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Division II
State of Washington
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NO. 52661-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH GRAHAM,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Randolph Graham had long-standing issues with his neighbor, Randall Lester. They lived on a property that shared a well and an easement for a driveway. The Lester family had siphoned power from the well to bring power to their shed. Mr. Graham believed the Lester family was stealing power from him, which was especially difficult because of his fixed income.

Mr. Graham was especially distraught about the decision by Mr. Lester to shoot his pet rabbits when they strayed on his property. At least three of them had been shot shortly before the incident at issue between Mr. Graham and Mr. Lester, which left Mr. Lester dead.

Although the prosecution introduced no evidence Mr. Graham committed a provoking act that necessitated his need to defend himself, the court provided the first aggressor instruction to the jury. The prosecution asserted the shooting was unprovoked, while Mr. Graham told the jury he acted in

self-defense. The court's error in giving the jury this instruction deprived Mr. Graham of his right to a fair trial.

Mr. Graham also asks for a new trial because the court deprived him of his right to represent himself when he moved to have his lawyer removed from his case.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it provided the jury with the first aggressor instruction (Jury Instruction No. 10).

2. The trial court erred when it did not grant Mr. Graham's motion to represent himself.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a first aggressor jury instruction, the prosecution must show a provoking act by the defendant other than the assault itself. First aggressor instructions are disfavored because the law of self-defense is usually explained without the need for the additional instruction. The instruction can also "effectively and improperly" remove from the jury's consideration a valid self-defense claim. In Mr. Graham's case, there was no evidence presented by either

party that Mr. Graham committed a provoking act that necessitated the need for self-defense. The only act of aggression was the assault itself. Where Mr. Graham's only defense was that he acted in self-defense, did the court's error in providing the jury with the first aggressor instruction deprive Mr. Graham of a fair trial, requiring reversal?

2. The Sixth and Fourteenth Amendment, along with article 1, §section 22 of the Washington Constitution guarantee a person accused of a crime the right to represent themselves. Where the waiver is knowing, voluntary, and intelligent, the court should grant the request, regardless of the wisdom of the decision. Mr. Graham made an unequivocal waiver of his right to be represented by appointed counsel. And while he did not make his request until after trial commenced, he offered to continue his case, to minimize disruption. In order to preserve Mr. Graham's constitutional rights, should the trial court have granted Mr. Graham's request to represent himself?

D. STATEMENT OF THE CASE

Randolph Graham had a long-standing dispute with his neighbor Randall Lester over the use of a shared well and an easement on his property used to create a joint driveway. RP 184. Mr. Graham discovered power for the shared well had been siphoned by his neighbors to power a shed built on their property. RP 301. Mr. Graham believed the Lester's were using the power for a marijuana grow. RP 185. The dispute over the well resulted in Mr. Graham's neighbors erecting no trespass signs, along with the need for an officer to be on the property when the power siphon was removed and a new meter was installed. RP 301-02, 224.

There were other disputes as well. The Lester's were upset when Mr. Graham's pet rabbits got loose. RP 320. Mr. Lester shot at least three of them when they crossed the property line. RP 322. The escalation in the dispute between the Lester's and Mr. Graham, when they killed his rabbits, was especially hard on Mr. Graham, who treated his pets like family. RP 834, 222.

Mr. Graham also objected to his neighbors placing a basketball hoop on the easement, along with parking a car that obstructed the use of his driveway, especially if large vehicles or firetrucks needed to use the road. RP 22-24.

On May 23, 2018, Mr. Graham came home from visiting with family. Mr. Lester and his son were outside shooting baskets. RP 257. Mr. Lester drove past them and Mr. Lester's son waved at Mr. Graham. RP 258. Mr. Lester and his son continued to play basketball. RP 264.

Shortly after, neighbors heard a single shot. RP 263. Mr. Graham's account of what happened differed greatly from that of Mr. Lester's son. According to Mr. Graham, he drove back down the driveway on his way to visit his father, who he intended to take target shooting. RP 807. He was driving his car back down the driveway when he saw the silhouette of a pistol in Mr. Lester's pocket. RP 812. Mr. Lester became worried and then unsnapped the satchel holding his pistol, placing it on the truck's dash. *Id.* Mr. Lester walked into the

path of the truck and Mr. Graham had to slam on his breaks, almost going through the windshield. RP 814.

