

FILED  
Court of Appeals  
Division II  
State of Washington  
8/13/2019 4:42 PM

NO. 52764-2-II

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

---

STATE OF WASHINGTON

Respondent,

vs.

MARGO THOMAS,

Appellant.

---

**BRIEF OF RESPONDENT**

---

JULIAN E. ST. MARIE  
Jefferson County Deputy Prosecuting Attorney  
Attorney for Respondent  
P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

**TABLE OF CONTENTS**

A. COUNTERSTATEMENT OF THE ISSUES..... 1

B. COUNTERSTATEMENT OF THE CASE..... 2

    1. SUBSTANTIVE FACTS ..... 3

    2. PROCEDURAL FACTS ..... 7

*a. Charges* ..... 7

*b. Expert Testimony* ..... 8

*c. Jury Instructions* ..... 9

*d. Closing Arguments*..... 9

*e. Verdicts, Judgment & Sentence*..... 11

C. ARGUMENT ..... 11

    1. THE JURY’S VERDICT IS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE INTENTIONAL ASSAULT IN THE SECOND DEGREE AND TO DISPROVE SELF-DEFENSE.. 11

    2. APPELLANT’S DUE PROCESS RIGHTS AND THE RIGHT TO PRESENT A DEFENSE ARE NOT VIOLATED BY THE COURT GIVING THE JURY THE PATTERN FIRST AGGRESSOR INSTRUCTION..... 14

*a. Evidence supports a “First Aggressor” instruction*..... 14

*b. The Washington Pattern Instruction does not include “Words Alone” language; Appellant cites no authority for the proposition that failure to so instruct violates due process where counsel did not request the instruction and no evidence exists to suggest this physical altercation was provoked by words.*..... 16

c.	Appellant provides no authority for the premise that defense counsel has a duty to propose an instruction with “Words Alone” language.....	17
3.	APPELLANT’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE IS NOT VIOLATED WHERE, AS HERE, DEFENSE COUNSEL’S REPRESENTATION DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT. ....	18
a.	A “First Aggressor” instruction was warranted as argued above; State would have proposed the instruction if Respondent had not; Appellant fails to demonstrate prejudice. ....	19
b.	Defense counsel has no duty to propose “Words Alone” language in any case and in particular where there is no evidence the assault alleged was provoked by words.....	19
c.	Appellant provides no authority for the proposition that trial counsel prejudiced her client by failing to object to an officer’s testimony that, in his course of his duties, once he determines there has been a crime committed, he determines who the primary aggressor is.....	20
4.	THE TRIAL COURT DID NOT ERR IN PROHIBITING SPECULATIVE TESTIMONY FROM THE DEFENSE EXPERT ABOUT THE EFFECTS IN GENERAL OF STRANGULATION AND THAT “ANY LEVEL” OF FORCE WOULD BE JUSTIFIABLE IN SELF-DEFENSE .....	21
a.	The effect of strangulation in general is irrelevant and prejudicial under ER 401, 402.....	22
b.	Speculative testimony about the effect of strangulation in general is not helpful to the trier of fact and is not admissible under ER 702.....	25
D.	CONCLUSION.....	26

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Cases**

*State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571 (1984) .....25

*United States v. Robinson*, 560 F.2d 507, 514-15 (2d Cir.1977), *cert den'd*,  
435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978).....25

**Washington State Cases**

*Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash.2d 593, 260 P.3d 857  
(2011).....28

*In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004) .....23

*Lamborn v. Phillips Pacific Chemical Co.*, 89 Wash.2d 701, 575 P.2d 215  
(1978).....25

