

FILED
Court of Appeals
Division II
State of Washington
7/30/2019 11:48 AM
No. 52661-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RANDOLPH GRAHAM,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the trial court properly give the first aggressor jury instruction, and if not, was the error invited or harmless?
- B. Did the trial court abuse its discretion when it denied Graham's request to proceed pro se at the start of his third day of his jury trial?

II. STATEMENT OF THE CASE

Randy and Rachel Lester grew up together in the same community in Lewis County, Washington. RP 289-90.¹ Rachel and Randy began dating in 1998 and eventually married in 2005. *Id.* Rachel and Randy have two children: Hayden who was 17, and Hunter who was 16. RP 286-87.

Since 2009, the Lester family has resided at a house located on Meier Road in Winlock. RP 286. When Rachel and Randy purchased their home, no one else had ever lived in it. RP 293. Around the same time, in 2009, a couple moved into the house next door. RP 293-94. The couple moved out by early summer 2016 and Randolph Graham moved in. RP 294.

¹ The majority of the verbatim report of proceedings in Graham's matter is the multiple volume, continuously paginated, transcript that includes the six days of jury trial and sentencing hearing, which the State will cite as RP. The State will also be referring to the different members of families by that member's first name when there are multiple members of that family who testified. The first names are being used for clarity purposes, no disrespect is intended. Therefore, the Lesters, Randy, Rachel, and Hunter will all be referred to by their first names.

Rachel first met Graham in June 2016, when Graham came over and gave her mail that had been delivered to his mailbox. RP 294. The Lesters and Graham share a well, which requires them to share the cost of electricity and upkeep on the well. RP 296, 805. In December 2016, when the water pressure became low and it was thought the pipes may have frozen, Graham and Randy went out to the pump house to attempt to determine what was wrong and ultimately called a company out to do repairs on the well. RP 295-96. Graham did not have enough to cover his portion of the bill but paid the Lesters most of what he owed and requested to pay off the rest later, which was agreeable to Randy. RP 296. Graham asked if he could just pay the water bill to pay them back, and Rachel was fine with that, but then the bill was paid late. RP 296. Randy spoke with Graham about the late payment, which Graham apologized, as it was not intentional. RP 297.

The pump house is on the Lesters property. RP 299. The Lesters also have a shop on their property. *Id.* Late winter or early spring 2017, Graham told Randy that Graham had noticed the lights were on in the Lesters' shop around 2:00 a.m. RP 299-300. Graham had come onto the Lesters' property and walked around the shop and the outbuildings to see why the lights were on and what was

going on. *Id.* Rachel was upset that Graham was on this portion of their property. RP 300. Rachel felt Graham had no business being practically all the way to their house. *Id.* Rachel asked Randy to put up no trespassing signs, which he did, around the shop, the pump house, and at the entry onto their property. *Id.* Rachel wanted to make it clear Graham did not need to be over at their property but she also did not want to start trouble. RP 300-01.

Later, Graham told Randy that Graham believed the shop was wired into the pump house and Graham should not be paying for that charge. RP 301. Graham suggested disconnecting the meter and rewire it into the shop. *Id.* Randy contacted the PUD and requested someone come out to the property to look at the wiring. RP 302. It was discovered the shop was wired into the pump house. RP 303. Graham and Randy were upset. RP 302. Randy had the wiring fixed the following weekend and the power bill for the pump house only changed approximately five to ten dollars per month once the wiring was corrected. RP 303-04. The Lesters felt bad about the wiring issue and told Graham, who still owed the Lesters for the well repairs, not to pay the electricity bill for the remainder of the year. *Id.*

The Lesters continued to have issues with Graham. RP 305. In June 2017, a certified letter from Graham showed up in the

mailbox. RP 305. Graham began texting Randy regarding the letter, including a photo of the letter, which was a L&I inspection done May 31st, on the pump house, written out to Graham's address, stating that they needed to fix some conduit and the junction box needed to be secure. RP 305. The Lesters took corrective action without contacting Graham regarding the L&I inspection. *Id.* The Lesters did not want to have contact with Graham. *Id.* Graham would not stop texting Randy. *Id.* Rachel showed Randy how to block Graham's number from his phone. *Id.* Rachel then discovered Graham's Facebook page, which showed Graham had gone onto the Lesters' property after the No Trespassing signs had gone up, taken photographs of the outside of their buildings, their home, from inside their pump house, and mocked their No Trespassing signs. RP 306-07.

