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NO. 52405-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BLESS CHIECHI,

Appellant.

RESPONDENT'S BRIEF

**ERIC BENTSON/WSBA 38471
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Chiechi's conviction should be affirmed because:

- (1) He did not suffer a manifest error affecting a constitutional right, when the jury was properly instructed on the law and he failed to raise the issue at trial that he now raises for the first time on appeal; and
- (2) His attorney was not ineffective when he did not object to a jury instruction that was appropriate based on the facts of the case.

It may be appropriate to strike language from the judgment and sentence that potentially makes Chiechi responsible for discretionary legal financial obligations ("LFOs").

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Did Chiechi suffer a manifest error affecting a constitutional right when the jury was appropriately instructed on lawful use of force, and he did not object to the instructions given at trial?
- B. Was Chiechi's attorney ineffective for not objecting to a jury instruction that was appropriate based on the facts of the case?
- C. Should language imposing the potential for interest and the future cost of supervision by the Department of Corrections ("DOC") be stricken from Chiechi's judgment and sentence?

III. STATEMENT OF THE CASE

Bernard Berry came to America from Micronesia and eventually settled in Kelso, Washington, where he had a job at Foster Farms. RP 197-98. On August 26, 2017, Bernard was at his cousin's house at 710

Fourth Street in Kelso. RP 198-99. Bernard was drinking beer at the house along with a group of men that included, Bless Chiechi. RP 202. Chiechi and a man named Cassidy got into an argument. RP 202. Chiechi became angry, and using “strong language,” threatened Cassidy. RP 203-04.

Bernard told Chiechi not to cause problems at Cassidy’s house. RP 205. Chiechi told Bernard not to say anything. RP 205. Chiechi called Bernard a mother f***er and challenged Bernard to fight outside. RP 206. Both Bernard and Chiechi went outside. RP 206. Outside, Chiechi and Bernard threw punches at each other. RP 207. Bernard got Chiechi into a hold. RP 207. Eventually, Bernard let Chiechi go. RP 208. Chiechi ran to his house, which was about a block away. RP 206, 208.

Bernard remained on the sidewalk then headed for his brother’s house. RP 208. Chiechi obtained a metal bat. RP 208-09. From behind Bernard, Chiechi called Bernard’s name and said stop. RP 208. Bernard turned around, and as he did Chiechi struck him on the left side of the head two times with the bat. RP 208-09. Chiechi attempted to strike Bernard a third time in the head, but Bernard blocked the bat with his left arm. RP 209. Chiechi struck Bernard in the leg with the bat. RP 209-210. Chiechi then struck Bernard on the right side of the head with the

bat. RP 209-210. Chiechi struck Bernard a sixth time with the bat on the right leg. RP 209.

Mike Saito observed the latter portion of the first fight and the entirety of the second fight. RP 231-33. Saito testified when he observed the men outside, Bernard had a hold of Chiechi's hair. RP 231. After Saito told Bernard to let Chiechi go, he did so. RP 232. Saito observed Chiechi run away and retrieve the metal baseball bat from his car at his house. RP 232. Saito observed Chiechi and Bernard come together. RP 233. Chiechi had a weapon. RP 233. Bernard did not. RP 233. Saito observed Chiechi strike Bernard six times with the bat. RP 233. After being struck in the head, legs, and arms, Bernard was able to take the bat away from Chiechi and throw it. RP 233.

The blows to Bernard's head caused swelling that was wide and oblong to both sides of his head. RP 256, 272. Bernard went to his wife's house and 911 was called. RP 211. Bernard was transported by ambulance to St. John Medical Center in Longview. RP 273. The injuries to his head were located near his temples and were of significant mass. RP 296-97. A CT scan revealed a large hematoma to the left side of Bernard's head and a subarachnoid hemorrhage. RP 299. Because Bernard's internal bleeding risked displacing brain tissue, it put his life at

risk. RP 300-02. Bernard was transferred to Southwest Washington Medical Center, to be seen by a neurosurgeon. 304-05.

