheless, defendant remained the aggressor after stabbing Powell, approaching Powell's car and angrily jabbing the knife in the opened window where Powell's girlfriend Rodriguez sat in fear. RP 276, 341-342. Defendant threatened to "fucking kill" Powell. RP 279. Defendant intended to instill fear in Powell and Rodriguez¹. *See eg.* RP 279, 341-342, 343. A person who just defended himself out of fear that he was about to be attacked likely would not approach their alleged attacker's vehicle aggressively and continue to make threats.

Defendant's use of force was based on an unreasonable belief and went beyond what was reasonable. He was not entitled to use self-defense in a circumstance in which he was the aggressor. When unprovoked,

¹ On direct examination, the following exchanged occurred:

[State]: Okay. So, after the defendant is in front of you and you tried to speed off, did the defendant ever make any threats or gestures towards you?

[Rodriguez]: He came towards the car, towards the driver's side, as I swerved around him. I was obviously in a hurry. The knife was still in his hand. I felt like I was in danger, because my window was down, and I felt like I might -- the way that he was moving and had his body positioned, that he might have been coming at me with it. RP 341-342.

defendant stabbed Powell with a large serrated knife in the abdomen. RP 276. The State only had to disprove at least one element of self-defense to meet its burden. *State v. Whitaker*², No. 76128-5-I, 2018 WL 2966790, at *3 (Wash. Ct. App. June 11, 2018). Viewed in the light most favorable to the State, a rational trier of fact has more than sufficient evidence to find the State disproved the elements of self-defense beyond a reasonable doubt.

2. THE COURT PROPERLY INFORMED THE
JURY OF THE STATE'S BURDEN OF PROOF
WHEN THE JURY INSTRUCTIONS ARE
TAKEN AS A WHOLE.

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); *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). Jury instructions are sufficient when if read as a whole, they make the relevant legal standard manifestly apparent to the average juror. *Rodriguez*, 121 Wn. App. at 185; *Allery*, 101 Wn.2d at 595.

² While *State v. Whitaker*, No. 76128-5-I, 2018 WL 2966790 (Wash. Ct. App. June 11, 2018), is an unpublished case and therefore has no precedential value and is not binding on the court, it is permissibly cited under amended GR 14.1, effective September 1, 2016, for such persuasive value as the court deems appropriate.

Where a court gives self-defense instructions, the prosecutor's argument that defense has a burden to prove self-defense to the jury is a burden-shifting error. *McCreven*, 170 Wn. App. at 470. The jury should be instructed that the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 346, 562 P.2d 1259 (1977). A jury instruction on self-defense that misstates the law is an error of constitutional magnitude and is presumed prejudicial. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In *Whitaker*, the court rejected the argument that it improperly shifted the burden of proof to the defendant. 2018 WL 2966790 at *2. The jury had asked whether all three elements of self-defense had to be met to make a homicide justifiable. The court responded, "the State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. A homicide is justifiable when all three elements in Instruction 15 are met." *Id.*

The Court of Appeals there found the answer was proper because it was an accurate statement of the law. *Id.* The jury was seeking clarity as to whether the State had to disprove all of the elements in instruction 15 or just one of them. *Id.* at *4. The jury at no point expressed confusion as to which party held the burden of proof. *Id.* The court clearly stated that the

State had the burden of proving that all three of the elements were not met. *Id.* at *3. The State could carry this burden by proving beyond a reasonable doubt that one or more of the three elements in Instruction 15 has not been established. *Id.*

In another similar case, *Middleton vs. McNeil*, a jury instruction erroneously added the phrase “as a reasonable person” in a sentence regarding the defendant’s belief about imminent harm. 541 U.S. 433, 435, 124 S. Ct. 1830, 1831, 158 L. Ed. 2d 701 (2004). The Supreme Court found no likelihood that the jury was misinformed because the correct statement of the law, that the belief could be unreasonable, was given elsewhere in the instructions and was restated in the prosecutor’s closing argument. *Id.* at 438. The Supreme Court agreed with the trial court which stated, “reversal is not required because error cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole.” *Id.* at 435.