On June 23 2017, Graham was on his tractor, driving up and down the shared driveway (roadway), stopped in front of the Lesters' house and pushed over Hunter's basketball hoop. RP 311. Rachel, scared and furious, went outside, approached Graham, and asked Graham what his problem was. *Id.* Graham told Rachel the basketball hoop was in the easement and he should call the fire marshal and the sheriff on the Lesters. RP 311-12. Graham tried to

insinuate the basketball hoop has not always been in that location, which was not true. RP 313. Graham was angry and hostile. RP 318. Contrary to Graham's belief, the basketball hoop was not placed in that location to antagonize Graham. RP 313-14.

In early May 2018, Randy shot and killed rabbits that had gotten into the Lesters' garden. RP 322-23, 339. The rabbits belonged to Graham. RP 221. Graham's rabbits were very important to him. *Id.* Graham treated the rabbits like his children, and the rabbits ran around his home like a dog or cat would. RP 221-22. When Graham visited his father, Bernard, on May 23rd, Graham broke down crying due to being so distraught about his rabbits being killed by his neighbor. RP 221.

The evening of the 23rd, Hunter and Randy went outside to play a basketball at their basketball hoop, located at the end of their driveway next to the roadway. RP 249, 251, 257. While on his porch, Hunter saw Graham drive by in his raised black truck. RP 258-59. Hunter waived at Graham. RP 258. Graham then sped off and drove towards his house. RP 140-41, 262. After Graham pulled up to his house Hunter heard a gunshot he believed came from Graham. RP 263.

Graham pulled back up to the Lesters' driveway about five to ten minutes after Hunter and Randy began playing basketball. RP 267. It was shortly after 8:00 p.m. RP 149, 192, 210-11. There was no one else in the vehicle with Graham. RP 274. Graham was driving the truck fast and aggressively towards Hunter and Randy so they stepped off to the side of their yard. RP 267-68. Graham stuck his hand out of the window of the truck, said, "Hey, Randy," and then began shooting. RP 273. Randy fell backwards to the ground when Graham began shooting. RP 276.

Once Graham started shooting, Hunter began running. RP 275. Hunter ran all the way through the yard, to the right side of the house, and behind the house. RP 147, 275. Graham was still firing his gun as Hunter ran for the house. RP 147, 277. Hunter got to the back of house and went through the sliding glass door in the back. *Id.* Hunter entered through the living room and locked the door behind him. RP 278. Hunter shut the windows, locked the doors, and called 9-1-1. RP 278.

Rachel had been inside the house watching television when she heard the gunshots. RP 349-50. Rachel heard Hunter screaming, did not see anything, and went running down the hallway to find Hunter on the phone with 9-1-1. RP 350. Hunter was telling

the 9-1-1 operator “something like, ‘The neighbor just shot my dad and killed him,’ or something to that effect.” RP 350. Rachel ran to the front door, stepped out, saw a bullet casing or a bullet, her husband lying on the ground, and Graham’s truck parked in the grass. RP 350-51. Hunter screamed for his mom to come back inside, Graham had a gun, and he was going to kill them. RP 351. Rachel and Hunter then watched Graham drive back to his property, get something out of the back of his truck, and nonchalantly walk back into his house. RP 352.

Graham retreated into his home and called his father. RP 228, 231-32. Graham told Bernard, “Get over here. I shot my neighbor.” RP 228. Graham then took between 40 and 60 quick-release morphine pills. RP 826. Graham called 9-1-1, requesting an ambulance for himself, and mentioned as an afterthought they might want to send second ambulance. RP 835-36. Graham was eventually located in his residence by the Lewis County Regional SWAT Team. RP 412-15, 466, 484. Due to Graham being unresponsive, Deputy Andersen administered Narcan in an attempt to reverse the effects of a possible opioid overdose. RP 466-67. Graham was transported to the hospital for additional treatment. RP 441-42, 450.