*State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (1971).....26

*State v. Ague–Masters*, 138 Wn. App. 86, 156 P.3d 265 (2007).....13

*State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984).....12

*State v. Cheatam*, 150 Wash.2d 626, 81 P.3d 830 (2003).....29

*State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973) .....20

*State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992) .....21

*State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016).....11

*State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007).....22

*State v. Gogolin*, 45 Wn. App. 640, 727 P.2d. 683 (1986).....13

**BRIEF OF RESPONDENT**

*State of Washington v. Margo Thomas, No. 527464-2-II*

<i>State v. Green</i> , 182 Wn. App. 133 P.3d 988, <i>review denied</i> , 181 Wn. 2d 1019 (2014).....	29
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	20
<i>State v. Hughes</i> , 106 Wash.2d 176, 721 P.2d 902 (1986) .....	25
<i>State v. Hughes</i> , 106 Wn.2d.176, 721 P.2d 902 (1986).....	21
<i>State v. Janes</i> , 121 Wn.2d 220, P.2d 495 (1993) at 238 .....	14
<i>State v. Kee</i> , 6 Wn. App. 2d 874; P.3d 1080 (2018) (Div. 2).....	16
<i>State v. Kidd</i> , 57 Wn.App. 95, 786 P.2d 847 (1990) .....	21
<i>State v. Kitchen</i> , 46 Wash. App. 232, 730 P.2d 103 (1986) .....	26
<i>State v. LeFaber</i> , 128 Wn.2d.896, 913 P.2d 369 (1996).....	13
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	23
<i>State v. McCullum</i> , 98 Wn.2d. 484, 656 P.2d 1064 (1983).....	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	19
<i>State v. Rich</i> , 184 Wn.2d 897, 365 P.3d 746 (2016) .....	11, 12
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	15, 17
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	12
<i>State v. Smiley</i> , 195 Wn. App. 185, 379 P.3d 149 (2016) .....	23
<i>State v. Stark</i> , 158 Wn. App. 952, 244 P.3d 433 (2010) .....	16
<i>State v. Sullivan</i> , 196 Wn. App. 277, 383 P.3d 574 (2016).....	16
<i>State v. Tharp</i> , 27 Wash. App. 198, 616 P.2d 693 (1980), <i>aff'd</i> , 96 Wash.2d 591, 637 P.2d 961 (1981) .....	26

BRIEF OF RESPONDENT

*State of Washington v. Margo Thomas*, No. 527464-2-II

<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	20
<i>State v. Thompson</i> , 47 Wn.App. 1, 733 P.2d 584 (1987) .....	21
<i>State v. Wilson</i> , 141 Wn. App. 597, 171 P.3d 501 (2007).....	13
<i>State v. Wingate</i> , 155 Wn.2d 817, 122 P.3d 908 (2005) .....	16
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007).....	18
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	19

**Statutes**

Tegland § 105, at 248 .....	28
-----------------------------	----

**A. COUNTERSTATEMENT OF THE ISSUES**

THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT INTENTIONALLY ASSAULTED SANDRA LANGHAM, CAUSING SUBSTANTIAL BODILY INJURY; DEFENSE FAILED TO MEET ITS BURDEN TO PROVE SELF-DEFENSE.

1. The court did not violate Appellant's due process rights and the right to present a defense by giving the jury the Pattern "First Aggressor" instruction.
  - a. Evidence supports a "First Aggressor" instruction, where at a minimum, there is conflicting evidence as to who struck the first blow.
  - b. The Washington Pattern "First Aggressor" instruction does not include "Words Alone" language.
2. The trial court cannot be said to have erred in failing to give an instruction that counsel never requested.
3. A "First Aggressor" instruction is supported by the evidence; had defense not requested the instruction the State would have requested it; Respondent offers no authority for the proposition that defense request for the instruction is ineffective assistance of counsel.
4. Appellant cites no authority for the proposition that defense counsel's failure to request "Words Alone" language for inclusion in the "First Aggressor" instruction violates due process.
5. Appellant cites no authority for the proposition that an officer's testimony as to his statutory obligation to determine primary aggressor in domestic violence cases is improper or that defense failure to object is ineffective assistance of counsel.
6. Speculative testimony about the type of response warranted in cases of strangulation in general is not helpful to the trier of fact and was properly excluded pursuant to ER 702; such testimony is

irrelevant and prejudicial pursuant to ER 401, 402.

**B. COUNTERSTATEMENT OF THE CASE**

As outlined below, the State presented evidence at trial sufficient to prove that Appellant intentionally assaulted her sister, Ms. Langham. Defense failed to present credible evidence to prove self-defense. The evidence proves beyond a reasonable doubt that Appellant struck Ms. Langham in the face with a wine bottle. Nobody other than the victim and Appellant were present. Ms. Langham was rendered unconscious. When Ms. Langham regained consciousness, she was lying in a pool of liquid. There was broken glass everywhere. She was able to crawl to a neighbor's house for help. Her neighbor, Jeffery Johnson, testified that Ms. Langham was almost unrecognizable, because her face was so swollen and bloody. One eye was swollen almost shut.