Mr. Lester then dropped his cigarette and out of his left pocket he pulled out his pistol, aiming it at Mr. Graham with both hands. RP 815. Mr. Graham was sure Mr. Lester was going to shoot him. *Id.* Mr. Graham “freaked out” and shot Mr. Lester three times, not even aiming at him. RP 817. He shot him to avoid being shot and killed himself. *Id.* He then got out of his car in an attempt to seize Mr. Lester’s pistol, fearful Mr. Lester would still use his firearm against him. RP 820. Still fearful of being shot, he shot Mr. Lester one more time. *Id.* Mr. Lester died almost immediately after the last shot was fired. RP 521.

Mr. Lester’s son denied his father possessed a firearm when the altercation occurred. RP 266. He said Mr. Graham shot at them and that he started running inside his house, fearful Mr. Graham would shoot him as well. RP 273, 275. He said he stayed inside the house with his mother until the

police arrived. RP 278. He never saw his mother leave the house. RP 280.

Mr. Graham stated that after he discharged his firearm, he decided to leave the scene undisturbed for the police. He returned to his truck, which he drove back up to his house. RP 822. He stated he saw Mrs. Lester walk out to Mr. Lester's body and remove something. RP 824. He knew she took the gun. RP 829. Despondent, Mr. Graham ingested a bottle of quick-release morphine. RP 826. He then called 911 upon going into cardiac arrest. RP 839. He remembered very little of what he said to the 911 operator. RP 836. Mrs. Lester denied ever going to her husband's body or removing anything from the scene. RP 365. No second firearm was ever recovered from the scene.

After the first day of trial, Mr. Graham asked the court to remove his lawyer and allow him to represent himself. RP 330. Mr. Graham expressed his frustration in his lawyer not challenging any of the evidence. RP 331. He also told the court his lawyer only talked with him for 20 minutes in the

preceding 90 days. RP 333. Mr. Graham believed he was capable of representing himself. RP 331. He asked the court for some leniency, requesting a continuance so he could subpoena witnesses and access the in-jail kiosk to review the evidence rules. RP 333, 335. After a colloquy, the court denied Mr. Graham's request. RP 335.

Although there was no evidence from either party that Mr. Graham created a necessity for acting in self-defense through his actions, the prosecutor asked the court to read the first aggressor instruction to the jury. RP 843. Mr. Graham's attorney did not object to this request. *Id.*

The jury found Mr. Graham guilty of murder in the first degree, attempted murder in the first degree, drive-by shooting, manufacturing marijuana, and unlawful possession of marijuana. RP 988. He was sentenced above the standard range, to a total of 800 months. RP 1015.

E. ARGUMENT

1. **The court erred when it provided the jury with the first aggressor instruction, as there was no evidence to suggest Mr. Graham created a necessity to defend himself from Mr. Lester's aggression.**

At the government's request, the trial court gave the jury the first aggressor instruction, which reads:

No person may, by any intentional act reasonably likely to prove a belligerent response, create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provided or commenced the fight, then self-defense is not available as a defense.

CP 116 (Instruction No. 10).

The court gave this instruction in error. The government never suggested Mr. Graham provoked Mr. Lester or otherwise engaged in a fight with him. To the contrary, the prosecution's theory was that Mr. Graham's act of shooting Mr. Lester occurred almost immediately after he drove down his driveway. RP 913. According to the government, Mr. Lester never acted in any way to provoke the shooting, or to necessitate Mr. Graham's need to defend

himself. *Id.* This instruction was unnecessary and deprived Mr. Graham of his right to a fair trial. Reversal is required.

a. The court improperly gave a first aggressor instruction that was not supported by the evidence and misled the jury.