Randy died from multiple gunshot wounds. RP 526; Ex. 40.² There was no gunpowder noted at any of the entrance wounds, therefore the gunshots came from at least 18 to 24 inches away. RP 506; Ex. 40. Randy suffered from two “superficial” gunshot wounds, one to his upper front chest and one to his right middle back. RP 518-19, 522; Ex. 40. Randy suffered from two other gunshot wounds that would have been each individually fatal. RP 521. One gunshot, to the left middle back, perforated Randy’s heart in several places. RP 519-20; Ex. 40. Finally, the gunshot wound to the back of Randy’s head was the last gunshot, as death would have been almost instantaneous. RP 527; Ex. 40.

The State charged Graham with Count I: Murder in the First Degree, Count II: Attempted Murder in the First Degree, Count III: Drive-By Shooting, Count IV: Manufacture of Marijuana, Count V: Possession of a Controlled Substance, in the Third Amended Information. CP 48-51. Count I and II included firearm enhancements. CP 48-49. Count I also included four other enhancements, 1) deliberate cruelty, 2) particularly vulnerable victim,

² The State will submit a supplemental Clerk’s papers designating exhibit 40, the autopsy report.

3) destructive and foreseeable impact on persons other than the victim, and 4) egregious lack of remorse. *Id.*

Graham elected to have his case tried to a jury. See RP. The State's evidence was presented consistent with the summary provided above. In addition, the State presented evidence Graham had marijuana growing at his residence and was in possession of over 40 grams of marijuana. RP 621-22, 627-28, 641-44, 722, 792; Ex. 56.

On the third day of the jury trial, Graham requested to proceed pro se. RP 330-32. Graham complained of the manner in which the State was being allowed to present its evidence. *Id.* The trial court conducted a colloquy of Graham and subsequently denied his request to proceed pro se. RP 334-37.

Graham testified on his own behalf. RP 799-841. Graham explained he came home around 7:00 to 7:15 p.m. on May 23, 2018. RP 806-07. Graham arrived home, planning to be there for a short while and then leave again for his parent's house. RP 807. According to Graham, "I was actually going to take them to lunch and shoot my pistol with my father." RP 807. Graham went to his truck, grabbed his pistol, fired a round into the front yard, and then proceeded to back

into his truck. RP 807. The pistol was placed in a leather case in the front passenger's seat of Graham's truck. RP 808.

Graham explained he got into his truck to leave but then Hunter came out from behind some foliage and walked to the side of the Lester house. RP 805. Graham decided to wait before leaving. *Id.* Randy and Hunter then went to play basketball. RP 810. Graham believed it may be a good time to discuss the well with Randy. *Id.*

Graham drove down towards the Lesters. RP 811. Graham said Hunter and Randy started walking in Graham's direction. *Id.* Graham noticed a pistol in Randy's left pocket. RP 813. Concerned, Graham unsnapped his satchel, grabbed his pistol, and put it in his center console. RP 813.

According to Graham, Randy then jumped in front of Graham's truck, causing Graham to quickly stop and slam into the windshield. RP 814. Randy then put his cigarette out on Graham's truck, grabbed his pistol out of his left pocket and fully extended both arms, pointing the gun directly at Graham. RP 815-16. Graham believed Randy was going to shoot him. RP 816. Graham shot at Randy to prevent from being shot at himself. RP 817. Graham remembered shooting Randy three times while Graham was in his truck. RP 817. Graham put the truck into park, opened his door, and

took off running after Randy. RP 818. Graham wanted to disarm Randy. RP 818. Randy tripped. RP 819. When Randy fell, he started to roll towards Graham. RP 820. Graham believed Randy was going to shoot him. RP 820. Graham shot Randy a fourth time, waited to make sure Randy was not moving, then left. RP 821-22. Graham also stated Rachel came out of the house and took something from Randy's body. RP 823-25.

The jury convicted Graham as charged, including all enhancements. CP 152-159. Graham was sentenced to an exceptional sentence above the standard range. CP 163-64. The trial court sentenced Graham to a total of 800 months in prison. CP 164. The trial court only imposed the mandatory \$500 crime victim assessment and the \$100 DNA fee for legal financial obligations. CP 166-67. Graham timely appeals his conviction. CP 173.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION, AND ANY ERROR WAS INVITED OR HARMLESS.

Graham's trial counsel's affirmation of the first aggressor jury instruction precludes Graham's ability to challenge the instruction on

appeal. Graham argues the trial court impermissibly gave the first aggressor instruction, thereby depriving Graham of a fair trial by diluting his claim of self-defense. Brief of Appellant 9-17. If this alleged error can be raised, there was sufficient evidence in the record, in the light most favorable to the State, to warrant giving the first aggressor instruction. This Court should affirm.

