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NO. 52764-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARGO THOMAS,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence as a matter of law to prove beyond a reasonable doubt that Margo Thomas intentionally assaulted Sandra Langham and did not act in self-defense. U.S. Const., amend. 14; Const., art. I, § 3.¹

2. The trial court erred and denied appellant due process by instructing the jury:

No. 13

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

CP 213.

3. The trial court erred and denied appellant due process by failing to instruct the jury that words alone cannot be the provocation that denies a person the right to self-defense. U.S. Const., amend. 14; Const., art. I, § 3.

4. Appellant was denied effective assistance of counsel at trial by counsel proposing a first

¹ The relevant constitutional provisions are contained in Appendix A.

aggressor instruction when there was no evidence appellant was the first aggressor. U.S. Const., amends. 6, 14; Const., Art. I, § 22.

5. Appellant was denied effective assistance of counsel when counsel failed to include in the first aggressor instruction that words alone cannot be the provoking conduct that denies a right to act in self-defense. U.S. Const., amends. 6, 14; Const., Art. I, § 22.

6. Appellant was denied effective assistance of counsel when counsel failed to object to an officer testifying to his conclusion that a crime of domestic violence was committed and the defendant committed the crime. U.S. Const., amends. 6, 14; Const., Art. I, § 22.

7. The trial court erred and denied appellant her right to present a defense by excluding opinion evidence from an expert witness on the effect of being strangled in a case of self-defense. U.S. Const., amends. 6, 14; Const., art. I, § 22.

Issues Pertaining to Assignments of Error

1. Where defendant's sister, the only other person present, testified to mutual combat but not

to how it "became physical," and the defendant testified her sister committed the first assault and she acted in self-defense, was there sufficient evidence for a jury to find beyond a reasonable doubt that the defendant intentionally assaulted her sister and did not act in self-defense?

2. In a felony assault trial where the undisputed evidence was that verbal conflict led to mutual combat, was it constitutional error to give a first aggressor instruction but fail to instruct the jury that words alone cannot be the provocation to deny a person the right to self-defense?

3. Where there was evidence of a verbal conflict followed by mutual combat, the complaining witness did not testify how the combat began, and the defendant clearly stated her sister first physically attacked her, was it ineffective assistance for defense counsel to propose a first aggressor instruction and omit the settled legal principle that words alone cannot be the provocation to deny a person the right to self-defense?

4. Was it ineffective assistance of counsel not to object to a police officer testifying he

determined a domestic violence crime had been committed and who the "primary aggressor" was?

5. Did the court err and deny appellant her right to present a defense when it excluded an expert's opinion that strangulation would support the reasonableness of a person's panic and reaction in self-defense?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

In December, 2017, Sandra Langham lived in Port Townsend. Her younger sister Margo Thomas, age 59, lived in Bellevue. Sandra attended Margo's daughter's wedding the previous August. They were together in Montana in November. They planned for Margo to visit Sandra in December and do some shopping. RP 526-27; Ex. 27.

They met in Poulsbo for lunch on Friday, December 8, then went to Port Angeles. After a pleasant day, Margo slept at Sandra's. RP 528.

Saturday after breakfast they went shopping together. Late in the afternoon they had some food and drinks. Before going home, they purchased wine and whiskey. Back home about 5:30-6:00, they each had some wine and Margo had some whiskey. Both got

phone calls. Margo stepped outside to take a call from her daughter. RP 418-23, 529-30.

From this point, the sisters' versions of events become less precise. They agree they had a fight. Both had been drinking. Both experienced head injuries and extensive bruising. Both testified to being rendered unconscious. Both acknowledged memory problems.

After the call, Margo came inside to tell Sandra something lovely her daughter had said. Sandra started making fun of Margo. They then began arguing about "past family stuff." Margo testified:

A: ... And then it got into my divorce of many, many years ago where I did not feel supported at all, and I wanted her to hear me. ... I wanted her to hear that I was, I'd never told her how I felt about that. ... I explained to her what a hard time it was in my life, and that I needed her, and I needed family. She started getting quite mad and quite snippy about it. And then she told me I had to leave, and she got up. ... She told me I had to leave, and I just kept talking and trying to get her to hear me. And then she just came at me, and she just pushed me, and I hit my head on the wood stove.

Q: Did she give you any warning that she was going to push you down like that?

A: No.

Q: What happened after she pushed you?
A: A lot of yelling. ... I landed on the floor after hitting my head on the wood stove. And then it was like a brawl started. It was escalating. We were yelling at each other, screaming at each other. It was ridiculous.
...
A: And she, she kept knocking me down.
Q: How many times did she knock you down?
A: I don't know. A few times. And --
Q: And what would happen when you'd get knocked down?
A: Well, the last time that she did it, we were in the kitchen area. And she, I had gotten up. I mean, we had knocked bottles over and glasses. It was a mess in there. And then she came at me in the kitchen and put her hands around my throat.
Q: What did you do when she did that?
A: I couldn't breathe. I was quite frightened.
Q: What happened next?
A: I don't know.
Q: Did you lose consciousness?
A: I did.

RP 530-33. She acknowledged "We were fighting. We caused injury to each other and to ourselves." RP 546-50. She believed Sandra hit her in the head with a fire poker from the wood stove, causing an indent in her head. The last event she remembered was Sandra strangling her. RP 540-45, 573-75. She had no memory of striking Sandra in the face with a wine bottle. RP 555-56. She could not remember all the events in sequence, but her last memory was

Sandra strangling her until she lost consciousness. Margo was defending herself the entire time. RP 578-90.

Sandra remembered they talked "about family" in some detail. They had "discussions" and "conversation," they "talked," and they had an "argument." RP 425-27, 437-38. At some point in the discussion, Sandra asked Margo to leave. Sandra testified:

A: That's when things got physical. And I just remember being in the kitchen, and there was, you know, yelling and shoving. Then we were on the floor. And I don't know what was said, and I don't remember, you know. I remember when I, because I was unconscious, so when I woke up and she was on top of me, I asked her to stop, and I told her that, you know, I was her sister and she needed to stop.

Q: So you were unconscious. I just want to backtrack a bit. What caused you to become unconscious?

A: Because she hit me with the bottle in the face.

RP 427. Sandra didn't see the bottle hit her, she just remembered "boom." RP 427-28. She did not remember a bottle hitting her. She had trouble remembering what happened. RP 434-35, 441-43, 450. Sandra acknowledged she probably hit Margo too, and Margo probably was injured in their "fight." RP

437-39. If Margo had bruises on her neck, Sandra admitted she probably put her hands on her neck and caused those bruises. She denied "strangling" Margo. If Margo had bruises on her arms, Sandra caused them. RP 444-45. "We were in a physical fight" or "altercation." She did not know if Margo was hurt because she did not see Margo after the fight. RP 432, 451-52. But she was "sure we had matching bruises." RP 449.

Sandra didn't remember if she ever told the police that she hit Margo. RP 452.

At no time did Sandra testify that Margo was the first to make things "physical."

About 8:00 p.m., Sandra's neighbor Jeffrey Johnson heard a loud crash, screaming, and a thud. He soon found Sandra at his glass door, bleeding from her head. He called 911 and tended to her wound. RP 306-14.