A first aggressor instruction tells the jury a defendant is not entitled to act in lawful self-defense if he “provoked or commenced the fight.” *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010); *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). To obtain a first aggressor jury instruction, the prosecution must show a provoking act by the defendant other than the assault itself. *Id.* The provoking act that justifies a first aggressor instruction must be one a jury could reasonably assume would provoke a belligerent response by the victim. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011), *rev. denied*, 173 Wn.2d 1003 (2011) ; *Wasson*, 54 Wn. App. at 159. Use of the “first aggressor” instruction is infrequent because the law of self-defense is usually explained without the need for the additional instruction. *Stark*, 158 Wn. App. at 960.

A first aggressor instruction can “effectively and improperly” remove from the jury’s consideration a valid self-defense claim. *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). The instruction increases the defense burden and runs counter to the constitutional requirement that the prosecution bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

Because of this, first aggressor instructions are disfavored. “First aggressor instructions should be used sparingly because the other self-defense instructions will generally be sufficient to allow the theory of the case be argued.”¹¹ *Washington Practice: Washington Pattern Jury Instructions: Criminal* 16.04 cmt. at 256 (4th ed. 2016); *Stark*, 158 Wn. App. at 960. “Few situations come to mind where the necessity for an aggressor instruction is warranted.” *State v. Arthur*, 42 Wn. App. 120, 125, n. 1, 708 P.2d 1230, 1232 (1985) (Reversal required because aggressor instruction “effectively vitiated any claim of self-defense.”)

In fact, first aggressor instructions are only appropriate “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need [for the alleged victim] to act in self-defense.” *Riley*, 137 Wn.2d at 909-10. The provoking act must be intentional, but it cannot be the actual assault. *Bea*, 162 Wn. App. at 577; *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847, *rev. denied*, 115 Wn.2d 1010 (1990).

In *Wasson*, for example, this Court found insufficient evidence the defendant acted as a first aggressor. The defendant and his cousin were in a fight, and the alleged victim came outside after hearing the commotion, told the two to quiet down, and eventually fought with the defendant’s cousin, knocking him to the ground. *Wasson*, 54 Wn. App. at 157. When the victim then “took several rapid steps” towards the defendant, the defendant shot him in the chest. *Id.* at 157-58.

Because Mr. Wasson did not initiate any belligerent act towards the victim until the final assault, there was no

evidence he acted in order to provoke an assault. *Wasson*, 54 Wn. App. at 159-60 (“Perhaps there is evidence here of an unlawful act by Mr. Wasson, a breach of peace. However, there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed.”). The jury could be instructed that the defendant acted in self-defense, but not that he was the first aggressor. *Id.* at 158, 160-61. Accordingly, this Court remanded for a new trial. *Id.*

In *Birnel*, the defendant had moved out of the family home, but slept at his wife’s house one night because of a child’s birthday and awoke to noises that caused him to suspect his wife was taking methamphetamine. *State v. Birnel*, 89 Wn. App. 459, 462-63, 949 P.2d 433 (1998), overruled on other grounds by *In re Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007) . Mr. Birnel went through his wife’s purse, found drugs, and decided to confront her, waiting for her at the top of the stairs. *Id.* at 463. The two argued about her drug use and ability to pay the bills, as well as his search of her purse. *Id.* The wife then ran to the kitchen and

returned with a knife. *Id.* Mr. Birnel claimed he fell over his wife as he arose from the floor where he was sitting, she attacked him, and a fight over the knife ensued, during which the wife was fatally stabbed. *Id.* at 463-64.

Mr. Birnel argued he acted in self-defense, whereas the prosecution claimed he acted out of rage and should have known how his wife would react when he searched her purse. *Birnel*, 89 Wn. App. at 466, 473. This Court found the trial court erred by giving an aggressor instruction, as Mr. Birnel did nothing but wait for his wife at the top of the stairs and it was not reasonable to assume searching his wife's purse would provoke an attack. *Id.* at 473. "Even if he knew that his wife did not like him to search her purse, a juror could not reasonably assume this act and these questions would provoke even a methamphetamine abuser to attack with a knife." *Id.* This Court also remanded for a new trial. *Id.*

This Court reviews de novo the legal question of whether the prosecution produced sufficient evidence to justify an aggressor instruction. *State v. Sullivan*, 196 Wn.

