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Court of Appeals
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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Randolph Graham asks this Court to reverse his convictions. Mr. Graham's only defense was that he acted in self-defense. The court's first aggressor instruction effectively and improperly removed from consideration this valid defense. Because the prosecution cannot demonstrate this error was not harmless beyond a reasonable doubt, reversal is required.

Mr. Graham also asks this Court to reverse his conviction because he was deprived of the right to represent himself. Mr. Graham's request was unequivocal. While it was untimely, Mr. Graham was willing to make accommodations in order to exercise this right. This Court should hold the trial court abused its discretion when it refused Mr. Graham's request to represent himself.

- 1. The court's error in improperly providing a first aggressor instruction to the jury where there was no evidence Mr. Graham committed a provoking act that required him to act in self-defense requires reversal.**

This Court should hold that the trial court erred when it improperly instructed the jury that Mr. Graham was not

entitled to act in self-defense if it found he was the first aggressor. CP 116 (Instruction No. 10). There was, however, no evidence Mr. Graham committed a provoking act that required him to act in self-defense. *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010). This instruction, which improperly removed a valid self-defense claim from the jury's consideration, was given in error. *Id.* By improperly instructing the jury, the trial court deprived Mr. Graham of his only defense. Reversal of Mr. Graham's conviction is required.

a. The invited error doctrine does not apply to instructional error unless the defendant affirmatively assented to the error, materially contributed to it, or benefited from it, none of which occurred here.

The prosecution argues that this Court should not reach the instructional error issue because Mr. Graham invited the error by acquiescing to the erroneous instruction. Brief of Respondent at 12.

This Court has held otherwise. In *State v. Hood*, the prosecution argued that because the defense "joined in" the

prosecution's instructions, it could not challenge an instruction given to the jury. 196 Wn. App. 127, 133–34, 382 P.3d 710 (2016). This argument was rejected. Instead, the *Hood* court recognized that since “it is the State that wishes to secure the conviction, the State ordinarily assumes the burden of proposing an appropriate and comprehensive set of instructions.” *Id.* at 134. The Court then held that the doctrine of invited error requires an affirmative action by the defendant. *Id.* at 135 (citing *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000)).

To determine whether an error is invited, reviewing courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In Re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). For example, in a consolidated appeal where defendants were claiming self-defense, those who proposed a particular self-defense instruction that the court accepted and gave to the jury were held to have invited the error. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049

(2003). Those who did not ask for the instruction were entitled to a new trial. *Id.*

The prosecution cites *State v. Corn* in support of its position that the erroneous instruction was invited. Brief of Respondent at 15 (citing *State v. Corn*, 95 Wn. App. 41, 56, 975 P.2d 520 (1999)). But like the more recent cases interpreting invited error, *Corn* also holds that acquiescing in a trial court's erroneous instruction or failing to object to it is not the same as inviting the error. *Corn*, 95 Wn. App at 56. Like *Corn*, the prosecution's argument in this case blurs the line between the invited error doctrine and the waiver theory. *Id.* This Court should likewise hold that "failing to except to an instruction do not constitute invited error." *Id.* (citing *State v. McLoyd*, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997)).

This Court should follow *Hood* and find that Mr. Graham did not invite the erroneous by not objecting to it. *Hood*, 196 Wn. App. at 133–34. There is no evidence Mr. Graham proposed an initial aggressor instruction to the court. His statement that he was not objecting to the prosecutor's

instructions is not invited error. *Id.* This Court should reject the prosecution's argument to the contrary.

b. There was no evidence presented to the jury to warrant a first aggressor instruction, as neither party argued Mr. Graham committed an act that required him to act in self-defense.

The prosecution argues that the court did not commit error by instructing the jury with the first aggressor instruction because the evidence presented at trial supported “the idea that Graham provoked the need to act in self-defense.” Brief of Respondent at 16. A first aggressor instruction should only be given in the limited circumstances where the prosecution is able to produce some evidence Mr. Graham was the first aggressor, different from the shooting itself. *Stark*, 158 Wn. App. at 959. Because there is no such evidence, reversal of Mr. Graham's conviction is required.

The prosecution agrees there was no provoking act. Brief of Respondent at 19. The government analyzes the two alternative theories of the shooting that were presented to the jury, but does not argue that either of them presented a provoking act. *Id.* at 20.

This analysis is not different from Mr. Graham's. At trial, the government's theory was that Mr. Graham's action were unprovoked. RP 913. Mr. Graham stated he only shot his pistol after Mr. Lester pulled out his pistol, for no apparent reason. RP 815. In neither theory presented to the jury did Mr. Graham provoke an attack that required him to defend himself. Neither of these theories warranted a first aggressor instruction.