When Margo woke up after being strangled, she gathered her things to put in her car. She knew she was in no shape to drive but she didn't feel safe in the house. She got a pillow so she could sleep in the car. She put on her down coat. The neighbor confronted her and would not let her into

her car. RP 533-34, 583. She didn't see Sandra after regaining consciousness. RP 535.

Jeffrey Johnson went outside to find Margo stumbling toward her SUV carrying a pillow. He told her to get on the ground. He knocked her to the ground and threatened to get a weapon. It was very dark; he saw no obvious injury on Margo. He assumed she was the aggressor. She was very intoxicated. He told her her sister was beaten to a pulp. Margo said she didn't know anything about that. Police arrived and arrested her. RP 306-24.

Johnson helped secure Sandra's residence. There were two wine bottles that were not broken, and a broken glass on the kitchen counter. There was broken glass the same color in the living area, and broken glass that apparently was from a wine bottle. He damped the fire in the stove,² police gave him the keys, and he locked all the doors. RP 329-34; Exs. 12-15.

² Mr. Johnson thus likely put the poker back in its place. The State argued this poker position disproved Margo's testimony that Sandra hit her with the poker. "[T]he photograph that shows the stove and the accoutrements that go with the stove, including the poker, they're all in their place just like they should be." RP 637.

When police asked, Margo denied hitting her sister with a bottle. She said they were in an argument. The Sergeant could not say if Sandra was hit with a bottle. RP 380.³

Deputy Przygocki, the first officer on the scene, did not take any items from the scene into evidence. He did not sample any blood or seize any glass. Nonetheless he testified as if an expert:

Q: ... Do you have any training and experience specifically with respect to investigating domestic violence crimes?

A: Yes, I do.

Q: Okay. Tell us something about that.

A: When we're trained in the academy and through continuing education with domestic violence crimes, the first thing we want to do is determine if there was a crime after securing a scene. Once we've determined that there has been a crime committed, we determine who the primary aggressor is.

Q: And is that the procedure you followed in this case?

A: Yes, it is.

MS. ST. MARIE: I don't have any more questions.

There was no objection. RP 402-03. He saw blood on Margo's hat and jacket, but did not take them into evidence to determine whose blood it was. "[W]e" felt "it appeared pretty clear cut with the

³ He didn't talk to her. He did not gather any evidence or write a report. RP 369-82.

evidence and the statements that were made." He did not know if Margo had any injuries under her jacket. RP 411-13.

Sandra suffered an orbital fracture to her face and other injuries to her body. She had surgery on her face. RP 431-32; Exs. 1-2.

Margo's injuries were not to her face and so less obvious. She obtained medical attention over the next three months for throat and head pain, swelling on the back of her head, difficulty swallowing, and bruises over her body. Her neck and thyroid were swollen and painful. She lost her voice for a week, and had ongoing hoarseness. Her head had a bruise on the back raised about 2 cm (one inch). Once the swelling resolved, she had a 4 cm long indentation on the back of her scalp. In January, she still had swelling to the cartilages in her throat. RP 479-93; Exs. 3-4, 10, 22-28. Her symptoms were consistent with a concussion and strangulation. RP 516-17, 522-23.⁴

⁴ The court overruled the State's objection to this testimony here. When the defense later asked if Margo's injuries were likely caused by strangulation, the court sustained the objection. RP 523-25.

2. PROCEDURAL FACTS

a. *Charges*

The State initially charged Margo Thomas December 11, 2017, with domestic violence assault in the second degree, alleging that she assaulted Sandra Langham with a deadly weapon -- a wine bottle. CP 1-4.

Shortly before trial, the State moved to amend the Information to charge domestic violence assault in the second degree, alleging Margo Thomas

did intentionally assault another person, to-wit: Sandra Langham, and thereby did recklessly inflict substantial bodily injury.

CP 116-17. The State alleged an orbital fracture.

The defense moved to dismiss for lack of probable cause. Sandra Langham testified in deposition she could not remember what happened to cause her injury. CP 92-95. The State responded Ms. Langham told an officer at the scene that her sister hit her. The court granted the amendment and denied dismissal. RP 126-31.

b. *Expert Testimony*

The defense offered the expert testimony of Dr. Jannifer Stankus, an emergency room doctor, on the injuries Margo suffered and the effects of

being strangled. CP 125-38. Dr. Stankus reviewed all the materials from the case, including police reports, photographs, and medical reports. She offered in her written report:

I will testify about the pain and panic that [being strangled] creates and a victim's expected response in self-defense. I will testify that any level of force to stop that threat to life would be justified.

CP 136-38. The State moved to exclude her testimony entirely. CP 118-38; RP 148-58. Initially the court granted the motion.

Now, a bigger problem with her report, **and I don't know if she was going to be asked this or not**, but her report has the provision in there that says that in this kind of a situation, **on a more probable basis than not, that there's evidence of strangulation of Ms. Thomas in this case and that during the time of strangulation, any level of use of force in self-defense would be justified. I mean, with all due respect, that is baloney.** But she's not going to be permitted to talk about whether self-defense is justified or not. That's a legal conclusion. She can't do that. That's exactly what the jury has to decide is whether there was self-defense and whether it was justified and whether the level of force was appropriate under the law. **So this witness is not going to be permitted to testify about self-defense and about whether or not Ms. Thomas was justified in doing something.**

I don't know what's left for this expert to testify to because I'm not going to allow her to testify about strangulation, and I'm not going to allow

her -- the easiest part of this is I'm not going to allow her to testify about any justification for self-defense.

As I said, it's basically an effort to vouch for the credibility of the defendant and to give an opinion about her credibility. For all those reasons - - in addition, then it becomes misleading to the jury and consequently, not helpful.

...

So anyway. As I read the reports, I just see absolutely no objective evidence of strangulation. What I do see is the defendant's self-reports of that. And as a consequence, all this expert does is basically express an opinion about the defendant's credibility, first of all, and second of all, gives legal conclusions.

RP 158-64.

On reconsideration, the court ruled Dr. Stankus could testify to the meaning of Margo Thomas's medical records. It ruled, however, that she could not say Margo was "strangled" or use the word "strangulation," as that "is more of a term of art;" and she could not testify what was "justifiable," as that was a legal conclusion. RP 348-67.

c. Jury Instructions

The court instructed the jury on self-defense as proposed by the defense. CP 211-14; RP 602. It also gave the first aggressor instruction, quoted above. CP 213.

d. *Closing Arguments*

Having succeeded in excluding the defense expert's opinion on the effect of strangulation, the State argued regarding self-defense:

Not only do you consider what did the circumstances look like from the perspective of the person using force, you also consider would a reasonably prudent person, and we assume that all of you are reasonably prudent people, would any of you consider that the level of force used in this case was justified?

There simply was zero testimony in this case about why exactly the defendant used this level of force.

RP 633-34 (emphasis added). Referring to Margo:

She cannot describe the exact moment in time where she thought to herself, I am about to be seriously injured. It is imminent. I got to defend myself now. She can't come up with anything specific in that regard.

RP 646-47.

Moreover, the definition of self-defense requires proportionate force, reasonable force. And it's kind of like a variation on the statement "You don't bring a gun to a knife fight" or vice versa. I think they say [it] the other way, "You don't bring a knife to a gun fight." What is meant by that is that proportional force is what's fair in all kinds of combat. **And when you're talking about some sort of fisticuffs, you don't use a potentially deadly weapon to defend yourself. ...** Even if you believe everything that the defendant said in terms of what she says Ms. Langham did, there is nothing that would justify this level of force and the extent of the

injuries that Ms. Langham suffered at her hands.