App. 277, 289, 383 P.3d 574 (2016). This requires the prosecution to produce some evidence showing Mr. Graham was the first aggressor, different from the shooting itself. *Stark*, 158 Wn. App. at 959 (citing *Riley*, 137 Wn.2d at 909-10).

b. There was no preceding act of aggressiveness, justifying a first aggressor instruction.

For the court to give the jury the first aggressor instruction, the provoking act must be an intentional act reasonably likely to provoke a belligerent response from the victim. *Birnel*, 89 Wn. App. at 473; *Wasson*, 54 Wn. App. at 159. It cannot be the shooting itself. *Stark*, 158 Wn. App. at 959. It is error to give such an instruction if it is not supported by credible evidence from which the jury can conclude that it was the defendant who provoked the need to act in self-defense. *Birnel*, 89 Wn. App. at 473; *Wasson*, 54 Wn. App. at 158–59.

It was error in Mr. Graham's case to give a first aggressor instruction. The government never suggested Mr. Graham created a circumstance where he was forced to

defend himself. RP 913. Instead, the government's theory was that Mr. Lester's shooting was unprovoked, almost immediately after Mr. Graham drove his truck towards where Mr. Lester was playing basketball. *Id.* With the evidence presented at trial, the jury could have found Mr. Graham was not defending himself from Mr. Lester when he shot him, but the evidence did not suggest there was any act that preceded the shooting that warranted the first aggressor instruction. Rather, it was the shooting itself.

On the other hand, Mr. Graham claimed Mr. Lester approached his truck with a gun raised, requiring Mr. Graham to use his own firearm to shoot Mr. Lester. RP 815.

Either Mr. Graham committed the homicide by shooting Mr. Lester without provocation, so it was not a precipitating act, or Mr. Lester drew his firearm first making Mr. Graham's use of his weapon lawful self-defense. The first aggressor instruction was not supported by any additional precipitating act. *See Riley*, 137 Wn.2d at 910 ("An aggressor instruction is appropriate if there is conflicting evidence as to

whether the defendant's conduct precipitated a fight.”). There was no evidence of a precipitating act of aggression. *Riley*, 137 Wn.2d at 910-11. The erroneous first aggressor instruction was given in error.

c. The prosecution cannot prove the erroneously provided instruction was harmless beyond a reasonable doubt.

When the court provides an unwarranted first aggressor instruction, the error is constitutional. *Stark*, 158 Wn. App. at 961; *Birnel*, 89 Wn. App. at 473. It requires reversal and remand for a new trial unless the government proves the error harmless beyond a reasonable doubt. *Stark*, 158 Wn. App. at 961; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The prosecution cannot show the erroneous first aggressor was harmless. Mr. Graham's case depended on whether the jury believed he acted in lawful self-defense. The court diluted this claim by inserting an unsupported first aggressor instruction. Mr. Graham asks this Court to reverse his conviction and remand this matter for a new trial.

2. The court erred when it deprived Mr. Graham of his right to represent himself.

The trial court erred when it denied Mr. Graham's request to represent himself guaranteed by the Sixth Amendment, the Fourteenth Amendment, and article 1, section 22 of the Washington Constitution. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). This right is afforded to a defendant even though it has potentially detrimental consequences for both the defendant and the administration of justice. *Madsen*, 168 Wn.2d at 503 (citing *Faretta*, 422 U.S. at 834).

After the start of the second day of trial, Mr. Graham asked the court to relieve his attorney and allow him to represent himself. RP 330. Mr. Graham expressed frustration with his attorney who did not present an opening statement before the start of the evidence or conduct much in the way of cross-examination, asking two of the witnesses about ten questions in total. RP 156, 282. Mr. Graham also told the court how little time he had been able to speak with his

attorney, stating he met with him for 20 minutes in the preceding 90 days. RP 333. He especially objected to his lack of representation when he said his attorney did not challenge testimony from witnesses suggesting he was “crazy.” RP 331. He stated that if allowed to represent himself, he would be able to present evidence to demonstrate his defense. *Id.*

In making his request to represent himself, Mr. Graham did not object to continuing his case. RP 335. He also told the court there were a number of witnesses that needed to be called that he would subpoena if given the chance, including his daughter, the Robinsons, Jennifer Bush, along with April, Joyce, and Jerry Berry. RP 333.