The government relies on *State v. Riley* to argue a first aggressor instruction was warranted. Brief of Respondent at 17 (citing *State v. Riley*, 137 Wn.2d 904, 906-08, 976 P.2d 624 (1999)). But in *Riley*, the Court found there was credible evidence from which the jury could infer that the defendant provoked the need to act in self-defense. *Riley*, 137 Wn.2d at 909-910. Riley and the decedent were gang members, who were both armed with firearms. *Id.* at 906-07. The evidence suggested that Riley either insulted the decedent, causing the decedent to pull out his gun before Riley shot him, or it established that Riley approached the decedent with his gun

drawn and shot the decedent when he thought he was going to shoot Riley with his own firearm. *Id.* Under both of these theories, Riley was the initial aggressor, justifying the initial aggressor instruction. *Id.* at 909.¹

To obtain a first aggressor instruction, the prosecution must show that the provoking act was an act other than the assault itself. *Stark*, 158 Wn. App. at 960. The provoking act must also 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). Because no such evidence was presented to the jury by either the government or Mr. Graham, the court committed error when it provided the first aggressor instruction to the jury.

c. The prosecution cannot demonstrate beyond a reasonable doubt that the instructional error was harmless.

The prosecution agrees it must establish this error was not harmless beyond a reasonable doubt. Brief of Respondent

¹ *Riley* also addresses a different issue than the one raised here, which was whether words alone allow the court to use the first aggressor instruction. 137 Wn.2d at 906. Because there was other evidence Riley was the first aggressor, the Court affirmed his conviction. *Id.* at 913.

at 21. The prosecution argues that the facts of the case establish Mr. Graham is guilty and that the instructional error does not require reversal. *Id.*

But this Court has disagreed, acknowledging that 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). First aggressor instructions should be used sparingly because other self-defense instructions are generally sufficient to allow the theory of the case to be argued. *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 (1985).

As the prosecution correctly observes, there was no issue of whether Mr. Graham shot Mr. Lester. Brief of Respondent at 22. Likewise, there were no witnesses to the exchange except for Mr. Graham. *Id.* Mr. Graham’s only defense was that he was justified when he shot Mr. Lester. By instructing the jury that he could only claim self-defense if

the jury found Mr. Graham was not the first aggressor, Mr. Graham's valid self-defense claim was effectively and improperly removed from the jury's consideration. *Douglas*, 128 Wn. App. at 563.

This error is not 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). 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. *State v. Wasson*, 54 Wn. App. 156, 161, 772 P.2d 1039, 1041 (1989).

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

The prosecution agrees Mr. Graham made an unequivocal request to represent himself. Brief of Respondent at 23. But because the request was not timely, the prosecution argues the court did not abuse its discretion when it denied the request. *Id.* This Court should find to the contrary and

hold that Mr. Graham was deprived of his right to self-representation. *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); U.S. Const. amend. VI, XIV; Const. art. I, § 22.

The prosecution argues that Mr. Graham's request was not timely. Brief of Respondent at 24. While timeliness is an issue, Mr. Graham asks this Court to find that his willingness to accommodate the government when he made his request to represent himself mitigated this issue. RP 335. He told the court he was willing to delay his trial to prepare. *Id.* He did not ask for a mistrial or to excuse the jury. *Id.* He made no attempt to discharge the jury or otherwise obstruct his trial.

Given the seriousness of the charges and the likelihood Mr. Graham will never be released from custody, Mr. Graham's request was reasonable. Mr. Graham did not seek to take advantage of the government or attempt to unnecessarily delay his trial. Despite the untimely nature of

his request, the court should have accepted his request to represent himself.

Mr. Graham made an unequivocal request to represent himself. RP 330. While this request was made after trial started, 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)). Mr. Graham asks this Court to find the trial court abused its discretion and order reversal of his conviction.

B. CONCLUSION

Mr. Graham asks this Court to reverse his conviction. He is entitled to reversal because of the trial court's error when it improperly provided a first aggressor instruction to

the jury. The court also erred when it did not grant Mr. Graham's request to represent himself.

DATED this 4th day of September, 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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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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v.)	NO. 52661-1-II
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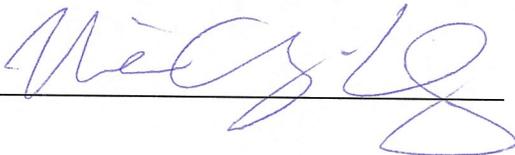
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