Appellant tried to leave the scene but was prevented from doing so by Mr. Johnson, who called law enforcement. Law enforcement also testified to Ms. Langham's extensive injuries. Medical records admitted into evidence indicated an orbital fracture that required surgery to repair. Ms. Langham's injuries were obvious in photographs admitted into evidence. Mr. Johnson and law enforcement testified Appellant was obviously intoxicated and that Ms. Langham was not noticeably intoxicated. Mr.

Johnson and law enforcement testified they did not observe injuries of any note with respect to Appellant.

At trial, defendant testified that she acted in self-defense but she couldn't say what caused her to act in self-defense. A jury convicted Appellant of Assault in the Second Degree-intentional assault-reckless infliction of substantial bodily harm.

### 1. SUBSTANTIVE FACTS

On December 8, 2017, the Appellant came to Port Townsend, Washington in Jefferson County to visit her sister, Sandra Langham at Ms. Langham's home in Port Townsend. RP 418-419. On the morning of December 9, 2017, Ms. Langham prepared breakfast, then the women showered and left Ms. Langham's home to do some shopping in Port Townsend. RP 419. The two sisters went to the Saturday market and then went into town, hit all of the stores and bought a lot of things. RP 419. The two went to Alchemy to eat, after which they did more shopping. RP 420. After that, they went back to Alchemy for dinner. RP 420. Ms. Langham had a Kamikaze with dinner. RP 420. Other than the Kamikaze, Ms. Langham consumed no additional alcohol. RP 421. Appellant had three shots of whiskey. RP 421. The sisters did some additional shopping and then went to Safeway so Appellant could purchase a bottle of whiskey. RP 421. Ms. Langham purchased a bottle of wine. RP 421. After some additional driving around, Ms. Langham drove them home. RP 422. After

some time, Ms. Langham opened the bottle of wine. RP 422-423.

Appellant opened the bottle of whiskey. Ms. Langham had two glasses of wine. Appellant had a glass of wine, followed by a full, stemmed wine glass of whiskey. RP 423-424. The sisters talked and eventually the conversation ventured into topics relating to family. RP 426. At some point Ms. Langham told Appellant to leave her home. RP 427; 531.

That's when things got physical. RP 427. There was yelling and shoving. RP 427. Ms. Langham lost consciousness because Appellant hit her in the face with a wine bottle. RP 427. "It was just boom". RP 428.

When Ms. Langham regained consciousness, Appellant was on top of her. RP 427-428. Appellant was screaming at Ms. Langham and hitting her. RP 428. Then Ms. Langham lost consciousness again. RP 428. Ms. Langham testified, "I would think that she (Appellant) would probably have some injury because, you know, I didn't just let her beat on me until I was unconscious, so I'm sure that I probably did hit her." RP 438. Ms. Langham testified, all she remembers is "a lot of pain and then I don't remember because I was unconscious." RP 442. Ms. Langham testified she knows her sister hit her in the face with a wine bottle even though she doesn't have a memory of the blow. RP 450. There was glass matching the wine bottle everywhere. RP 450-451. Ms. Langham's orbital socket was fractured. RP 431-432.

Appellant testified that she believed Ms. Langham hit her in the head with a fire poker, and that Ms. Langham strangled her. RP 540-545. Appellant never told law enforcement she had been strangled. RP 399. Appellant did not indicate to law enforcement she had been injured. RP 400. Appellant told law enforcement that her sister had injured herself and has “mental health” issues. RP 400. Law enforcement did not deem it medically necessary to evaluate Ms. Langham before she was booked into jail. RP 402.

Appellant first sought documentation of her injuries when she went to Summit Urgent Care on December 12, 2017. RP 482. No objective findings were noted other than elevated blood pressure and some “fullness” bilaterally on the neck. RP 484; RP 483. On January 8, 2018, Appellant presented at Puget Sound Ear, Nose & Throat. RP 471. Some bruising was noted. RP 485. No evidence was presented to indicate that defendant reported an injury to her head. On December 24, 2017, Appellant returned to Puget Sound Ear, Nose & Throat and reported for the first time a four-centimeter long indentation along her scalp. RP 487. No objective findings support Appellant’s claim of strangulation. RP 161. Ms. Langham testified, she did not strangle her sister. RP 444. Ms. Langham testified that if Ms. Langham had bruises all over her neck, it was because her sister was strangling her and was on top of her in the kitchen. RP 449.