- a. The jury instructions when taken as a whole clearly stated the burden on the State to disprove self-defense beyond a reasonable doubt.

When taken as a whole, the instructions given to the jury in this case adequately state the law on self-defense. The jury’s question in response to Instruction No. 17, “[d]o we have to be in 100% agreement

that it was or was not self-defense,” sought clarity as to whether or not their finding on self-defense had to be unanimous. RP 70. The answer, “yes,” was an accurate statement of the law because it expressed that the jury could not convict the defendant unless all jurors unanimously agreed that the State met its burden of disproving self-defense beyond a reasonable doubt. RP 70. Therefore, they needed to be in 100% agreement, meaning 100% of the jury had to agree to their finding.

Instruction No. 17 nonetheless explicitly stated that the State had the burden of proof. RP 70. Additionally, an answer to another jury question informed the jury that “the jury instructions must be taken as a whole.” RP 72. Taking the instructions as a whole, the jury was clearly informed of the State’s burden, and their question in response to Instruction No. 17 did not express confusion on that matter. RP 70. Defendant’s claim that the answer shifted the burden of proof fails for these reasons.

This case is like *Whitaker*, where a defendant claimed the response to a jury question shifted the burden of proof. 2018 WL 2966790 at *2. Like in *Whitaker*, the defendant’s argument is misplaced because the jury’s question did not indicate confusion about which party had the burden of proof. *Id.* at *4; RP 70. The jury’s question concerned

unanimity. RP 70, 436. The jury was nonetheless unambiguously informed of the State's burden. 2018 WL 2966790 at *4.; RP 70.

Furthermore, like in *Middleton*, even if the answer to the jury's question had been a misstatement of the law, the jury instructions here correctly stated that the State has the burden of proof. 541 U.S. 433; RP 70. The jury here was reminded to take the instructions "as a whole" in response to another question. RP 73. In *Middleton*, the Supreme Court found the jury instructions were sufficient when as a whole, they properly conveyed the applicable legal standard. 541 U.S. at 436.

Additionally, the prosecutor here reminded the jury of the State's burden in the closing argument, a requisite favorable to the defendant. *Id.* at 438, RP 390. The fact that the prosecutor properly restated the law in the closing argument supported the finding in *Middleton* that any ambiguity to the law was resolved, because the correct statement of the law was favorable to the defendant. 541 U.S. at 436. Likewise in this case, when taken as a whole, the instructions given to the jury made the applicable law manifestly apparent. Defendant cannot show error in the jury instructions here.

- b. Defendant's claim for review is precluded because he invited the error when he agreed to the answer to the jury's question about Instruction No. 17.

Under the doctrine of invited error, even where constitutional rights are involved, courts are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998); *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005); *State v. Earl*, 142 Wn. App. 768, 776, 177 P.3d 132 (2008); *State v. Clark*, 170 Wn. App. 166, 194, 283 P.3d 1116 (2012). To determine whether the invited error doctrine applies, we consider whether the defendant “affirmatively assented to the error, materially contributed to it, or benefited from it.” *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009).

Here, defendant is precluded from making a claim for review because he agreed to the answer to the jury question. When the court discussed the question, “[d]o we have to be 100% in agreement to say that it was or was not self defense? (ie. Instruction 17),” the judge began by saying he thought it was important for the defendant to be present. RP 434. Counsel agreed, and called defendant, who waived his presence for the jury question. *Id.*

In the context of Instruction No. 17, the parties and the court agreed that the jury was confused as to whether or not their decision on

self-defense had to be unanimous, which the instruction was unclear about. RP 436. The State suggested the answer, “Yes. You do have to reach a unanimous decision,” because the law is clear on requiring unanimity. RP 434. Counsel for defendant expressed numerous times during the discussion concerns about the possibility of confusing the jury, saying at one point, “I’m always trepidatious in this situation.” RP 435-436. The judge reasoned that a simple answer of “yes” would best avoid confusion by not adding or taking away from the given instructions. RP 436. Both parties agreed and approved the answer. RP 436-437.