1. Standard Of Review

A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenge to the first aggressor jury instruction is reviewed de novo. *State v. Kee*, 6 Wn. App. 2d 874, 878, 431 P.3d 1080 (2018). Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

2. Graham's Affirmation Of The First Aggressor Jury Instruction Precludes His Ability To Raise The Issue On Appeal.

The State requested, without objection, exception, and beyond mere acquiescence, that the trial court give the first aggressor jury instruction, WPIC 16.04. RP 843-44, 864-65; CP 116.

The trial court gave the requested instruction, which states:

No person may, by any intentional act reasonably likely to provoke 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 defendant's act and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 116 (Instruction 10). Graham now asserts, for the first time, this instruction was given by the trial court in error. In the context of the entire record, the doctrine of invited error precludes Graham from raising the issue.

Washington Courts hold to the principle of invited error, which "prohibits a party from setting up an error in the trial court then complaining of it on appeal." *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). This doctrine applies to a party raising issue with a jury instruction he or she request be given by the trial court. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1998). The invited error doctrine is a strict rule, but the Supreme Court has declined the opportunity to adopt a more flexible approach. *Studd*, 137 Wn.2d at 547. Even when a clearly erroneous instruction is given, as occurred in *Studd*, the invited error doctrine is followed and an appellant cannot complain about an instruction he or she requested the trial court give. *Id* at 546.

While Graham did not propose the first aggressor jury instruction, he actively participated in determining what jury

instruction would be submitted to the jury. RP 842-66. Graham's trial counsel explained he had emailed his proposed self-defense instruction to the State, but there had been a communication error. RP 843. The State indicated it was not objecting the Graham's self-defense instruction and would be proposing "the primary aggressor instruction as well." RP 843. Graham's counsel replied, "And I can't object to that, given the state's evidence." RP 843.

Later, when the jury instruction packet was assembled, Graham's counsel stated, "These are the changes that we discussed and given these changes, I'll have to look, but I'm not sure I'm going to have any objections or exceptions. I think this is going to meet with what I believe are the appropriate instructions." RP 865. The following day, after Graham motioned the trial court to dismiss Count II, Attempted First Degree Murder, he also addressed Instruction 11. RP 870-76. Graham noted Instruction 11 was not required, could be confusing and mislead the jury, and therefore requested it not be given. RP 875-76. The trial court, with no objection from the State, removed Instruction 11. RP 876. Graham's counsel also made it clear it was a tactical decision to not request a lesser included instruction and there were no other issues raised regarding the jury instructions. RP 875-78.

Acquiescence is generally not sufficient to show a party has invited error in regards to a challenge to a jury instruction. *State v. Corn*, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Yet, in *Corn*, the defendant did not merely acquiesce to the challenged jury instruction. *Corn*, 95 Wn. App. at 56. Corn's counsel told the trial court it would be best at that time to accept the jury instruction rather than ask for a mistrial, but after speaking to his client, the attorney may request a mistrial based on the instructions. *Id.* Therefore, Corn did not acquiesce, she also affirmatively acted to preserve her right to raise the issue. *Id.*

Similarly, Graham did not merely acquiesce but took affirmative steps to support the State's requested first aggressor instruction. RP 843. Graham, by stating, "I can't object to that" is not merely acquiescing. Graham could object, had the ability to demand the trial court not give the instruction, but instead actively participated in agreeing the instruction was appropriate to be submitted to the jury. Graham's counsel stated the instructions were "appropriate." RP 865. Graham is prohibited by the doctrine of invited error from attacking the first aggressor jury instruction on appeal. This Court should find the issue barred and affirm the trial court.

3. The Trial Court Properly Gave The Proposed First Aggressor Jury Instruction.

While the State maintains Graham is prohibited from raising issue with the first aggressor jury instruction, *arguendo*, the trial court properly gave the first aggressor instruction as requested by the State. The evidence presented at trial sufficiently supported, when viewed in the light most favorable to the State, the idea that Graham provoked the need to act in self-defense.