Ms. Langham testified, when she woke up she was wet and cold. RP 428. Appellant wasn't there. RP 428. Ms. Langham's eye was swollen shut. RP 434. Ms. Langham went to her neighbor's house. RP 428. Mr. Johnson, Ms. Langham's neighbor, put pressure on her facial wounds and Mr. Johnson called law enforcement. RP 310-315.

Mr. Johnson saw Appellant stumbling across the driveway with a pillow under her left arm. RP 315. Appellant was about to get into her vehicle. RP 315. Mr. Johnson smelled a very strong odor of alcohol. RP 316. Appellant physically kept coming at Mr. Johnson who said, "Do I need to get a weapon to defend myself?"

The investigating officer testified as to his training in the Academy and through continuing education on domestic violence crimes, that he is trained to first determine if there is a crime and if so, determine who the primary aggressor is. RP 402-403. The officer testified that is what he did in this case. RP 403. Defense counsel lodged no objection. RP 403. The officer testified,

"[I]t appeared pretty clear cut with the evidence and the statements that were made". RP 411-413. [I]t appeared that she had been struck with something that was a blunt object. She said it was a bottle. There was a broken bottle on the floor. It appeared it was probably the bottle."

Medical providers at the hospital told Ms. Langham she had an orbital floor fracture and referred her for surgery. RP 431. Ms. Langham had

surgery. RP 432. At the time of her testimony she continued to experience nerve damage. RP 433.

Appellant testified that she (Ms. Langham) “came at me in the kitchen and put her hands around my throat”, and then Appellant lost consciousness. RP 533. Appellant testified she had no memory of striking her sister in the face with a wine bottle. RP 555. Appellant testified that she “had no idea” her sister had been injured. RP 547.

The State’s deputy prosecutor asked:

Q: So explain to me how it is that you had to, that you struck your sister in self-defense.

A: I can’t explain that to you.

Q: Okay. So under oath, as you sit here today, you can’t say that you acted in self-defense, can you? Because you don’t remember, do you? According to what you just said.

A: That’s true.

RP 555.

## **2. PROCEDURAL FACTS**

### ***a. Charges***

The court found probable cause for the charge of Assault in the Second degree, substantial bodily injury. The court denied defense motion for pre-trial dismissal.

*b. Expert Testimony*

Defense proffer of testimony by Dr. Jennifer Stankus, an emergency room physician, as outlined 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.

The court ruled that "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 about whether Ms. Thomas was justified in doing something. I don't know what's left for the expert to testify to because I'm not going to allow her to...testify about any justification for self-defense."

The court ruled that Dr. Stankus could testify about the meaning of Appellant's medical records. It ruled that Dr. Stankus could not say Appellant was "strangled" or use the term "strangulation" as that is a term of art, and she could not testify as to what was "justifiable", as that is a legal conclusion. RP 348-367.

*c. Jury Instructions*

The court instructed the jury on self-defense as proposed by the defense: WPIC 17.02, 16.05, 16.04; 17.05, and 17.04 CP 211-214; RP 602. WPIC 16.04 is the “First Aggressor” instruction:

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.

*d. Closing Arguments*

The State argued:

“So let’s talk about the complete lack of any significant injuries to the defendant. So she doesn’t seek any medical aid at the scene and nobody thinks she needs any. She wasn’t medically cleared before she was brought to jail because there wasn’t any need to do that. And after she got out of jail, even though there’s plenty of providers here in this area, there’s an emergency room here, she didn’t go see any of them. And what she told you on the stand was that she didn’t think her injuries were sufficiently serious to require medical attention. Then in another breath on the stand, she tells you that she had these terrible injuries. She was unable to speak. She was hoarse for almost a month. She had lost consciousness. She was strangled and left unconscious on the floor. She was pummeled and beaten and thrown at least four times to the floor. She never describes any of these things to a medical provider. And she admitted, astoundingly, on the stand that when she went to the Summit Walk-in clinic on the 12<sup>th</sup> of December, which is three days after this happened, she did not go to seek medical attention; she went because her attorney told her to go there.”  
RP 643-644.