Chiechi was charged with assault in the first degree with a deadly weapon enhancement. CP 12-13. Several of the witnesses testified at trial, including Bernard. RP 197-244, 253-407. Chiechi also testified. RP 379-401.

Chiechi testified that he had gone over to the house to see Cassidy. RP 380. Chiechi said he was drinking with Bernard and the other men that were there. RP 381. Chiechi said Bernard challenged him to fight. RP 381-82. Chiechi claimed he exited the house to avoid Bernard. RP 383. Chiechi claimed Bernard followed him, then pulled his hair from behind, while they were walking on the sidewalk. RP 383. Chiechi said Bernard held him so he was unable to turn. RP 384. Chiechi said Bernard pushed him to the grass. RP 384. Chiechi claimed Bernard continued to hold his hair while they walked to Chiechi's house. RP 384-85.

Chiechi claimed that as they got closer to his house, Bernard was holding his hair with one hand and used the other to punch him. RP 385. Chiechi claimed while this occurred he was able to open his locked car door and retrieve an aluminum bat from inside. RP 385. Chiechi testified that he hit Bernard with the bat in the legs, causing Bernard to release his hair. RP 385-86. Chiechi said Bernard left and returned with a metal

cutter with two handles. RP 386. Chiechi claimed Bernard struck him with the metal cutter. RP 388. Chiechi claimed he then warned Bernard if he had to injure him he would not be breaking the law because he was at his house. RP 388. Chiechi testified that after being hit, he struck Bernard. RP 389. Chiechi said Bernard then ran to Chiechi's car in an effort to strike it. RP 389. Chiechi said he then struck Bernard in the head because Bernard had struck him with the cutter and said he would damage his car. RP 389-390.

Chiechi's testimony contradicted what he had originally told Detective Tim Gower. RP 329-332. Chiechi told Detective Gower, Bernard wanted to fight, so he went to his car, retrieved a baseball bat, and struck Bernard six times. RP 330. Chiechi told Detective Gower, that Bernard did not have a weapon when he was striking him with the bat. RP 330. Chiechi told Detective Gower that after he had struck Bernard once in the leg, twice in the body, and three times in the head Bernard ran away. RP 330. Chiechi told Detective Gower that after this Bernard returned with pruning sheers and swung them at him, missed, and left. RP 331.

The State proposed the aggressor jury instruction as part of the law on use of force. RP 410. The court inquired as to whether Chiechi was objecting to that instruction. RP 410. Chiechi's attorney told the court: "I think it states the law correctly." RP 410. Chiechi did not object to the

aggressor instruction. RP 410. During his closing argument, Chiechi's attorney argued Chiechi's use of the bat as a weapon was lawful because Bernard was the aggressor. RP 464-480.

IV. ARGUMENT

A. CHIECHI DID NOT SUFFER A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT WHEN THE COURT GAVE THE AGGRESSOR INSTRUCTION TO THE JURY.

Chiechi did not object to the aggressor instruction at trial; he may not raise this issue for the first time on appeal because he did not suffer a manifest error affecting a constitutional right. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *See also* RAP 2.5(a). The evidence at trial was sufficient to support the aggressor instruction. The aggressor instruction was given, and Chiechi did not object. Chiechi fails to show that this jury instruction constituted a manifest error affecting a constitutional right. Therefore, the issue was waived.

"[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn. App. 68, 75, 604 P.2d

1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). The Supreme Court has explained: “This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial. Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts.” *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). An error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). Under RAP 2.5(a), an appellate court “may refuse to review any claim of error which was not raised in the trial court.” This rule requires parties to bring purported errors to the trial court’s attention, thus allowing the trial court to correct them.¹ *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Although an argument must be raised at trial to be preserved for review, in certain limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration has been satisfied. In *State v. Lynn*, 67 Wn.

¹ Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a “manifest error affecting a constitutional right” are not without limits:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be “manifest,” otherwise the word “manifest” could be removed from the rule. *Id.* The court explained: “[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344.