The invited error doctrine precludes defendant’s claim because he agreed to the wording of the jury instructions, including the answer given to the jury’s question about unanimity which he uses as the basis of his claim. Several courts have held that invited error precludes claims about jury instructions to which the defendant agreed to the wording of. *Gaff*, 90 Wn. App. at 845; *Winings*, 126 Wn. App. at 89; *Earl*, 142 Wn. App. at 776; *Clark*, 170 Wn. App. at 194. Under the standard in *Momah*, the invited error undoubtedly applies here because defendant both assented to and materially contributed to the alleged error when counsel for defendant took part in deliberation over the appropriate answer and then agreed to the answer that was given. 167 Wn.2d at 154.

3. COUNSEL WAS NEITHER DEFICIENT NOR PREJUDICIAL IN AGREEING TO THE ANSWER TO THE JURY'S QUESTION ON UNANIMITY BECAUSE IT WAS AN ACCURATE STATEMENT OF THE LAW.

Review is precluded by the invited error doctrine unless invited error is the result of counsel's ineffectiveness. *Rodriguez*, 121 Wn. App. at 184. Courts review claims of ineffective assistance of counsel de novo. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011).

Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). There is a strong presumption that counsel's performance was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. Counsel is not deficient in agreeing to a jury instruction which, as a whole, accurately conveys the law. *State v. Eplett*, 167 Wn. App. 660, 666, 274 P.3d 401 (2012).

Defendant fails to show counsel was deficient in agreeing to the court's answer "yes," to the jury's question, "[d]o we have to be 100% in agreement to say that it was or was not self defense? (ie. Instruction 17)," because it was an accurate statement of the law. CP 88. The jury question asked whether the jury's decision on self-defense had to be unanimous. RP 436. The jury's decision is required to be unanimous, so they had to be in 100% agreement. RP 436. Therefore, "yes," was an appropriate response to the question that was asked.

The jury asked the question in the context of Instruction No. 17, which explicitly states that the State has the burden of disproving self-defense beyond a reasonable doubt. CP 70. This rebuts defendant's contention that the question expressed confusion over which party had the burden. App. Br. 17. The answer, "yes," solely went to the jury's confusion about unanimity. CP 88. Counsel's assent to the answer was not deficient because the answer accurately conveyed the law and did not shift the burden of proof, which was unambiguously stated in Instruction No. 17. *Id.*

Nor was counsel's agreement to the answer prejudicial. Prejudice exists only where there is a reasonable possibility that but for counsel's error the outcome would have been different. *Strickland*, 466 U.S. at 703. The record does not suggest that had counsel objected to the answer, the

outcome would have been different. When counsel expressed concerns about the proposed answer repeatedly during the discussion of the question, the judge agreed with the State that an unambiguous “yes” was necessary to inform the jury of the requirement that their decision be unanimous. RP 435-436.

Moreover, the answer “yes” was legally accurate, so even if counsel had further objected to it, the court likely would have overruled the objection. There was no reasonable possibility that the outcome would have been different. An error in self-defense instruction is presumed prejudicial. *Walden*, 131 Wn.2d at 473. However, the answer to the jury question was an accurate statement of the law, so in agreeing to its wording, counsel made no error which could be deemed prejudicial.

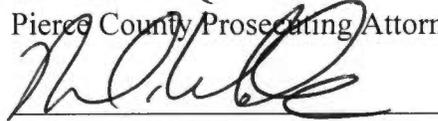
Defendant cannot show that counsel’s conduct was either deficient or prejudicial, so his claim of ineffective assistance of counsel fails.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks that the Court affirm defendant's conviction.

DATED: July 30, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373



Brenna Quinlan
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-30-18 Therese
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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