“[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 as one of just a general denial, the defendant saying "I didn't do it", and you decide for yourselves is that credible or not".

RP 651. In addition, the State argued:

"Moreover, the definition of self-defense requires proportionate force, reasonable force."

RP 651.

The State continued:

"On the 8<sup>th</sup> of January, it's the first time she says she's been strangled. And they palpate her throat. And you heard from the expert witness, what does TTP mean? It means tenderness to palpation. So when the doctor touched her throat, she said 'Ow' or something like that. She indicated by self-report that she had some tenderness on one side of her throat and so that was what was documented. That's what she said, so the doctor documented it in the report. But to follow up on her complaints, they did some real examination. They did a flexible scope with a camera down her throat to look for any evidence of injury that would explain the soreness or fullness that she was complaining about. And you'll see in the medical records, 'Normal. Normal, Normal' in every way. All systems completely normal. So what we have in that report is nothing more than the defendant's self-report of a sore throat and that's it. An objective finding of some slight fullness. That's all there is there."

RP 645-646.

As the State argued:

"[T]he defendant cannot say how those injuries occurred to her sister or what specifically she was defending herself against. 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. 646-647.

*e. Verdicts, Judgment & Sentence*

The jury found Appellant guilty and that it was an act of domestic violence. CP 219-220. Appellant's sentencing range was three to nine months incarceration. The court sentenced Appellant to the presumptive mid-point of the range, six months.

**C. ARGUMENT**

1. THE JURY'S VERDICT IS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE INTENTIONAL ASSAULT IN THE SECOND DEGREE AND TO DISPROVE SELF-DEFENSE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Circumstantial evidence and direct evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). A trial court determines whether there is sufficient evidence to instruct a jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984); *State v. McCullum*, 98 Wn.2d. 484, 488-89, 656 P.2d 1064 (1983).

In this case, the record shows that the State presented overwhelming evidence that Appellant intentionally assaulted Ms. Langham with a wine bottle and thereby recklessly inflicted substantial bodily harm, and that Appellant did not act in self-defense. RP 1-597. Ms. Langham woke up to Appellant on top of her, hitting her. RP 428. Appellant testified she didn't remember what happened so couldn't say she'd acted in self-defense. RP 555-556.

An appellate court reviews a challenge to the sufficiency of the evidence *de novo*. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). A sufficiency challenge admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and interpreted strongly against the defendant. *State v. Wilson*, 141 Wn. App. 597, 608, 171 P.3d 501 (2007). Deference is given to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

The defendant is entitled to the benefit of all the evidence, and the court should give a self-defense instruction if there is credible evidence supporting the defendant's claim. *State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d. 683 (1986). In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant

reasonably believed that he or she was in danger of imminent harm. *State v. LeFaber*, 128 Wn.2d.896, 899, 913 P.2d 369 (1996). The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 860 P.2d 495 (1993) at 238.

To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; and (3) the defendant was not the aggressor, *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). RCW 9A.16.020 (3). Here, Appellant testified that she couldn't say what caused her to act in self-defense. RP 555-556. Thus, any fear of imminent danger of death or great bodily harm was not objectively reasonable. Finally, Appellant was the primary aggressor -- no other conclusion can be drawn from the injuries Ms. Langham sustained. The investigating officer determined Ms. Langham had been struck with a blunt object. RP 382.

Appellant attempts the same false equivalency here as defense counsel did at trial in terms of injuries to the parties. The photographic evidence amply demonstrated Ms. Langham's injuries were far more serious than those her sister claimed. Whoever the "First Aggressor" was, it is clear from Ms. Langham's injuries that Appellant used disproportionate force.

2. APPELLANT’S DUE PROCESS RIGHTS AND THE RIGHT TO PRESENT A DEFENSE ARE NOT VIOLATED BY THE COURT GIVING THE JURY THE PATTERN FIRST AGGRESSOR INSTRUCTION.

a. Evidence supports a “First Aggressor” instruction

Ms. Langham told Appellant to leave. RP 427; 531. Ms. Langham 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 remember 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 a wine bottle in my face”.