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the

alleged error is “manifest;” an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term “manifest” means “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.* Chiechi’s claim fails to meet this stringent standard, therefore he should not be permitted to raise the issue for the first time on appeal.

1. The alleged error does not suggest a constitutional issue.

The giving of an aggressor instruction alone does not suggest a constitutional issue, because whether the aggressor instruction is appropriate requires an evidentiary determination. “[A]ppellate courts should determine on a case-by-case basis whether an unpreserved claim of error regarding a self-defense jury instruction constitutes a manifest constitutional error.” *State v. O’Hara*, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) (abrogating *State v. LeFaber*, 128 Wn.2d 896, 900, 913 (P.2d 369 (1996))). Chiechi assumes the giving of the aggressor instruction

necessarily suggests a constitutional issue. However, giving the aggressor instruction requires an evidentiary determination, which the trial court was best-positioned to make. Further, even if the facts had not supported the aggressor instruction, the giving of the instruction would not have involved a constitutional error.

In *O'Hara*, the Supreme Court overruled its previous *per se* rule that a jury instruction misstating the law of self-defense amounted to an error of constitutional magnitude. *Id.* The Supreme Court explained that instructional errors violating explicit constitutional provisions or that deny a defendant a fair trial through a complete verdict are of constitutional magnitude. *Id.* at 103. However, instructional errors are not of constitutional magnitude when they allow for possible justifications for defense counsel's failure to object or when they still permit the jury to come to the correct conclusion. *Id.*

Here, there were possible justifications for Chiechi's attorney's decision not to object to the aggressor instruction and the instructions as a whole still permitted the jury to come to the correct conclusion. Chiechi's attorney chose not to object for two reasons. First, because there was sufficient evidence for the jury to find Chiechi was the aggressor, an objection would have been futile. Second, considering the testimony, it was likely Chiechi's attorney saw the benefit of the language in this

instruction. Had there been no aggressor instruction the sole issue would have been whether it was reasonable and necessary for Chiechi to strike Bernard repeatedly with a metal baseball bat. Bernard and Saito both testified that Chiechi attacked Bernard with the bat, and Chiechi admitted to Detective Gower that he had struck an unarmed Bernard six times with the bat. Without the aggressor instruction, it would have been difficult to convince the jury that this was a reasonable and necessary use of force.

Chiechi's attorney argued that Bernard was the aggressor. Because Chiechi's justification for using the weapon against Bernard was based on a claim that Bernard was the aggressor, it was likely Chiechi's attorney sought to focus the jury's attention on the aggressor instruction's language that stated: "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." CP 89. Such language could have served to focus the attention of the jury on Bernard's acts, which Chiechi claimed precipitated his use of the bat. Because there were possible justifications for Chiechi's decision not to object to the instruction it did not constitute constitutional error.

Additionally, the jury instructions still permitted the jury to come to the correct conclusion. Lawful force was fully defined for the jury, and

the jury was instructed that the State had the burden of proving Chiechi's use of force was not lawful beyond a reasonable doubt. The aggressor instruction itself contained the additional safeguard of requiring the jury to find Chiechi was the aggressor beyond a reasonable doubt before deciding self-defense was unavailable. The jury was thus required to either find Chiechi was the aggressor beyond a reasonable doubt or to find the State had proved the absence of lawful force by Chiechi beyond a reasonable doubt. Had there had not been sufficient evidence that Chiechi was the aggressor, the jury would not have found so beyond a reasonable doubt. And if the jury did not make this finding, it was still required to find the State had proved the absence of lawful force beyond a reasonable doubt. Thus, even if the evidence had been insufficient for the aggressor instruction, the instructions still permitted the jury to come to the correct conclusion.

Citing *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011), Chiechi assumes that the giving of an erroneous aggressor instruction would necessarily implicate his constitutional rights. However, *Gordon* did not involve an aggressor instruction. Because there was a justification for Chiechi's attorney's decision not to oppose the instruction, and the instructions as a whole still permitted the jury to come to the correct

conclusion, under the circumstances of this case, the giving of the aggressor instruction did not suggest a constitutional issue.