A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). This principle applies equally to the prosecution. *Griffin*, 100 Wn.2d at 420. The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). While the first aggressor instruction is not generally favored, a first aggressor jury instruction may be given when, viewing the evidence in the light most favorable to the State, there is some evidence the defendant was the first aggressor. *Kee*, 6 Wn. App. 2d at 878-79; *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 443 (1998). It is

appropriate to give a first aggressor instruction when there is credible evidence presented for “which a jury can reasonably determine that the defendant provoked the need to act in self-defense.” *Kee*, 6 Wn. App. 2d. at 879. “[W]hen there is conflicting evidence as to whether the defendant’s conduct precipitated the fight” it is also appropriate to give the first instruction. *Id.* A defendant who is the first aggressor cannot, generally, invoke a claim of self-defense. *Id.*

The provoking act of the defendant cannot be the actual assault. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). The defendant does not need to deliver the first blow to meet the criteria for a provoking act. *Bea*, 162 Wn. App. at 577. “The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response by the victim.” *Id.* (internal quotations and citations omitted).

In *State v. Riley*, 137 Wn.2d 904, 906-08, 976 P.2d 624 (1999), conflicting evidence supports giving a first aggressor instruction. Riley, 15-years-old at the time, shot 26-year-old Jaramillo in the back of the neck. *Riley*, 137 Wn.2d at 906-07. Jaramillo and a friend stole cars together, and on the day of the shooting, Jaramillo had a stolen car and stolen pistol in his possession. *Id.* at 906. Riley approached Jaramillo about purchasing a car and a pistol. *Id.* Riley

left, then returned to find Jaramillo and his friend lying on a lawn nearby. *Id.*

There was conflicting testimony regarding the events that occurred surrounding the shooting. *Id.* at 906-07. Riley testified he made a comment in jest about Jaramillo being a “wanna be” gang member, which angered Jaramillo so much Jaramillo responded he was going to shoot Riley. *Id.* According to Riley, he demanded Jaramillo’s gun, which Jaramillo claimed to not be in possession of, and then Jaramillo attempted to distract Riley by claiming the police were coming. *Id.* at 906-07. Riley claimed he shot Jaramillo to keep Jaramillo from shooting him. *Id.* This testimony was contrary to other witnesses, who claimed Riley pulled out his gun, stood over Jaramillo, demanded Jaramillo’s pistol, and shot Jaramillo while his hands were over his head and Jaramillo was propped up on his elbow. *Id.* at 907. The Supreme Court held that the conflicting evidence supported giving the first aggressor instruction. *Id.* at 910.

Similar to *Riley*, there was conflicting credible evidence presented to support giving the first aggressor instruction. Graham narrowly focuses his argument on the evidence the State produced in its case in chief, as if it is the only evidence the State may rely upon when requesting a jury instruction or considering possible

alternative theories of a case. Brief of Appellant 15-17. Just as a defendant may rely upon any evidence admitted when requesting jury instructions, including a self-defense instruction, the State may rely on all the evidence submitted when it requests jury instructions. *State v. Douglas*, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005); *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

True, the State's theory of the case was that Graham, unprovoked, shot Randy. But, the State is not precluded from alternatively considering evidence Graham presented. The backdrop to this incident is a neighbor dispute that had been brewing for over a year. While that cannot be the provoking event, it is an important part of the story because it explains why Randy would react, arming himself with a gun, that day. Prior to May 23, 2018, Graham had trespassed on the Lesters' property, posted photos on Facebook of their property, and knocked down their son's basketball hoop with his tractor RP 306-07, 311. The relationship between the neighbors had deteriorated to the point that Randy had blocked Graham's number when Graham would not stop texting Randy. RP 305.

On May 23, 2018, Hunter was outside on his porch, saw Graham driving by and waved. RP 258-59. After Hunter waved at Graham, Graham sped up as he drove towards his house. RP 262.

Around 8:00 p.m. Kent Lawrence saw Graham's truck fly up his driveway, speeding approximately 30 miles per hour, which was significant because Graham never traveled that fast on the driveway. RP 140-41. Kent could see Hunter and Randy playing basketball. RP 142. After Graham pulled up to his house, Hunter heard a gunshot he believed came from Graham. RP 263. Graham fired a single round from his pistol into his front yard. RP 807.