RP 427.

“[A]n aggressor or one who provokes an altercation” cannot successfully invoke the right to self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). While not favored, an aggressor instruction is appropriate “where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.” *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016) (quoting *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010),

*review denied*, 171 Wn.2d 1017 (2011)), *review denied*, 187 Wn.2d 1023 (2017). If a reasonable juror could find from the evidence that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *Id.*

Appellate courts review *de novo* whether the state provided sufficient evidence to support a primary aggressor instruction. *Id.* The reviewing court views the evidence in the light most favorable to the party requesting the instruction. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

Although primary aggressor instructions are not favored, such an instruction is appropriate when “the jury can reasonably determine from the evidence that the defendant provoked the fight” and when “the evidence conflicts as to whether the defendant's conduct provoked the fight.” *Sullivan*, 196 Wn. App. at 289; *See also, State v. Kee*, 6 Wn. App. 2d 874; 431 P.3d 1080 (2018) (Div. 2). The facts in *Kee* are on point with facts in this case in that there were conflicting accounts of which party provoked the second-degree assault. Regardless of who threw the first punch, there was no dispute that both hit the other before Kee threw the punch that broke bones. For that reason, the Court of Appeals held that sufficient evidence supported giving the first aggressor instruction.

Here, as in *Kee*, at a minimum the evidence conflicted as to whether Appellant's conduct provoked the fight. The trial court's decision to give a primary aggressor instruction was supported by sufficient evidence.

- b. The Washington Pattern Instruction does not include "Words Alone" language; Appellant cites no authority for the proposition that failure to so instruct violates due process where counsel did not request the instruction and no evidence exists to suggest this physical altercation was provoked by words.

Appellant argues that the trial court's failure to include "Words Alone" language in the "First Aggressor" instruction, WPIC 16.04, is reversible error, citing *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). However, defense counsel did not request "Words Alone" language; the trial court cannot be said to have erred where it was not asked to make a ruling. Moreover, Appellant's argument is misplaced where no evidence exists to suggest that this physical altercation was provoked by words.

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. *Kee*, 6 Wn. App. 2d 874 at 880 (2018) (Div. 2). *State v. Woods*, 138 Wn. App. 191, 196, 156 P.3d 309 (2007). Self-defense instructions are subject to heightened scrutiny and must "make the relevant legal standard manifestly apparent to the average juror". *Woods*, 138 Wn. App. at 196.

The facts in *Kee* are readily distinguished from facts in this case because here, neither party presented evidence that words provoked the fight that resulted in Appellant breaking Ms. Langham's orbital socket. In *Kee*, the defendant said "Do you want me to 'F' your little butt up?", before the fight ensued. In *Kee*, the court stated:

"Where there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.04 is inadequate to convey the law established in *Riley*."

In *Kee*, the Court held there was sufficient evidence to support a "First Aggressor" instruction. In contrast, Appellant did not present evidence to support a suggestion that this altercation was provoked by words. This Court should reject Appellant's contention the court erred by failing to include "Words Alone" language where the language was never requested and because "Words Alone" language was not warranted in this case.

- c. Appellant provides no authority for the premise that defense counsel has a duty to propose an instruction with "Words Alone" language.

Appellant provides no authority for the contention that defense counsel had a duty to propose a Jury Instruction that does not conform to the evidence, as outlined below.

**3. APPELLANT’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE IS NOT VIOLATED WHERE, AS HERE, DEFENSE COUNSEL’S REPRESENTATION DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT.**

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Our scrutiny of counsel's performance is highly deferential; there is a strong presumption of reasonableness. *McFarland*, 127 Wn.2d at 335. To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable trial tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If a defendant fails to establish either deficiency or prejudice, the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 697.

- a. A “First Aggressor” instruction was warranted as argued above; State would have proposed the instruction if Respondent had not; Appellant fails to demonstrate prejudice.

In general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). In addition, where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Hughes*, 106 Wn.2d.176, 191-92, 721 P.2d 902 (1986); *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990). Similarly, if there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. *State v. Thompson*, 47 Wn.App. 1, 7, 733 P.2d 584 (1987). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). Defense counsel was not ineffective for proposing an instruction that conforms to the evidence. As argued above, at a minimum the evidence conflicted as to whether defendant’s conduct precipitated a fight.