2. The alleged error was not manifest because it had no practical and identifiable consequence on the trial.

Because Chiechi deliberately chose not to challenge the aggressor instruction at trial, and his rights were not actually affected, the alleged constitutional error was not manifest; therefore it should not be considered for the first time on appeal. To raise a constitutional challenge for the first time on appeal “[t]he error must be ‘manifest’ and not a constitutional issue that the appellant *deliberately* chose not to litigate below.” *State v. Trout*, 125 Wn. App. 313, 318, 103 P.3d 1278 (2005) (emphasis in original) (citing *State v. Valladareas*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983); *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994)). Chiechi fails to show there was as constitutional error, much less one that was manifest. Because the aggressor instruction, which correctly stated the law, did not actually affect Chiechi’s rights he did not suffer actual prejudice. Therefore, the error was not manifest and had no practical and identifiable consequence on the trial. Moreover, Chiechi deliberately chose not to challenge the aggressor instruction. Because he fails to show a manifest constitutional error and deliberately chose not to raise a constitutional issue at trial, the issue was waived.

“Without a showing that the defendant’s rights were actually affected by the alleged constitutional error, the alleged error is not ‘manifest’ under RAP 2.5(a)(3), and the claimed error may not be raised for the first time on appeal.” *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). “RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining a new trial whenever they can identify some constitutional issue not raised in the trial court.” *McFarland*, 127 Wn.2d at 333. “The exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (citing Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). “The defendant must identify a constitutional error and show how in the context of the trial the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest[.]’” *McFarland*, 127 Wn.2d at 333.

“[A]n alleged error is manifest only if it results in a concrete detriment to the claimant’s constitutional rights, *and* the claimed error rests upon a plausible argument that is supported by the record.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (emphasis in original). Further, “[i]f the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125

(2007) (citing *State v. WWJ Corp.*, 138 Wn.2d at 602). “Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *WWJ Corp.*, 138 Wn.2d at 603.

Here, the constitutional error Chiechi alleges was not manifest, as there was no practical and identifiable consequence on his trial. To show the alleged error was manifest and raise the issue for the first time on appeal, Chiechi must show that his rights were actually prejudiced. He does not. Chiechi challenged Bernard to the first fight, then the two men went outside and threw punches at each other. After the first fight ended, Chiechi went to his home, obtained the bat, returned and attacked Bernard with the bat, causing Bernard to defend himself against this attack. Thus, there was evidence that Cheichi made the first move in drawing a weapon, provoked the fight, and there was conflicting evidence as to whether Chiechi provoked the fight. Taking the evidence in the light most favorable to the State there was sufficient evidence for the court to give the aggressor instruction.

Further, at trial, when given the opportunity to object, Chiechi deliberately chose not to, stating the instruction was a correct statement of the law. Because the instruction contained language that permitted Chiechi’s attorney to focus the jury’s attention on Bernard’s actions, rather

than Chiechi's decision to strike an unarmed Bernard several times in the head with a metal baseball bat, he deliberately sought not to challenge the instruction. For these reasons, the alleged error was not manifest, and Chiechi may not raise the issue for the first time on appeal.

3. There is no merit to Chiechi's claim because the aggressor instruction was appropriate.

Because there was sufficient evidence to support giving the aggressor instruction, Chiechi's claim of error has no merit. "A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant provoked the fight; or (3) the evidence shows the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn.App. 85, 89, 180 P.3d 885 (2008). Chiechi's claim is without merit. The initial fight between Chiechi and Bernard ended and the two separated. Chiechi returned a few minutes later and attacked Bernard with a weapon. As was obvious to the trial court, and even Chiechi's attorney, the aggressor instruction was entirely appropriate under the facts of the case.

"Each party at trial is entitled to have the trial court instruct upon its theory of the case if there is sufficient evidence to support the theory." *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987) (citing *State v.*

Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980)). “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.” *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999) (citing *Thompson*, 47 Wn. App. at 7). “An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *State v. Wingate*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Although “words alone” do not constitute sufficient provocation for giving an aggressor instruction, “[w]here 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 909-910.