RP 651 (emphasis added).

...[T]here's no evidence at all to point to self-defense being necessary. If you're going to raise that defense, you've got to be able to acknowledge that you struck the blow and you've got to give a reason for the level of force that you used. That's not here in this case. So I think how you should treat this case is one of just a general denial, the defendant saying, "I didn't do it," and you decide for yourselves is that credible or not.

...
I notice that defense didn't talk too much about their expert witness. Probably because their expert witness really didn't have anything to offer other than going over line-by-line what these walk-in clinic reports and the report from ear, nose, and throat had to say.

RP 678-79.

e. *Verdicts, Judgment & Sentence*

The jury found Margo Thomas guilty, and that it was an act of domestic violence. CP 219-20. The court sentenced her to six months in jail, which she completed serving in February, 2019. CP 235-42.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO PROVE AN INTENTIONAL ASSAULT AND TO DISPROVE SELF-DEFENSE.

In considering the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); U.S. Const., amend. 14; Const. art. I, § 3.

The standard of review is designed to ensure that the fact finder at trial reached the "subjective state of near certitude of the guilt of the accused" required by the Fourteenth Amendment. *Jackson*, 443 U.S. at 315.

Second degree assault as charged here required the State to prove that Margo intentionally assaulted Sandra and thereby recklessly inflicted substantial bodily harm and that she did not act in

self-defense. RCW 9A.36.021(1)(a), 9A.16.020(3);⁵ *State v. Acosta*, 101 Wn.2d 612, 617, 683 P.2d 1069 (1984) (State has burden to prove absence of self-defense beyond a reasonable doubt).

There is no issue Sandra suffered substantial bodily harm.⁶ Sandra's injuries alone do not make a crime. Margo also was injured. The only issue was self-defense. Sandra herself testified after they argued, "there was, you know, yelling and shoving." RP 427. She never testified Margo began the physical affray. Instead she testified that after arguing "it got physical."⁷ It was a "fight," during which she believed she was struck in the face with a wine bottle. Like Sandra, Margo did not recall striking Sandra with a wine bottle.

⁵ The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...
(3) Whenever used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person ... in case the force is not more than is necessary;

⁶ RCW 9A.04.110(4)(b) ("substantial bodily harm" includes "a fracture of any bodily part").

⁷ Contrast: *State v. Kee*, 6 Wn. App. 2d 874, 877, 879, 431 P.2d 1080 (2018) (witnesses gave conflicting versions of who struck the first blow).

But she recalled Sandra strangling her to unconsciousness.

(26) "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe; ...

RCW 9A.04.110(26). Assault "by strangulation" is an alternative definition of second degree assault.

RCW 9A.36.021(1)(g).

A "physical altercation with injuries"⁸ that would support charges of second degree assault against both sisters without self-defense is insufficient as a matter of law to prove the lack of self-defense.

This Court should reverse and dismiss the charge.

2. APPELLANT WAS DENIED DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT GAVE THE JURY A FIRST-AGGRESSOR INSTRUCTION AND FAILED TO INSTRUCT THE JURY THAT WORDS ALONE ARE NOT SUFFICIENT TO MAKE A DEFENDANT THE FIRST AGGRESSOR IN AN ALTERCATION.

Jury instructions are sufficient when they are supported by substantial evidence, permit the parties to argue their theories of the case, and properly inform the jury of the applicable law.

⁸ As the officer described it in his Declaration of Probable Cause. CP 109-13.

... Self-defense instructions are subject to heightened scrutiny and "must make the relevant legal standard manifestly apparent to the average juror."

State v. Kee, 6 Wn. App. 2d 874, 431 P.3d 1080 (2018).⁹

If an erroneous instruction goes to the essence of an accused's defense, the error may so deprive a criminal defendant of due process of law that manifest justice requires the matter to be remanded for a new trial, even if counsel did not except below.

State v. Painter, 27 Wn. App. 708, 715, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981).

In cases of self-defense, if "a reasonable juror could read" the instructions to wrongly prohibit consideration of the defense, the instruction is erroneous. *Walden*, 131 Wn.2d at 477.

[B]ecause the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude ... ,

⁹ Citing *State v. Woods*, 138 Wn. App. 191, 196, 156 P.3d 309 (2007), *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Accord: *State v. LeFaber*, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996); *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977).

and this error can be raised for the first time on appeal.

State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

a. *The Evidence Did Not Support an Aggressor Instruction.*

In cases of self-defense, a first aggressor instruction should be used only sparingly.

[A]ggressor instructions are not favored. ... 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. ... The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim.

State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) (citations omitted).

An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight.

State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). But the Court clarified:

[W]e hold that words alone do not constitute sufficient provocation. Therefore, the giving of an aggressor instruction where words alone are the asserted provocation would be error.

Id. at 911. Accord: *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010), review denied, 171

Wn.2d 1017 (2011) (serving husband with no contact order cannot be act of aggression; evidence did not show Ms. Stark "made the first move," error to give aggressor instruction); *Birnel, supra* (asking wife if using drugs, even searching her purse, could not support aggressor instruction); *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989) (breach of peace does not support instruction). See also: *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986) (no evidence defendant committed any wrongful or unlawful conduct that might have precipitated the affray; reversed for giving aggressor instruction).

To determine whether the evidence was sufficient to support an aggressor instruction, this Court reviews the evidence in the light most favorable to the party offering the instruction, *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005), or most favorable to the State, *State v. Kee*, 6 Wn. App. at 878.¹⁰

¹⁰ *Kee's* definitive statement on the standard of review reflects that the State "invariably" proposes the first aggressor instruction. Nonetheless, for no discernible reason, defense counsel offered the instruction here, as challenged below as ineffective assistance of counsel.

In this case, whether viewed in the light most favorable to the State or the defense, there was no evidence that Margo made the first move, was the first aggressor. It was error to give a first aggressor instruction.

b. *Failing to Instruct the Jury that Words Alone Cannot Be the Provoking Act Denied Appellant Due Process.*

Both sisters agreed the fight began with a verbal argument. Margo insisted she "kept on talking" because she wanted Sandra "to hear" what she had to say about "old family stuff." In response to this talking, Sandra then physically shoved her down.

The court in *Riley* clearly held that words alone cannot be the provoking conduct that justifies a first aggressor instruction. *Riley*, 137 Wn.2d at 911-12. However, the jury instruction given here did not convey this rule of law. The trial court's first aggressor instruction stated that "if you find beyond a reasonable doubt that the defendant was the aggressor, and that [the] defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." ... **The trial court did not instruct the jury that words are not adequate provocation to negate self-defense.**

Kee, *supra*, 6 Wn. App. 2d at 880-81 (emphasis added). In *Kee*, this Court reversed a conviction where the court gave a first aggressor instruction

but failed to instruct the jury that words alone were not sufficient to negate self-defense.

The *Kee* decision controls this case. In *Kee*, as here, the defendant was charged with second degree assault for striking the complaining witness who suffered a fractured facial bone. As here, the dispute began with a verbal exchange. There the parties and two witnesses disagreed who threw the first punch. There was no dispute that both parties struck each other.