- b. Defense counsel has no duty to propose “Words Alone” language in any case and in particular where there is no evidence the assault alleged was provoked by words.

In this case, neither party alleged that words alone led either one of the sisters to commit assault in response to words. Thus, the lack of “Words Alone” language could not have prejudiced Appellant. Appellant’s argument also fails because the pattern instruction given in this case does not provide that words alone would be sufficient provocation to preclude a claim of self-defense. WPIC 16.04 states that

“[n]o person may, by any intentional *act* reasonably likely to provoke...” (*emphasis added*.) The instruction does not refer to verbal provocation. Thus, the question of whether the victim is sufficiently provoked to use force, thereby denying the defendant the right to self-defense, does not turn on the nature of defendant's speech. Defense counsel was not ineffective by failing to propose “Words Alone” language where the facts do not support that instruction.

- c. Appellant provides no authority for the proposition that trial counsel prejudiced her client by failing to object to an officer's testimony that, in his course of his duties, once he determines there has been a crime committed, he determines who the primary aggressor is.

On direct examination, the State's deputy prosecuting attorney

asked:

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

A: Yes I do.

Q: 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.”

RP 402-403. Appellant contends that defense counsel's failure to object constitutes ineffective assistance of counsel. When a defendant bases his ineffective assistance of counsel claim on counsel's failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). Generally, we consider the decisions of whether and when to object as a

“classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). It is a legitimate trial tactic to forego an objection to avoid highlighting certain evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Only in egregious circumstances will the failure to object constitute incompetence of counsel justifying reversal. If the failure to object could have been a legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016) [*internal citations omitted*].

The extent to which this was an error is *de minimis* at best. An objection could have been raised but defense counsel would quite possibly come across as petulant or childish. Maintaining credibility in front of the jury is one of the most important things trial counsel can do. Raising silly or frivolous objections and wasting the jurors’ time does nothing to enhance one’s reputation. Defense counsels’ decision to not object was no doubt a strategic decision. As such, there was no prejudice to Appellant.

**4. THE TRIAL COURT DID NOT ERR IN PROHIBITING SPECULATIVE TESTIMONY FROM THE DEFENSE EXPERT ABOUT THE EFFECTS IN GENERAL OF STRANGULATION AND THAT “ANY LEVEL” OF FORCE WOULD BE JUSTIFIABLE IN SELF-DEFENSE**

The trial court’s preclusion of speculative testimony does not offend Appellant’s constitutional right to present a defense. Defense expert was

properly prohibited from testifying about the effects of strangulation in general, and that any level of force would be justifiable in self-defense.

- a. The effect of strangulation in general is irrelevant and prejudicial under ER 401, 402.

Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402, which state:

**RULE 401. DEFINITION OF “RELEVANT EVIDENCE”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

The relevancy of evidence is a consideration within the discretion of the trial court. *Lamborn v. Phillips Pacific Chemical Co.*, 89 Wash.2d 701, 706, 575 P.2d 215 (1978). The trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact. *State v. Hughes*, 106 Wash.2d 176, 201, 721 P.2d 902 (1986). *See generally, United States v. Robinson*, 560 F.2d 507, 514-15 (2d Cir.1977), *cert den'd*, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978) (discussion of superior position of trial judge in being able to weigh probative value against prejudicial effect).

A trial court's decision on the relevance and prejudicial effect of the evidence may only be reversed upon a manifest abuse of discretion. *State v. Rupe*, 101 Wash.2d 664, 686, 683 P.2d 571 (1984); *State v. Kitchen*, 46 Wash. App. 232, 239, 730 P.2d 103 (1986). Abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” *State v. Tharp*, 27 Wash. App. 198, 206, 616 P.2d 693 (1980), *aff'd*, 96 Wash.2d 591, 637 P.2d 961 (1981) (*quoting State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). Here, the trial court clearly stated the grounds for its decision to limit defense expert’s testimony so as to avoid speculation and opinion as to legal conclusion; the decision was exercised on tenable grounds. Dr. Stankus reviewed all the materials from the case, including police reports, photographs, and medical reports. Dr. Stankus 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 136-138. The trial court stated:

“[A]s 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. . . [S]o this witness is not going to be permitted to testify about self-defense and whether Ms. Thomas was justified in doing something.