Here, the aggressor instruction was appropriate. According to testimony of both Saito and Bernard, Chiechi and Bernard’s first fight ended. Bernard remained on the sidewalk and then began to walk to his brother’s home. Meanwhile, Chiechi went to his home where he obtained the metal baseball bat. Chiechi then returned to where Bernard was with the bat and struck him twice in the head before Bernard was able to block the third blow and defend himself. Both Bernard and Saito testified to this. Because there was credible evidence that Chiechi made the first move by drawing a weapon, the aggressor instruction was appropriate.

Further, even if the attack with the bat was viewed as part of a continuous event, the aggressor instruction would still have been appropriate. The first fight began when Chiechi challenged Bernard to a fight then went outside with him, and the two men began punching each other. Thus, there was sufficient evidence to find Chiechi's acts provoked the fight. Also, Saito, Bernard, and Chiechi's testimony provided conflicting evidence as to whether Chiechi's conduct provoked the fight. Accordingly, there is no merit to Chiechi's claim that there was insufficient evidence to support the aggressor instruction.

4. The claimed error was harmless because no rational jury would have found the severe beating of Bernard with a metal bat was a reasonable and necessary use of force under the circumstances.

Chiechi's act of striking the unarmed Bernard in the head multiple times with a metal bat provided overwhelming evidence of unlawful use of force, therefore even absent the aggressor instruction the result of the trial would have been the same. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). Because Chiechi's use of force was not reasonable and necessary, a jury would have found him guilty regardless

of whether the aggressor instruction had been given. Further, the jury was instructed that the State had to disprove Chiechi's use of force was lawful beyond a reasonable doubt and could only avoid this if it found he was the aggressor beyond a reasonable doubt.

Here, Chiechi was observed by an independent witness, Mike Saito, attacking Benard with a metal bat. Chiechi admitted to Detective Gower that he struck Benard six times with the bat, while Bernard was unarmed. Bernard suffered severe injuries to his head that could have resulted in his death. Even absent the aggressor instruction, to find this use of force to be lawful the jury would still have had to find it was reasonable and necessary. It was unreasonable for Chiechi to go retrieve a bat, return to where Bernard was and attack him. Moreover, striking Bernard multiple times in the head while he was unarmed went far beyond what anyone would reasonably find to be a necessary use of force. Thus, had the aggressor instruction not been given the outcome of the trial would not have been any different.

The claim that the aggressor instruction relieved the State of the burden to disprove self-defense beyond a reasonable doubt is flawed. The jury was instructed: "The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful." CP 85. The jury was also instructed that only "if you find beyond a

reasonable that the defendant was the aggressor, and the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." CP 89. Thus, the jury was informed it was the State's burden to disprove self-defense beyond a reasonable doubt. The aggressor instruction similarly held the State to a reasonable doubt standard before it could find self-defense to be unavailable. The reason self-defense becomes unavailable to an aggressor is because one who is the aggressor is necessarily not acting in self-defense. The aggressor instruction appropriately explained this to the jury.

The inclusion of the aggressor instruction with the other use of force instructions provided the jury with a comprehensive understanding of the law regarding use of force. The criminal justice system entrusts juries to make decisions on matters of enormous consequence. Appraising the jury fully of the law relating the issue to be decided provides for the most fully-informed decision-making. In Chiechi's case either the jury found beyond a reasonable doubt Chiechi was the aggressor and was therefore not acting in self-defense, or it found beyond a reasonable doubt that striking an unarmed Bernard six times with a metal baseball bat was

an unreasonable or unnecessary use of force. Trusting the jury with knowledge of the law should not be considered error.²