Graham then proceeded to get back into his truck, and the events branch into two distinct paths: one path follows Graham's testimony and the other path follows the evidence as presented by the State. The State's evidence, in its most distilled form, was that Graham drove back down the driveway, said, "Hey, Randy," and began shooting. RP 270-73. Graham's in its most distilled form was that Graham drove back down to the Lesters', Randy confronted Graham with a firearm, and Graham reacted by shooting at Randy. RP 810-11, 813-17.

Graham, a man who had been in this acrimonious neighbor dispute with Randy, sped off at a high rate of speed when a 16-year-old boy simply waved to him from the yard. This aggressive action, coupled with Graham immediately firing a single round from his gun are intentional acts the jury could reasonably assume would provoke

a belligerent response from Randy. A father, pushed to defend his family from a threatening, aggressive, and now armed neighbor, Randy arms himself to protect his family and reacts to Graham coming back to his property. Therefore, just as in *Riley*, the conflicting evidence supports giving the first aggressor instruction. Viewing one branch of the evidence, as it was presented to the jury, in the light most favorable to the State, there was some credible evidence presented sufficient to support the first aggressor instruction. The trial court did not err when it gave the first aggressor instruction. This Court should affirm.

4. Harmless Error.

If the trial court erred by giving Instruction 10, the first aggressor instruction, the error requires reversal unless it is harmless beyond a reasonable doubt. *Birnel*, 89 Wn. App. at 473, *citing State v. Kidd*, 57 Wn. App. 95, 101 n.5, 786 P.2d 847 (1990). A harmless error is one in which this Court, from an examination of the record, can affirmatively find the error in no way affected the final outcome of the case. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Graham's testimony was the only testimony in this case evincing Randy possessing a firearm. Graham's explanation for no

firearm being found with Randy was that Rachel had gone out and disturbed the body. RP 823-25. On the other hand, Kent Lawrence, a neighbor to the Lesters and Graham, saw Hunter running during the shooting and entering the Lester house. RP 147. As Kent was approaching his house he heard a woman scream. RP 148. Kent walked around his shop and saw "Randy Lester laying face down, dead, at the front of his driveway in front of his garage." *Id.* Kent did not see anyone around Randy. *Id.* Kent did not approach the body, nor did he see anyone else approach Randy's body. RP 149. Kent did not see a weapon or a firearm with Randy. *Id.*

It is uncontroverted that Graham shot Randy. Dr. Lacsina's testimony was the fatal gunshot to the chest, which would not have caused Randy to die instantly, showed a trajectory indicative of Randy ducking. RP 519-21. Dr. Lacsina also testified the trajectory of gunshot wound to the back of Randy's head was upwards, consistent with Randy falling or ducking. RP 516. This is contrary to Graham's version of events, in particular, the last shot where Randy was already on the ground and rolling towards Graham. RP 820.

Graham also testified he only fired four shots, three from inside his truck and one outside when running after Randy. RP 821. Again, Graham's version conflicts with the other eyewitness

testimony and the physical evidence. Kent heard eight shots. RP 144. Nancy Lawrence heard between five and seven shots. RP 164-65. Ralph Willey heard between four to five gunshots and then a second set of shots, approximately six to eight. RP 164. Victoria Willey believed she heard between six and eight gunshots and then a second set of shots but did not specify the number. RP 210-11. The police recovered five bullets that were examined by firearms expert Johan Shoeman. RP 697-98. There was at least two bullets the police were not able to recover, as one was not located and the other was permanently embedded in two by six structural post in the Lester's home. RP 605, 609, 756-57. Therefore, at a minimum, Graham fired his pistol seven times, not four.

Given totality of the evidence presented to the jury, this Court can affirmatively find that if the trial court erred in giving the first aggressor instruction, that instruction in no way affected the outcome of Graham's trial. The evidence presented made it clear Graham's version of events was not plausible, it was contrary to other witnesses accounting, and the physical evidence. This was not a case of self-defense, it was a case of premeditated, first degree murder. This Court should find any error harmless beyond a reasonable doubt and affirm Graham's convictions.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED GRAHAM'S REQUEST TO PROCEED PRO SE AT THE START OF THE THIRD DAY OF JURY TRIAL.