As in *Kee*, this Court should reverse this conviction and remand for a new trial.

"The error is constitutional and cannot be deemed harmless unless it is harmless beyond a reasonable doubt." *Stark*, 158 Wn. App. at 961; *State v. Birnel*, 89 Wn. App. at 473.

The error cannot be harmless. If the jury could have believed Margo's continued insistence that her sister "hear" her provoked Sandra to shove her down, the failure to instruct on this point of law deprived Margo of her right to defend herself. *Kee*, *supra*.

3. APPELLANT WAS DENIED HER CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

"If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review." *State v. Kylo*, 166 Wn.2d at 861, citing *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999), *State v. Rodriguez*, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004).

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); U.S. Const., amends. 6, 14; Const., art. 1, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'

Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 466 U.S. at 686.

This Court reviews claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

a. *Counsel's Performance was Deficient for Proposing the First Aggressor Instruction When No Witness Testified the Defendant was the First Aggressor.*

[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.

State v. Riley, supra, 137 Wn.2d at 909-10.

"The State is invariably the party to propose a first aggressor instruction." *State v. Richmond*, 3 Wn. App. 2d 423, 432-33, 415 P.3d 1208, review denied, 191 Wn.2d 1009 (2018).

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. Just as a defendant has no duty to bring [her]self to trial, ... a defendant has no duty to propose the instructions that will enable the State to convict [her].

... An attorney has an obligation to object to instructions that appear to

be incorrect or misleading and must also propose instructions necessary to support argument of the client's theory of the case.

State v. Hood, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016), review denied, 187 Wn.2d 1023 (2017).

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *Strickland*, 466 U.S. at 290-91; *Kyllo*, 166 Wn.2d at 862. "Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel." *State v. Woods*, 138 Wn. App. at 197-98; *State v. Aho*, 137 Wn.2d at 745-46.

Despite this settled law, here inexplicably defense counsel proposed the first aggressor instruction. RP 602; CP 213. Counsel proposed this instruction when, as shown above, there was no evidence that their client was the first aggressor. The instruction directed the jury to completely disregard any evidence of self-defense -- the entire defense. Proposing it was deficient performance.

- b. *To The Extent Defense Counsel Had a Duty to Propose the "Words Alone" Language, Appellant was Denied Effective Assistance of Counsel.*

While proposing the first aggressor instruction, counsel failed to request an instruction that words alone cannot be the act or conduct that provoked the affray.

Where the claim of ineffective assistance of counsel is based on counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

Since at least 1999, the law has been clear: words alone cannot be the provoking conduct to preclude self-defense. *Riley, supra; Kee, supra*. Thus where, as here, the evidence shows an altercation began with a verbal argument, and even if there were a dispute who began any physical aggression, the jury must be instructed on this point. Margo testified, "I just kept talking and trying to get her to hear me." Without a proper instruction, the jury could find these persistent

words were "defendant's acts and conduct" that provoked her sister to shove her down. *Kee*, 6 Wn. App. 2d at 882 (verbal abuse constitutes an "act," but is not aggression).

In *Kyllo*, counsel proposed an instruction that incorrectly stated the "act on appearances" standard for self-defense. He also argued in closing that his client was entitled to act on appearances if he reasonably believed he was in danger of death or great bodily injury. But his client had used non-deadly force: the law entitled him to defend himself if he believed he was about to be injured at all. Counsel erroneously applied a higher standard than the law required. *Kyllo*, *supra*.

The Supreme Court held counsel's inaccurate requested instructions were deficient performance when legal authority stated the correct standard.

Failing to research or apply relevant law was deficient performance here because it fell "below an objective standard of reasonableness based on consideration of all the circumstances."

Kyllo, 166 Wn.2d at 868-69. The Supreme Court held there was no valid tactical or strategic purpose:

[T]here was no strategic or tactical reason for counsel's proposal of an

instruction that incorrectly stated the law [and] eased the State of its proper burden of proof on self-defense. ... [T]he court [of appeals] could not conceive of any reason why the defendant's lawyer would propose the defective instructions, since they decreased the State's burden to disprove self-defense. We agree.

Kyllo, 166 Wn.2d at 869.

Nor could the failures here have been legitimate trial strategy or tactics. There can be no strategic or tactical reason for counsel to request an instruction that incorrectly states the law and reduces the State's burden of proof.¹¹ Counsel had the basic duty to research the law and propose accurate instructions to support, not undercut, the defense theory.

¹¹ *Id.*, citing *State v. Woods*, *supra*, 138 Wn. App. at 156. See also *Rodriguez*, *supra* (court could not conceive of any reason why counsel would propose defective instructions); *In re Pers. Restraint of Edwards*, Court of Appeals No. 51236-0-II (2/6/2019) (counsel's failure to request self-defense instruction on one count where evidence supported it and court gave self-defense instructions on the other counts required reversal; no legitimate trial strategy for not requesting it). (Appellant cites this unpublished case pursuant to GR 14.1(a). It has no precedential value but may be cited as non-binding authority and accorded such persuasive value as this Court deems appropriate. A copy is attached as App. B.)

c. *The Failure to Instruct on the Theory of the Defense Was Prejudicial.*

The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

Kyllo, 166 Wn.2d at 862; *Strickland*, 466 U.S. at 687. The jury instructions in a case of self-defense are particularly crucial in allocating the burden of proof and accurately conveying the law to the jury. *Kyllo*, *supra*.

In *Kyllo*, self-defense was the defendant's "entire case." Here, self-defense was Margo Thomas's entire case. By proposing a first aggressor instruction, and failing to request an instruction that words alone cannot be an aggressive "act" or "conduct" that denies the right to act in self-defense, defense counsel reduced the State's burden to disprove this defense theory.

In *Walden*, the Court held the definition of great personal injury was a misstatement of the law and therefore "is presumed prejudicial to the defendant." It could not be harmless. *Walden*, 131 Wn.2d at 478; *Wanrow*, *supra*. See also: *Painter*, *supra*, and *Woods*, *supra*. "To make a determination

of prejudice, we consider the totality of the evidence before the jury." *State v. Classen*, 4 Wn. App. 2d 520, 542, 422 P.3d 489 (2018).

Here the only witnesses were the two sisters. They agreed they began by arguing. Sandra never testified who began the physical confrontation; Margo said Sandra did. Given these facts, if a juror could believe that Margo's words, her insistence on "being heard," was provoking conduct according to Instruction No. 13, then the instruction was prejudicial. *Kee, supra*.

Without instructing the jury that words alone could not be the provoking conduct that denied the right to act in self-defense, the court reduced the State's burden to prove that Margo actually committed some intentional physical violent act that provoked a physical response from her sister. It allowed the jury to convict based on words alone -- in violation of law.

Thus this missing instructional requirement was prejudicial and violated due process. Counsel's ineffective assistance here requires a new trial.

d. *Counsel's Assistance was Ineffective for Failing to Object to Unconstitutional Inadmissible Evidence at Trial.*

Under *Strickland*, where there can be no reasonable tactical purpose for counsel's conduct, failure to object is deficient performance. *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

Counsel's performance was deficient for failing to object to evidence that was clearly inadmissible and prejudicial to the defense.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'"

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (Court's modifications), citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), and *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.