B. CHIECHI DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT OBJECT TO THE AGGRESSOR INSTRUCTION.

Chiechi did not suffer ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

² A footnote from *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999) is often cited for the admonition that the aggressor instruction should be used "sparingly." *See, e.g., State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005) (citing *Riley*, 132 Wn.2d at 910 n.2.). However, *Riley* did not use the term "sparingly," but rather advised that courts should use care when giving the instruction. *Id.* Earlier in the same footnote, *Riley* also stated "...an aggressor instruction should be given where called for by the evidence[.]" The term "sparingly" provides little guidance for the trial court which must make an individualized determination in a specific case. The instruction is either given or it is not. A trial court cannot make a determination on whether to use the instruction in one case because of the facts of another. Thus, it is difficult for trial courts to comply with the directive to use the instruction sparingly.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

1. Legitimate trial tactics supported Chiechi’s attorney’s decision not to object to a jury instruction.

It was a legitimate trial tactic for Chiechi’s attorney not to object to the aggressor instruction. “Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to

second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable[.]" *Strickland v. Washington*, 446 U.S. at 689. There were legitimate tactical reasons for Chiechi's attorney not to object. First, an objection would not have been sustained because the aggressor instruction was appropriate. Second, the aggressor language was helpful to Chiechi's attorney's closing argument, in which he argued Bernard was the aggressor.

"The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn. App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has "wide latitude in making tactical decisions." *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of

counsel.” *Id.* Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (“[T]here is no ineffectiveness if a challenge to the admissibility of evidence would have failed[.]”).

Using jury instructions containing language supportive of a defense attorney’s closing argument, is an example of a strategic decision made concerning what is helpful to the overall defense. *Cf. State v. Piche*, 71 Wn.2d 583, 589-90, 430 P.2d 522 (1967) (“[T]rial practice, despite persistent efforts toward its advancement, remains more of an art than a science....the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics.”). “Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point...which in retrospect may seem important to the defendant.” *Id.* at 590. A defense attorney’s representation is to be evaluated as to whether it fell below an objective standard of reasonableness. *In re Pers. Restraint of Stenson*, 142 Wn.3d 710, 742, 16 P.3d 1 (2001) (citing *Strickland*, 466 U.S. at 688.). There are not detailed rules for reasonable conduct because, “[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Id.* (quoting *Strickland*, 466 U.S. at 689.).

With regard to jury instructions, trial attorneys must make several strategic decisions—these decisions are presumed to be reasonable. *See Grier*, 171 Wn.2d at 33. For example, “[n]ot requesting a limiting instruction can be a legitimate tactic to avoid reemphasizing damaging evidence.” *State v. Embry*, 171 Wn.App. 714, 762, 287 P.3d 648 (2012). Also, the decision not to request a lesser included offense instruction has been found to be part of a legitimate trial strategy to obtain acquittal. *Id.* (citing *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009)). Moreover, when evidence would not support a self-defense claim, a defense attorney’s decision not to request a self-defense instruction constitutes a “clear strategic reason” for such action. *See State v. Calvin*, 176 Wn. App 1, 14, 316 P.3d 496 (2013).

Here, Chiechi’s attorney’s decision not to object to the aggressor instruction was a legitimate trial strategy because the evidence supported giving the instruction, and the language of the instruction was helpful to Chiechi’s attorney’s closing argument. There was evidence Chiechi provoked the fight, there was conflicting evidence as to whether Chiechi provoked the fight, and Chiechi made the first move during the second fight by drawing—and using—a weapon. Independently, any of these would have constituted sufficient grounds for the court to give the aggressor instruction. Depending on how the jury considered the

testimony, all three of these grounds existed. Both Bernard and Saito testified that prior to the second fight Chiechi obtained the bat and attacked Bernard. The evidence so overwhelmingly supported giving the aggressor instruction that Chiechi's attorney affirmatively told the court it was a correct statement of the law. Thus, an objection to the instruction would not have been sustained.