Graham argues the trial court violated his constitutional right to represent himself in a criminal proceeding when it denied his unequivocal request to represent himself at the start of the third day of his jury trial.³ Brief of Appellant 18-23. Graham acknowledges his request was after the trial had commenced, but argues the request was timely because Graham did not ask the trial court to excuse the jury or seek a mistrial. *Id.* 21-22. While the State concedes that Graham's request to represent himself was unequivocal, the request was not timely. The trial court did not abuse its discretion when it denied Graham's request to proceed pro se at the start of the third day of his jury trial.

1. Standard Of Review.

Denial of a request by a defendant to self-represent is reviewed for abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable, applies an incorrect legal standard, or

³ In his briefing, Graham asserts it was the start of the second day of trial. Technically, it was the third day, as the first day was consumed with voir dire. *See*, RP (8/21-22/18). It was the beginning of the second day of substantive testimony.

relies on unsupported facts. *Coley*, 180 Wn.2d at 559 (internal quotations and citations omitted).

2. The Trial Court Did Not Abuse Its Discretion When It Denied Graham's Request To Self-Represent Because The Request Was Not Timely.

The Sixth Amendment grants a criminal defendant the right to self-representation. *Faretta v. California*, 422 U.S. 806, 572-74, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 572-73. The Washington State Constitution also expressly guarantees a criminal defendant the right to self-representation. *State v. Breedlove*, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995). The right to self-representation "is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010), *citing Faretta* 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). An improper denial of the right to self-representation cannot be harmless and requires reversal. *Madsen*, 168 Wn.2d at 503; *Vermillion*, 112 Wn. App. at 851, *citing McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

The trial court is “required to indulge in every reasonable presumption against a defendant’s waiver of his or her right to counsel.” *Madsen*, 168 Wn.2d at 503 (internal quotations and citations omitted). But, a defendant does not have an absolute or self-executing right to proceed pro se. *Id.* at 504. When a defendant makes a request to proceed pro se, the trial court first must determine whether the request is timely and unequivocal. *Id.* If the trial court finds the request is unequivocal and timely, it must then determine if the waiver of the right to counsel is knowing, voluntary and intelligent. *Id.* If the court finds the request to self-represent “untimely, equivocal, involuntary, or made without a general understanding of the consequences... [s]uch a finding must be based on some identifiable fact...” *Id.* at 504-05. It is not proper for a judge to deny a request to self-represent out of concern for the defendant’s competence because if the trial court doubts a defendant’s competence the court needs to take the necessary action in regards to a competency review. *Id.* at 505. Further,

A court may not deny a motion for self-representation based on the grounds that self-representation would be detrimental to the defendant’s case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant was represented by counsel.

Id.

The State concedes Graham's request to proceed pro se was unequivocal. Graham told the trial court, "After yesterday, what went on here in the courtroom, the things that I've heard, I'm going to fire my attorney right here, right now, and I'm going to ask you to allow me some leniency because of how I've been incarcerated and represent myself..." RP 330. Graham never wavered on his request to proceed pro se:

THE COURT: Mr. Graham, have you ever represented yourself before?

THE DEFENDANT: It would be my first time, but I did go up to Mason County, and I should have been in law school right now, and I would have been there had I not had a heart attack last July and had a stent put in me.

THE COURT: Have you had any legal training?

THE DEFENDANT: I've had some paralegal classes, but it was about 20 years ago. And I've spent several hours bouncing around, and that's why I'm asking for leniency to represent myself quasi pro se....

THE COURT: So you don't have any formal legal training?

THE DEFENDANT: No, not yet.

THE COURT: Are you familiar with the rules of evidence, specifically the rules that allow for certain evidence to be admitted and not admitted?

THE DEFENDANT: I can get on that kiosk. I've spent some time on the kiosk trying to pull some of that stuff up, but I can't find it. So you have to give me a little bit of time.

That's why I'm saying I would much prefer us reconvening in this at another time so I can spend a little time on there...

RP 333-35.

Graham did assert he required more time to prepare before he would be ready for the case to proceed. *Id.* Graham explained he needed to subpoena witnesses, the Robinsons, April Berry, Joyce Berry and Jerry Berry, and Jennifer Bush. RP 333. Graham stated he required his daughter to be present, as she had documents Graham believed were necessary for him to be able to proceed. RP 331, 333. Graham also required additional time to review the rules of evidence.