State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); U.S. Const., amends. 6, 14; Const., art. I, § 22.

"[E]vidence regarding the issuance or nonissuance of a citation by the police officer would be inadmissible as opinion evidence." *Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967). A police report stating defendant's conduct caused the vehicle accident should not have been admitted; it was impermissible opinion evidence. *Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 830-31 (8th Cir. 1988), cited with approval in *Demery*, 144 Wn.2d at 760-61.

In *Kirkman*, the appeal challenged detectives' testimony about the protocol used to interview child witnesses, which included asking if they would tell the truth. In *Demery*, the appeal challenged officers' recorded statements in a pretrial interrogation that they did not believe the defendant. This "indirect" opinion evidence was not constitutional error that could be raised for the first time on appeal.

In contrast to the indirect evidence in *Kirkman* and *Demery*, the officer's testimony here is

as explicit as an opinion can get. He plainly said, based on his special training in domestic violence, he "determine[d] if there was a crime," and "once we've determined that there has been a crime committed, we determine[d] who the primary aggressor [was]." RP 402-03.

An officer's live testimony offered during trial, like a prosecutor's statements made during trial, may often "carr[y] an 'aura of special reliability and trustworthiness.'"

Demery, 144 Wn.2d at 763.

There was absolutely no strategic or tactical purpose served by allowing this testimony. It was clearly objectionable and should have been excluded. Counsel's failure to object was deficient performance.

This testimony was also very prejudicial to the defense. The ultimate issue was whether a crime was committed. If Margo acted in self-defense, there was no crime. This officer told them he'd determined there was a crime and Margo was the first aggressor. The aggressor instruction then told the jury it could not consider self-defense.

This Court should reverse the conviction for ineffective assistance of counsel.

4. THE COURT ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT PROHIBITED THE DEFENSE EXPERT FROM TESTIFYING ABOUT THE EFFECTS OF STRANGULATION ON A PERSON STRANGLED.

a. *Constitutional Right to Present a Defense*

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

While these rights are not absolute, if the offered evidence is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." ... [F]or evidence of *high* probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22."

Jones, 168 Wn.2d at 720-21 (Court's emphasis; citations omitted).

This Court reviews a claim of a denial of the right to present a defense through a three-step test: First the offered evidence must have some minimal relevance. Second, if the defendant establishes minimal relevance, the burden shifts to the State "to show the evidence is so prejudicial

as to disrupt the fairness of the fact-finding process at trial." Third, the State's interest in excluding prejudicial evidence must be balanced against the defendant's need for the information. Where a defendant seeks to present evidence "of high probative value 'no state interest can be compelling enough to preclude its introduction.'" *State v. Jones*, 168 Wn.2d at 719-20.

An erroneous evidentiary ruling that violates the defendant's constitutional right to present a defense is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

This Court's review is de novo. *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017); *Jones*, 168 Wn.2d at 719.

- b. *The Effect of Strangulation on a Victim's Perceptions was Relevant for the Jury to Assess Whether Margo Thomas's Fear and Use of Force Were Reasonable.*

In a self-defense case,

[Jurors are to] put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the

[deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent [person] similarly situated would have done.

State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (Court's brackets), quoting *State v. Wanrow*, 88 Wn.2d at 235-36.

By learning of the defendant's perceptions and the circumstances surrounding the act, the jury is able to make the "critical determination of the 'degree of force which ... a reasonable person in the same situation ... seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary.' "

Janes, 121 Wn.2d at 239 (Court's emphasis and brackets), quoting *Wanrow*, 88 Wn.2d at 238, et al.

Self-defense requires that the party acting to defend herself reasonably perceive the danger she faces and use reasonable force in response. The State here, as is common in self-defense cases, argued Ms. Thomas was not reasonable if she caused her sister's facial injury. RP 651.

In 2007, the Legislature added "assault by strangulation" as a means of committing second degree assault. RCW 9A.36.021(1)(g); RCW 9A.04.110(26) (quoted above). Strangulation does not require complete obstruction of one's ability

to breathe. It is sufficient if one has "trouble breathing" while being choked. *State v. Rodriguez*, 187 Wn. App. 922, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015).

The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. ... **Strangulation is one of the most lethal forms of domestic violence.** The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW.

Laws 2007 ch. 79, § 1 (emphasis added). When the new law took effect, then-Attorney General Rob McKenna wrote:

The reality is, while victims can be strangled to the edge of death, the physical evidence left by the perpetrators is sometimes hard to detect.

Victims of domestic violence by strangulation are in a fight for their lives. ...

Domestic violence by strangulation is a cruel act that strikes terror in victims and causes real physical harm.

McKenna, Rob, *Violence by Strangulation: Clamping Down on a Cruel Act*, SEATTLE TIMES (8/2/2007)¹² (emphasis added).

The law recognizes strangulation causes psychological as well as physical effects. Victims experience terror as they are in "a fight for their lives."

The trial judge found it "hard to detect" physical evidence that Sandra strangled Margo. He was skeptical of the medical evidence before he even knew what it meant, calling it "baloney." RP 159.

The reasonableness of Margo's fear and her response to it turns on her perceptions while she was being strangled. Evidence that Margo was strangled, her perception of danger and the need to act in response to prevent strangulation, was crucial to self-defense. Dr. Stankus's proposed testimony explained that her fear, her perception that she was in a fight for her life, and any actions she took to stop the strangling, was

¹² www.seattletimes.com/opinion/violence-by-strangulation-clamping-down-on-a-cruel-act/ (last visited 4/5/2019).

reasonable. ER 401, 402; RCW 9A.16.020(3); CP 211, 212, 214. It was, in fact, her entire defense.

The State had no danger of prejudice to overcome this essential evidence for the defense.

c. *The Testimony was Admissible Under ER 702.*

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge, will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. There was no issue of Dr. Stankus's qualifications.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 704.

Being strangled is beyond the common knowledge of laypersons. The specific terror and panic that ensues is particularly frightening and warns of impending death.

In *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984), the Court reversed a murder conviction where the trial court excluded the defense expert

on battered women's syndrome. The defense intended the expert testimony "to provide a basis from which the jury could understand why defendant perceived herself in imminent danger" when she used violence. *Id.* at 596. The Supreme Court held this goal was a valid use of expert testimony that would be helpful to the jury.¹³

As in *Allery*, the expert testimony here would have explained how a person perceives danger when being strangled, and why that perception is reasonable; and why a degree of force used in response also would be reasonable. Unlike *Allery*, no deadly force was used here. But the prosecutor argued to the jury that it was unreasonable to "bring a gun to a knife-fight," and so the degree of force Margo used was not reasonable. RP 651, 678.

In *State v. Green*, 182 Wn. App. 133, 328 P.3d 988, *review denied*, 181 Wn.2d 1019 (2014), this Court reversed a homicide conviction where the trial court excluded the defense expert's opinion

¹³ The State presented equivalent evidence in *State v. Ciskie*, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988), "to assist the trier of fact in understanding the mental state of a crime victim."

because they were within the common knowledge of laypersons and because they involved Green's credibility, which likely would invade the fact-finding province of the jury.

Id. at 146. This Court observed the defense offered the expert's testimony

not whether or not she's telling the truth or she's lying on the stand, ... but what the diagnoses and what the [battered women's] syndrome creates, where people who have been battered for a long time tend to take responsibility for things because it's what they've been trained to do because they have been battered.