Additionally, the language in the instruction was helpful to the closing argument of Chiechi's attorney. The entire thrust of Chiechi's attorney's closing argument was that Chiechi was justified in using the bat to strike Bernard, because Bernard was the aggressor. Chiechi's attorney argued:

- "And what it [the evidence] has shown is that my client, Bless Chiechi, is the victim." RP 464.
- "Ladies and gentlemen, my client was defending himself that night. He was not the aggressor, and he did what was necessary and appropriate in that situation." RP 467.
- "What did Berry [Bernard] tell to Officer Gower? Well, he admitted to being the aggressor. Berry admitted to being the aggressor. He said he put Bless [Chiechi] in a headlock." RP 472.
- "How did the fight start? According to Berry, Bless swung at him. That's what he testified to at this trial." RP 474.

- “So, basically, everyone who was present that testified, including my client, said that Berry was the aggressor, the one that started this[.] RP 474.
- “Ladies and gentlemen, when you look at all of this it’s clear that Bless was not the aggressor....What did occur was my client was defending himself.” RP 477.
- “If my client was the aggressor, where would the fight have occurred? At Mazawa’s house. It didn’t. It happened on the way to his house.” RP 478.
- “The circumstantial evidence shows that my client was not the one that wanted to get in a fight at the time. My client testifies that his hair was being pulled, that he was being attacked by this person en route to his house.” RP 478.

Chiechi’s attorney’s closing argument demonstrates that his strategy was to justify Chiechi’s use of force by claiming he had only done so to respond to an aggressor. Ultimately, Chiechi’s attorney used Chiechi’s claim that Bernard was attacking him as the reason for his violent acts:

“What is appropriate? What is necessary? Well, when examining that question, let’s go back and let’s go with just what the Prosecutor is going to say happened. That my client hit him six times when he didn’t have a weapon. Even in that situation, self-defense is appropriate.”

RP 480.

The aggressor instruction’s first sentence stated: “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.” CP 89. The “no person” language was supportive of Chiechi’s attorney’s argument, as it did not merely apply to Chiechi but to any person. Without the aggressor instruction, Chiechi’s attorney would have been left with arguing it was reasonable and necessary to strike Bernard six times with a metal bat, when Chiechi himself had admitted to Detective Gower that Bernard was unarmed. Chiechi’s attorney’s strategy was to change the jury’s focus from the reasonableness of his actions to a claim that Bernard was the aggressor. This was a legitimate trial strategy.

2. Chiechi did not suffer any prejudice.

Because the outcome of the trial would have been the same even if the aggressor instruction had not been given, Chiechi did not suffer any prejudice. With regard to the second prong of the *Strickland* test: “Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Chiechi did not suffer any prejudice. The jury was still instructed that the State had the burden of disproving the lawful use of force beyond a reasonable doubt. There is not a reasonable certainty that “but for” the aggressor instruction the result of the trial would have been different.

Chiechi admitted to striking an unarmed Bernard six times with the metal bat, then contradicted himself at trial. Mike Saito was an independent witness to the two fights, and he observed Chiechi attack Bernard with the bat. And, the injuries inflicted on Bernard from being struck in the head were life threatening. No jury would have found this was a reasonable and necessary use of force, even had there not been an aggressor instruction. Because Chiechi did not suffer any prejudice his ineffective assistance claim fails.

C. IF POTENTIAL FUTURE LEGAL FINANCIAL OBLIGATIONS ARE CONSIDERED DISCRETIONARY COSTS, THEN IT MAY BE APPROPRIATE TO AMEND THE JUDGMENT AND SENTENCE.

If the interest that had not yet accrued on Chiechi's LFO's and the cost of future supervision by DOC following Chiechi's term of incarceration are considered discretionary costs, then it would seem to be appropriate to amend the judgment and sentence to strike such provisions.³

³ At this time, it is still unknown whether Chiechi will accrue interest by failing to pay his LFO's, and it is unknown whether he will be employed and capable of paying when he is supervised by DOC.

V. **CONCLUSION**

For the above stated reasons, Chiechi's conviction should be affirmed.

Respectfully submitted this 18th day of June, 2019.

A handwritten signature in black ink, appearing to read "Eric H. Bentson", written over a horizontal line.

ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Peter Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058
ptiller@tillerlaw.com
bleigh@tillerlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 18th, 2019.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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