The court conducted a colloquy. RP 333. It asked Mr. Graham whether he had represented himself before. RP 333-34. He stated he had not, but had taken some paralegal classes, 20 years prior. RP 334. He did not have a great familiarity with the rules of evidence, but knew how to access them at the kiosk while he was in custody. RP 335. He also

told the court the only way he could defend himself properly was by representing himself. RP 334.

The court denied Mr. Graham's request. RP 335. The court stated it lacked confidence in Mr. Graham's ability to understand the legal process. *Id.* The court also told Mr. Graham he believed his attorney "knows what he's doing." RP 336. The court factored in the seriousness of the charges, its unwillingness to delay the trial, and the lack of resources Mr. Graham would have while in jail when it denied Mr. Graham's request. RP 337.

a. The court abused its discretion when it did not afford Mr. Graham his right to represent himself.

Once a defendant asserts his right to self-representation, the trial court must determine whether the assertion is unequivocal and timely. *Madsen*, 168 Wn.2d at 504. The issues of equivocality and timeliness focus on if, when, and how the defendant made a request and not on the request's motivation or purpose. *State v. Curry*, 191 Wn.2d 475, 486-87, 423 P.3d 179 (2018).

First, Mr. Graham's request to represent himself was unequivocal. He told the court he was going to fire his attorney and represent himself. RP 330. Mr. Graham recognized the logistical complications with his plan, but believed the obstacles could be overcome if he were afforded a little bit of time. RP 330. And while the court focused on the challenges Mr. Graham would have in representing himself, this is not a factor the court should consider when determining whether a person should represent themselves. *Curry*, 191 Wn.2d at 486-87. Further, there was no finding Mr. Graham did not understand what waiver met, or that his waiver was not knowing, voluntary, and intelligent. *State v. Burns*, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1747036, at *7 (Apr. 18, 2019). This Court should find Mr. Graham's request was unequivocal.

Mr. Graham's request to represent himself was made on the second day of trial, which raises issues of timeliness. Mr. Graham was, however, willing to delay his trial to prepare. RP 335. He did not ask the court to excuse the jury

or grant a mistrial. *Id.* Given the seriousness of the charges Mr. Graham was facing, along with the reality he would serve the rest of his life in prison if convicted, the trial court should have granted Mr. Graham's motion, despite timeliness issues. This is especially true, given the accommodations Mr. Graham was willing to make to exercise his right to self-representation. *Id.* This Court should hold Mr. Graham was entitled to represent himself at trial, despite timeliness and that his requests to preserve this right were reasonable accommodations the trial court should have accepted.

b. This Court should order a new trial, where Mr. Graham can represent himself.

Mr. Graham made an unequivocal request to represent himself. RP 330. While this request was made after the start of trial, this Court should find the accommodations Mr. Graham offered were sufficient to waive the timeliness requirement. RP 335. As a result, this Court should hold the trial court abused its discretion when it denied Mr. Graham his right to represent himself. Where such abuse is found this Court will reverse without any showing of prejudice. *Madsen*,

168 Wn.2d at 504. (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)); *State v. Breedlove*, 79 Wn. App. 101, 110, 900 P.2d 586 (1995). Mr. Graham asks this Court to find the trial court abused its discretion and order reversal of his conviction.

F. CONCLUSION

Mr. Graham asks this Court to hold the trial court erred when it improperly provided the first aggressor instruction to the jury and when it denied Mr. Graham his right to represent himself. These errors require reversal and a new trial.

DATED this 22nd day of April 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52661-1-II
)	
RANDOLPH GRAHAM,)	
)	
Appellant.)	

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