This proposed testimony would not have expressed an opinion regarding Green's credibility or invaded the jury's function.

Id. at 147. This Court noted that trial courts may limit an expert's testimony to exclude inadmissible opinions as to the defendant's credibility. *Id.* at 147-48 & n.2. But it further observed:

The fact that Dr. Maiuro's opinion lends an aura of reliability to Green's theory of the case cannot by itself be the basis for excluding his testimony because that is the purpose of most expert testimony.

Id. at 148 n.3.

Margo Thomas testified her sister strangled her. Medical providers documented injuries

consistent with strangulation. Sandra testified she probably put her hands on her sister's throat during their fight.

In addition to explaining the meaning of the medical records, Dr. Stankus would have testified "about the pain and panic that [strangulation] creates and a victim's expected response in self-defense." CP 136-37.¹⁴

As in *Green*, the expert testimony here was not a direct opinion on Margo's credibility as she testified at trial. Dr. Stankus provided an acceptable medical interpretation of medical records. Yet the court prohibited her from describing the effects of strangulation, the panic a person would experience, and the reasonableness of the perceived need to respond with force.

If the court was concerned an expert's testimony would invade the jury's province, it can limit it at trial to avoid this issue. See: *Ciskie*, 110 Wn.2d at 278-79 (expert may testify symptoms "consistent with" effect, may not say caused ultimate fact). The State routinely uses

¹⁴ See *Rodriguez, supra*, 187 Wn. App. 922, describing a strangulation victim's terror and panic.

experts in precisely this setting. *State v. Graham*, 59 Wn. App. 418, 423-24, 798 P.2d 314 (1990) (expert testimony re rape trauma syndrome admitted to explain victim's delay in reporting abuse was not inconsistent with her allegations); *State v. Cleveland*, 58 Wn. App. 634, 646, 794 P.2d 546 (1990) (expert's testimony re typical behaviors of child victims of sexual abuse admissible to aid jury in evaluating victim's credibility).

As in *Allery* and *Green*, *supra*, it was reversible error to exclude this expert testimony. It denied appellant due process and her right to present a defense.

D. CONCLUSION

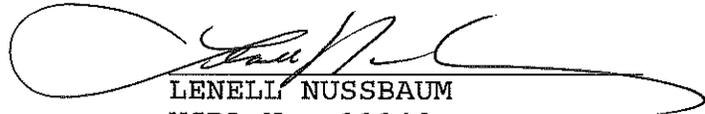
The evidence was insufficient as a matter of law to prove an intentional assault and not self-defense. This Court should reverse and dismiss the charge.

Erroneous jury instructions denied appellant due process of law and reduced the State's burden of proof. Appellant was denied effective assistance of counsel. And the exclusion of her expert witness's testimony denied her the right to present a defense. For these reasons, this Court

should reverse her conviction and remand for a new trial.

DATED this 9th day of April, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lenell Nussbaum", written over a horizontal line.

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant

APPENDIX A

Constitution, art. 1, § 3

"No person shall be deprived of life, liberty, or property, without due process of law."

Constitution, art. I, § 22

"In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel, ... [and] to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed"

United States Constitution, amend. 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence."

United States Constitution, amend. 14, § 1

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

APPENDIX B

In re Personal Restraint of Edwards,
Court of Appeals No. 51236-0-II
(Slip Opinion 2/6/2019)



In re Pers. Restraint of Edwards

Court of Appeals of Washington, Division Two

October 23, 2018, Oral Argument; February 6, 2019, Filed

No. 51236-0-II

Reporter

2019 Wash. App. LEXIS 301 *; 2019 WL 460356

In the Matter of the Personal Restraint of JOB MITCHELL EDWARDS, Petitioner.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *In re Pers. Restraint of Edwards*, 2019 Wash. App. LEXIS 336 (Wash. Ct. App., Feb. 6, 2019)

Prior History: [*1] Appeal from Pierce County Superior Court. Docket No: 12-1-04068-2. Judge signing: Honorable John A Mccarthy. Judgment or order under review. Date filed: 01/06/2014.

State v. Edwards, 192 Wn. App. 1055, 2016 Wash. App. LEXIS 591 (Mar. 1, 2016)

Counsel: For Petitioner: Robert Mason Quillian, Attorney at Law, Olympia, WA.

For Respondent: Jason Ruyf, Washington Attorney General's Office, Olympia, WA.

Judges: Authored by Lisa Worswick. Concurring: Thomas Bjorgen, Dissenting: Jill Johanson.

Opinion by: Lisa Worswick

Opinion

¶1 WORSWICK, J. — A jury found Job Edwards¹ guilty of unlawful imprisonment and felony harassment of Colton

¹Because Job Edwards and his brother Michael Edwards share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

Geeson, as well as possession of a controlled substance with intent to deliver and illegal use of a building for drug purposes. After a direct appeal, we reversed Job's conviction for unlawful imprisonment because the trial court failed to provide the jury with the self-defense instruction 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 17.02 (4th ed. 2016) (WPIC) as to that charge. In his personal restraint petition (PRP) Job asserts that his trial counsel provided ineffective assistance of counsel for failing to request a self-defense instruction as to his felony harassment charge. The State argues that Edward's petition is time barred and is barred as successive. [*2]

¶2 We hold that Job's petition is not time barred and is not barred as successive, and we grant the petition because Job received ineffective assistance of counsel when counsel failed to propose an instruction on self-defense to felony harassment based on WPIC 17.02.

FACTS

A. Background and Trial

¶3 The underlying events are described in the opinion on direct appeal and need not be repeated in full here. Job and his brother Michael Edwards were victims of an attempted armed robbery by Donald Thomas and Colton Geeson. Thomas and Geeson went to Job and Michael's house under the guise of buying drugs, but instead, attempted to rob Michael. During the course of that armed robbery, Thomas hit Michael's girlfriend with a gun, held the gun to Michael's head, and fought with Michael when Michael resisted. Thomas started going down the stairs. Job, who was in the basement of the house during the attempted robbery, started walking up the stairs. Job encountered Thomas on the stairs, and when Thomas raised his gun, Job shot and killed Thomas. In the ensuing chaos, Michael retrieved his gun and trained it on Geeson. Geeson told Michael that he did not know Thomas intended to rob them. Michael kept the gun [*3] trained on Geeson, saying "I got to kill you now. I'm sorry. I got to." 4 Verbatim Report of

Proceedings (VRP) (Nov. 19, 2013) at 99.

¶4 The State charged Job with unlawful possession of a controlled substance with intent to deliver, unlawful use of a building for drug purposes, first degree kidnapping, and felony harassment. The charge of felony harassment against Job rested only on accomplice liability for Michael's comment to Geeson.

¶5 At trial, Job's counsel proposed jury instructions for self-defense to kidnapping and unlawful imprisonment based on WPIC 17.02² and WPIC 17.03.³ The State did not object. The trial court found that Job was entitled to a self-defense instruction for kidnapping and unlawful imprisonment, and that it would instruct the jury based on WPIC 17.03, but not WPIC 17.02.