Graham asserts the trial court abused its discretion when it denied his request because the accommodations Graham offered were sufficient to waive the timeliness requirement. Brief of Appellant 22-23. Graham asserts he was willing to delay his trial but did not request the trial court excuse the jury or grant a mistrial. *Id.* at 21-22, *citing* RP 335. Yet, Graham told the trial court, "So I'm just asking you that I can at least have some subpoenas done. Even if you have to dismiss this and we reconvene later, that's fine with me. All right." RP 331. This, although inartful, is a request for a mistrial if it is necessary to achieve Graham's request to proceed pro se.

While the trial court gave a number of reasons why it denied Graham's request, it stated, "You are in a very, very, very bad position if you represent yourself at this time, and I'm not willing to stop the trial, I'm not willing to declare a mistrial to give you the opportunity to do so." RP 336-37. The trial court did not abuse its discretion when it determined the request was not timely. When it comes to timeliness of the request to proceed pro se the reviewing courts look at the right to self-representation on a continuum. *Breedlove*, 79 Wn. App. at 107.

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978) (internal citations omitted). This Court has previously explained that the trial court must balance a person's "interest in self-representation and society's interest in the orderly administration of justice." *Breedlove*, 79 Wn. App. at 107. Prior to trial, the defendant's interest is paramount, but as time continues, the interest in orderly

administration of justice, especially once trial has commenced, becomes weightier. *Id.*

Graham's request was tendered the beginning of the third day of trial, Thursday, August 23, 2018. RP 330-37. The jury was informed when voir dire began on Tuesday, August 21st, the trial was anticipated to take approximately five days and would likely conclude the following Tuesday or Wednesday (August 29th). RP (8/21-22/18) 8. Then, when questioning the jury about hardships they were again told the trial would only last through the following week. *Id.* at 64-65. Graham was requesting time to subpoena witnesses, get documents, and learn the rules of evidence so he could properly represent himself in a case where he was charged with Murder in the First Degree with multiple enhancements, Attempted Murder in the First Degree, Drive-By Shooting, Manufacturing Marijuana, and Possession of a Controlled Substance. RP 331-35; CP 48-51. At the time Graham requested to proceed pro se, the State had fully presented nine of the 31 witnesses it called to testify at Graham's trial. RP 133, 160, 176, 202, 207, 218, 234, 241, 246, 286, 381, 393, 406, 427, 434, 445, 451, 461, 469, 486, 497, 557, 561, 653, 659, 662, 665, 712, 716, 720, 742. Rachel Lester's testimony began on the second day of trial, but had not yet concluded, as the State was

about to have Rachel resume the witness stand when Graham asked the trial court to allow him to proceed pro se. RP 324-25, 330, 337-38.

Due to the place on the continuum where Graham chose to request to proceed pro se, where a trial had commenced, and the 10th witness was being examined out of the 31 witnesses subpoenaed, scheduled, and available to testify, any delay in the trial is contrary to society's interest in the orderly administration of justice. The possibility of losing jurors, who had been told they would be done the following week, were likely if they were told to go home and come back at a later date once Graham had located and subpoenaed his witnesses. Graham had already told the trial court he was fine if the case was dismissed and retried if he meant he could proceed at a later date.

The trial court has the discretion to weigh the timeliness of the request against the monumental inconvenience of reassembling 31 witnesses a second time, the cruelty of requiring Rachel and Hunter to relive the events by testifying again. These are the considerations that weigh against the timeliness of Graham's request to proceed pro se. The trial had already commenced, Graham's request to proceed pro se was not timely, the trial court's decision denying Graham's

request was manifestly reasonable, legally sound, and therefore, not an abuse of its discretion. *Coley*, 180 Wn. 2d at 559. This Court should affirm.

IV. CONCLUSION

The trial court properly gave the first aggressor jury instruction. There was sufficient evidence presented that warranted the instruction. If the trial court erred in giving the first aggressor jury instruction any error was invited or harmless. Graham's request to proceed pro se at the start of the third day of his jury trial was not timely. The trial court did not abuse its discretion by denying Graham's untimely request to proceed pro se. This Court should affirm Graham's convictions and sentence.

RESPECTFULLY submitted this 30th day of July, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

July 30, 2019 - 11:48 AM

Transmittal Information

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Appellate Court Case Number: 52661-1
Appellate Court Case Title: State of Washington, Respondent v. Randolph Thomas Graham, Appellant
Superior Court Case Number: 18-1-00413-1

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