RP 158-164. Ultimately, the court ruled Dr. Stankus could testify to the meaning of Appellant's medical records. It ruled, however, that she could not say Appellant was "strangled" or use the term "strangulation" as that is "more of a term of art"; in addition, she could not testify what was "justifiable" as that was a legal conclusion." RP 348-367.

ER 403 controls the exclusion of relevant evidence:

**RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403 contemplates a balancing process. The balance may be tipped toward admissibility if the evidence is highly probative or if the undesirable characteristics of the evidence are minimal. Conversely, the balance may be tipped towards exclusion if the evidence is of minimal probative value or if the undesirable characteristics of the evidence are very pronounced. By the very nature of the rule, each case must be decided on the basis of its own facts and circumstances. Teglund § 105, at 248. In this case, even if Dr. Stankus' speculative testimony as to what is justifiable force in response to strangulation were deemed relevant, it was properly excluded because of great potential prejudice to the State. In addition, such testimony would be confusing and a waste of time, as pure speculation always is.

- b. Speculative testimony about the effect of strangulation in general is not helpful to the trier of fact and is not admissible under ER 702.

ER 702 generally governs the admissibility of expert testimony. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash.2d 593, 600, 260 P.3d 857 (2011). Under ER 702, “[i]f 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.” Expert testimony usually is admissible under ER 702 if it will be “helpful to the jury in understanding matters outside the competence of ordinary lay persons.” *Anderson*, 172 Wash.2d at 600, 260 P.3d 857. We generally review the trial court's decision whether to admit expert testimony under an abuse of discretion standard. *State v. Cheatam*, 150 Wash.2d 626, 645, 81 P.3d 830 (2003); *State v. Green*, 182 Wn. App. 133, 328 P.3d 988, *review denied*, 181 Wn. 2d 1019 (2014).

Appellant relies *State v. Green*, wherein the Court of Appeals reversed the trial court’s exclusion of the defense expert’s opinion about PTSD and battered person syndrome, because “it would likely help the jury”. *Id.* at 147-148. However, the facts in *Green* are readily distinguished from those in this case. While PTSD and battered person syndrome are areas outside of a layperson’s expertise, the effects in general of strangulation are not. In *Green*, the expert did not seek to testify

as to any legal conclusion. In this case, the trial court properly prohibited defense expert Dr. Stankus from testifying about the effect of strangulation in general, and that any level of force would be “justifiable”, pursuant to ER 702 and Washington case law.

**D. CONCLUSION**

For the foregoing reasons, the Defendant’s conviction and sentence should be affirmed. Appellant’s due process rights, right to effective assistance of counsel and right to a fair trial were not offended. No error of law occurred.

Respectfully submitted this 13<sup>th</sup> day of August, 2019.



JULIAN E. ST. MARIE, WSBA #27268  
Jefferson County Deputy Prosecuting Attorney  
Attorney for Respondent

**PROOF OF SERVICE**

I, Laura Mikelson, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Lenell Nussbaum, WSBA #11140  
lenell@nussbaumdefense.com

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 13<sup>th</sup> day of August 2019, and signed at Port Townsend, Washington.



Laura Mikelson  
Legal Assistant

**JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 13, 2019 - 4:42 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52764-2  
**Appellate Court Case Title:** State of Washington, Respondent v. Margo Renee Thomas, Appellant  
**Superior Court Case Number:** 17-1-00203-3

**The following documents have been uploaded:**

- 527642\_Briefs\_20190813164134D2217081\_3833.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was 2019 08 13 Brief of the Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- lenell@nussbaumdefense.com
- mwalker@co.jefferson.wa.us

**Comments:**

---

Sender Name: Laura Mikelson - Email: lmikelson@co.jefferson.wa.us

**Filing on Behalf of:** Julian Elizabeth St. Marie - Email: jstmarie@co.jefferson.wa.us (Alternate Email: )

Address:  
PO Box 1220  
Port Townsend, WA, 98368  
Phone: (360) 385-9181

**Note: The Filing Id is 20190813164134D2217081**