¶6 Job's counsel also proposed a jury instruction for self-defense to felony harassment based on WPIC 17.03. Job argued that under the facts presented, the jury could find that Michael's "threatening to kill someone and to stay put after [the attempted robbery] was lawful" because he was acting in self-defense, and as an accomplice, Job was therefore entitled to a self-defense instruction. 7 VRP (Nov. 25, 2013) at 491-92. The State objected to instructing the jury [*4] on self-defense to felony harassment. The court ruled that Job was not entitled to the WPIC 17.03 instruction on self-defense to felony harassment.

¶7 The jury found Job guilty of possession of a controlled substance with intent to deliver, unlawful use of a building for drug purposes, unlawful imprisonment, and felony harassment. The jury also found three firearm enhancements for possession of a controlled substance with the intent to deliver, unlawful imprisonment, and felony harassment. Job appealed.

B. Direct Appeal

¶8 On direct appeal, we affirmed Job's convictions of possession of a controlled substance with the intent to deliver, unlawful use of a building for drug purposes, and felony harassment.

¶9 We reversed Job's conviction of unlawful imprisonment, holding that the trial court erred by declining to instruct the jury on self-defense under WPIC 17.02.

² WPIC 17.02 is titled "Lawful Force—Defense of Self, Others, Property."

³ WPIC 17.03 is titled "Lawful Force—Detention of Person." 11 WPIC 17.03 at 276 (4th ed. 2016).

¶10 Discussing Job's entitlement to an instruction on self-defense to felony harassment based on WPIC 17.02 for unlawful imprisonment, we stated:

[Thomas]'s pulling a gun and attempting to burglarize and possibly kill Michael and Freitas supplied the main theory of self-defense which could justify Job's use of force to keep Geeson in the house [*5] (a WPIC 17.02 theory)—not that Geeson had just unlawfully trespassed into the home and Job was detaining him to investigate his presence there (a WPIC 17.03 theory). Job's self-defense theory could have been that he reasonably feared for Michael's, Freitas's, and his own life and that he continued to fear while he had his gun pointed at Geeson throughout the incident. Arguably, after Geeson stripped and showed that he was unarmed, the threat of harm was alleviated and a WPIC 17.02 theory became more remote. However, there was still substantial evidence for a juror to believe that the dangers associated with the immediate aftermath of this armed robbery warranted Job in using the amount of force that he did against Geeson: not to merely detain an intruder, but to use necessary force to protect himself, Michael or Freitas.

Edwards, No. 45764-4-II, slip op. at 7-8. We also noted:

It could be argued that our self-defense analysis that caused Job's unlawful imprisonment to be reversed also could apply to Job's felony harassment charge as well. However, Job failed to propose a WPIC 17.02 instruction for felony harassment below and failed to raise this issue directly in his appellate briefing. Accordingly, we [*6] do not reach that issue.

Edwards, No. 45764-4-II, slip op. at 11 n. 6.

¶11 We filed our opinion on Job's direct appeal on March 1, 2016. The opinion became the decision terminating review on November 2, 2016. The clerk of this court issued its mandate on December 2, 2016. The mandate states:

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on March 1, 2016 became the decision terminating review of this court of the above entitled case on November 2, 2016.

Br. of Resp't (App. B). Job filed this PRP on December 4, 2017.

ANALYSIS

¶12 In his petition, Job seeks relief from his felony harassment conviction by arguing that he received ineffective assistance of counsel when his defense counsel failed to propose a self-defense jury instruction related to his felony harassment charge.⁴ The State argues that Job's petition is time barred and is barred as successive.

¶13 We hold that Job's petition is not time barred and is not barred as successive. We grant Job's petition because Job received ineffective assistance of counsel when counsel failed to propose WPIC 17.02 as to felony harassment.

I. TIME BARRED

¶14 As an initial matter, the State argues that Job's petition is time barred. [*7] We disagree.

¶15 The filing of a PRP is a collateral attack of a judgment. RCW 10.73.090(2). Collateral attacks of a judgment may not be filed more than one year after the judgment becomes final. RCW 10.73.090(1). We do not consider PRPs that are filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based on one of the exemptions enumerated in RCW 10.73.100, RCW 10.73.090(1); RCW 10.73.100; In re Pers. Restraint of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). The limitation period begins on "[t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction" if that is the last triggering event. RCW 10.73.090(3)(b) (emphasis added). When computing the period of time, the last day of the period is included, unless the last day of the period "is a Saturday, Sunday, or legal holiday, in which case the period extends to the end of the next day which is not a Saturday, Sunday, or legal holiday." RAP 18.6(a).

¶16 Here, this court issued its mandate on December 2, 2016. Job's petition was, therefore, due by December 2, 2017. RCW 10.73.090. December 2, 2017, however, fell on a Saturday. Therefore, Job's petition was not due until Monday, December 4, which was the day he filed it.

⁴ Job argues that trial counsel "provided ineffective assistance of counsel in failing to propose any sort of jury instruction, whether it was WPIC 17.02 or WPIC 17.03, positing the defense of self-defense or lawful use of force." Pet. at 10. Job's petition erroneously asserts that trial counsel did not propose any self-defense instruction regarding felony harassment. As the State notes, Job's assertion is belied by the record. Counsel proposed an instruction for self-defense to felony harassment based on WPIC 17.03.

¶17 The State argues that because the mandate references November 2, 2016 as the date for the decision terminating review, [*8] Job was required to file his petition by November 2, 2017. The State is incorrect. RCW 10.73.090(3)(b) clearly states that the limitation period begins to run on "[t]he date that an appellate court issues its mandate." Job's limitation period began on December 2, 2016, the date this court issued its mandate, and not on the other date referenced in the mandate. RCW 10.73.090(3)(b).

¶18 Because Job filed his petition within the one year limitation period from the date of this court's previous mandate and in accordance with court rules, Job's petition is timely.

II. SUCCESSIVE CLAIM

¶19 The State also argues that Job's petition should be barred as a successive petition because he raised the "legal ground of instructional error" in his direct appeal. Br. of Resp't at 8. We disagree.

¶20 The successive petition rule, RCW 10.73.140, applies to petitions that raise the same issues that were raised in a prior petition—not issues raised in a direct appeal. Because this is Job's first PRP, the successive petition rule does not apply.

¶21 To the extent the State argues that Job is raising an issue raised and rejected in his direct appeal, this argument also fails because Job did not raise this issue in his direct appeal.

¶22 A collateral attack may not renew an issue [*9] raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004).

¶23 On direct appeal, we addressed only whether the trial court erred in failing to instruct the jury on self-defense to unlawful imprisonment based on WPIC 17.02. Here, Job seeks review of whether he received ineffective assistance of counsel when his counsel failed to request an instruction on self-defense to felony harassment based on WPIC 17.02. Although a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal in a PRP, Job's claim was not raised and rejected on direct appeal. Because our opinion on Job's direct appeal did not address or reject Job's ineffective assistance of counsel claim, Job's PRP is not barred.

III. PRP Principles

¶24 A PRP is not a substitute for a direct appeal and the availability of collateral relief is limited. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 10, 84 P.3d 859 (2004). To be entitled to relief, the petitioner must show either a constitutional error that resulted in actual and substantial prejudice, or a nonconstitutional error that constituted a fundamental defect that inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010). A personal restraint petitioner must identify [*10] facts and admissible evidence that would entitle him or her to relief. *RAP 16.7(a)(2)*.

¶25 Ineffective assistance of counsel is a constitutional error, arising from the *Sixth Amendment to the United States Constitution* and *article I, section 22 of the Washington Constitution*. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). A petitioner claiming ineffective assistance of counsel necessarily establishes actual and substantial prejudice if the standard of prejudice applicable on direct appeal is met. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

¶26 Job contends that “as virtually conceded by [this court] in footnote 6,” he was entitled to an instruction on self-defense to felony harassment based on WPIC 17.02. Pet. at 9. Therefore, he argues that his trial counsel was ineffective by failing to propose an instruction on self-defense to felony harassment based on WPIC 17.02. Although we disagree with Job’s characterization of footnote 6, we agree that Job’s counsel was ineffective for failing to propose WPIC 17.02.

A. Legal Principles

¶27 This court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Ineffective assistance of counsel is a two-prong inquiry. *Grier*, 171 Wn.2d at 32. To show that he received ineffective assistance of counsel, a petitioner must show (1) that defense counsel’s conduct was deficient and (2) that the deficient performance resulted in prejudice. *Grier*, 171 Wn.2d at 32-33.

¶28 To establish deficient [*11] performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy and tactics cannot form the basis of a finding of deficient performance. *Grier*, 171 Wn.2d at 33. Prejudice can be

shown only if there is a reasonable probability that, absent counsel’s unprofessional errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

¶29 There is a strong presumption that defense counsel’s conduct was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, “the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336.

B. Self-defense Instruction

¶30 Where the claim of ineffective assistance is based upon counsel’s failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel’s performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). To show prejudice, a defendant must show a reasonable possibility that, but for counsel’s purportedly deficient conduct, the outcome of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

1. Entitlement to Instruction

¶31 A defendant is entitled [*12] to a jury instruction on self-defense where there is some evidence demonstrating self-defense. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). Once the defendant is entitled to a self-defense instruction, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473-74.

¶32 In determining whether some evidence supported instructing the jury on self-defense, we review the entire record in a light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). “Evidence of self-defense is evaluated ‘from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.’” *Walden*, 131 Wn.2d at 474 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). The “general rule in Washington is that reasonable force in self-defense is justified if there is an appearance of imminent danger, not actual danger itself.” *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). “[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the

defendant.” *State v. McCreven*, 170 Wn. App. 444, 462-63, 284 P.3d 793 (2012) (alteration in original) (quoting *Walden*, 131 Wn.2d at 474).

¶33 At trial, the State argued that Job was guilty of felony harassment as an accomplice to Michael's threat to Geeson. The criminal liability of an accomplice is the same as that of the principal. *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005); see *RCW 9A.08.020(1), (2)(c)*. Accordingly, if there was some evidence [*13] that Michael acted in self-defense, then Job would be entitled to an instruction on self-defense.

¶34 Viewed in the light most favorable to Job, the record contains evidence that Michael acted in self-defense. The evidence showed that Thomas struck Michael's girlfriend with a gun, placed the gun to Michael's head, and fought with Michael. Immediately after, Thomas started walking down the stairs. When Thomas moved down the stairs, Michael retrieved his gun and threatened Geeson. The evidence that Thomas struck Michael's girlfriend, pointed his gun against Michael's head, and fought with Michael support an inference that Michael reasonably believed that he, his girlfriend, and his property were in danger of imminent harm. A jury could reasonably find that Michael threatened Geeson in self-defense. Because the record contains evidence that Michael acted in self-defense, Job was entitled to an instruction on self-defense to felony harassment based on WPIC 17.02.

2. Deficient Performance

¶35 If a petitioner is entitled to an instruction, we next review whether counsel was deficient in failing to request the instruction. *Thompson*, 169 Wn. App. at 495. We strongly presume that defense counsel's conduct was not deficient. *Grier*, 171 Wn.2d at 33. Because [*14] of this presumption, a “defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336. A criminal defendant will not prevail on an ineffective assistance claim where no “evidence on counsel's strategic or tactical decisions was presented in the courts below.” *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018).

¶36 Here, the record shows that there was not a legitimate trial strategy for not requesting an instruction on self-defense to felony harassment based on WPIC 17.02. Counsel proposed instructions on self-defense to kidnapping and unlawful imprisonment based on both WPIC 17.02 and WPIC 17.03, but proposed an

instruction on self-defense to felony harassment based on only WPIC 17.03. This record shows that there is no legitimate tactical reason for this oversight. Accordingly, counsel's performance was deficient when he failed to request an instruction on self-defense to felony harassment under WPIC 17.02.

3. Prejudice

¶37 To succeed on his ineffective assistance of counsel claim, Job must also prove that his counsel's failure to request the self-defense instruction prejudiced him. Prejudice is shown where there is a reasonable probability that the result of the proceeding [*15] would have been different but for counsel's deficient performance. *Grier*, 171 Wn.2d at 34. “To make a determination of prejudice, we consider the totality of the evidence before the jury.” *State v. Classen*, 4 Wn. App.2d 520, 542, 422 P.3d 489 (2018).

¶38 Here, trial counsel's failure to request a self-defense instruction prejudiced Job. Without an instruction on self-defense to felony harassment, the State was relieved of its burden to prove that Michael did not act in self-defense, and the jury was not instructed on how to determine whether Michael acted with lawful authority. See *Walden*, 131 Wn.2d at 473-74 (holding that where there is some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt). Job was prevented from presenting a full defense, and the evidence before the jury demonstrates that the result of the proceeding would have been different but for counsel's deficient performance.

¶39 Because Job was entitled to a self-defense instruction under WPIC 17.02, counsel's failure to request such an instruction was deficient, and such failure was prejudicial, we hold that Job received ineffective assistance of counsel. Accordingly, we grant Job's petition, reverse his conviction for felony harassment, and remand to the superior court [*16] for further proceedings.

¶40 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with *RCW 2.06.040*, it is so ordered.

BJORGEN, J. PRO TEM., concurs.

Dissent by: JOHANSON

Dissent

¶41 JOHANSON, J. (dissenting) — I agree with the majority that Job Mitchell Edwards's petition is neither time barred nor successive. I also agree that Edwards may have been entitled to a self-defense instruction. However, I disagree that the record is sufficient to determine that counsel lacked any tactical reason for failing to propose a self-defense instruction. Therefore I would hold that Edwards has failed to show his counsel was deficient.

¶42 There is a strong presumption that defense counsel's conduct was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." McFarland, 127 Wn.2d at 336. A criminal defendant will not prevail on an ineffective assistance claim where no "evidence on counsel's strategic or tactical decisions was presented in the courts below." State v. Linville, 191 Wn.2d 513, 525, 423 P.3d 842 (2018).

¶43 Here, as the majority notes, counsel proposed instructions on self-defense [*17] to kidnapping and unlawful imprisonment based on both 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 17.02, at 268 (4th ed. 2016) (WPIC) and WPIC 17.03, at 276, but proposed an instruction on self-defense to felony harassment based on only WPIC 17.03. Contrary to the conclusion of the majority decision, it is just as likely, on this limited record, that there was a legitimate tactical reason for proposing only WPIC 17.03. Lacking any evidence in the record of counsel's actual strategic or tactical decision regarding these instructions, I must presume that counsel was not deficient. Accordingly, I would deny the petition.

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