

FILED
Court of Appeals
Division II
State of Washington
9/27/2019 10:06 AM

NO. 53133-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANJELA HASSERIES,
Appellant.

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

The Honorable Jennifer A. Forbes, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
ERIN C. SPERGER, WSBA No. 45931
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PRESENTED ON APPEAL.....	1
C. STATEMENT OF THE CASE.....	2
1. Procedural History.....	2
2. Substantive Facts.....	2
D. ARGUMENT.....	9
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ANJELA HASSERIES COMMITTED ASSAULT IN THE SECOND DEGREE UNDER RCW 9A.36.021(1)(a)	9
a. There was insufficient evidence of intent.....	10
b. There was insufficient evidence to prove Anjela did not act in self-defense.....	12
2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE LANGUAGE IN THE FIRST AGGRESSOR INSTRUCTION	15
a. Ineffective assistance of counsel.....	18

TABLE OF CONTENTS

	Page
3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME RELATED	21
E. CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	21
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	12
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	20
<i>State v. Crockett</i> , 118 Wn. App. 853, 78 P.3d 658 (2003)	21
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003)	15
<i>State v. Graves</i> , 97 Wn. App. 55, 982 P.2d 627 (1999)	13, 14
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	19
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993)	13
<i>State v. Jarvis</i> , 160 Wn. App. 111, 246 P.3d 1280 (2011)	11
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003)	22, 23
<i>State v. Kee</i> , 6 Wn. App. 2d 874, 431 P.3d 1080 (2018)	15, 16, 17, 18, 20, 21
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996)	13

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	19
<i>State v. McKague</i> , 159 Wn. App. 489, 246 P.3d 558, <i>aff'd</i> , 172 Wn.2d 802, 262 P.3d 1225 (2011)	10
<i>State v. Munoz-Rivera</i> , 190 Wn. App. 870, 361 P.3d 182 (2015).....	21, 22, 23
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010)	13
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	15, 16, 17, 21
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	10
<i>State v. Sandoval</i> , 171 Wn.2d 163, 249 P.3d 1015 (2011)	19
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005)	10
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007) (Smith II)	10
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999)	18, 19
<i>State v. Sullivan</i> , 196 Wn. App. 314, 382 P.3d 736 (2016).....	10

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009)	19
<i>State v. Tullar</i> , 9 Wn. App. 2 151, 442 P.3d 620 (2019).....	12
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007).....	12, 13, 19, 20, 21
<i>State, v. Melland</i> , __ P.3d __ (Aug. 19, 2019).....	10
FEDERAL CASES	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	19, 20
RULES, STATUTES, AND OTHERS	
RCW 9.94A.505	22
RCW 9A.08.010	11
RCW 9A.36.021	2, 9, 10, 11, 12
U.S. Const. Amend. VI.....	18
Wash. Const. art. I, § 22	19
WPIC 16.04	1, 8, 16

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Hasseries committed Assault in the Second Degree.
2. Defense counsel was ineffective when he failed to object to the language in the first aggressor instruction WPIC 16.04 (Instruction number 14).
3. The trial court abused its discretion by imposing conditions of community custody that are not crime related.

B. ISSUES PRESENTED ON APPEAL

1. Did the state fail to prove beyond a reasonable doubt that Hasseries committed Assault in the Second Degree when there is no evidence in the record that Hasseries intended to make physical contact with Patrick Hasseries?
2. Did the state fail to prove beyond a reasonable doubt that Hasseries committed Assault in the Second Degree when there was no evidence Hasseries did not act in self-defense?
3. Was defense counsel ineffective when he failed to object to the language in WPIC 16.04 (Instruction 14) regarding the first aggressor when the language inadequately conveyed the law on self-defense by allowing the jury to find

words alone could be the provoking conduct justifying the first aggressor instruction, thus, relieving the state of its burden to prove the absence of self-defense beyond a reasonable doubt?

4. Did the trial court abuse its discretion when it imposed alcohol and drug related prohibitions as a condition of community custody and ordered Hasseries to undergo a mental health evaluation and comply with all recommended treatment when there was no evidence in the record that alcohol, drugs, or mental health issues precipitated the crime?

C. STATEMENT OF THE CASE

1. Procedural History

Anjela Hasseries was charged by amended information with assault in the second degree (RCW 9A.36.021(1)(a)) with two special allegations: one, that the crime was committed with domestic violence and; and two that the crime was committed with a deadly weapon. CP 12-13. After a trial, Hasseries was convicted as charged and the jury answered yes to the two special verdict forms. CP 68, 73. This timely appeal follows. CP 85.

2. Substantive Facts

In July 2018, Anjela Hasseries revealed to her husband

Patrick Hasseries¹ that she was having an affair with a co-worker and former roommate, Benjamin Roberts. RP 142, 265. Patrick was angry and the couple decided to separate. RP 142, 267. When Patrick and the couples' son left the house for a few days, Anjela moved her property out of the house and into Roberts' house. RP 267. Approximately eleven days later, Anjela moved back into the marital home but instead of sharing a room with Patrick they converted his home office on the main floor into Anjela's bedroom. RP 147, 267, 329.

A few days after Anjela moved back into the home, Anjela was watching videos on her phone on the porch, and according to Patrick, she was smoking marijuana. Patrick invited Anjela to watch the videos with him in the living room. RP 148-49. Anjela agreed and she and Patrick began to talk. RP 149. When Patrick learned that Anjela was still working with Roberts, he demanded she quit. RP 150, 200, 271. Anjela told Patrick she would not quit and she did not intend to stop spending time with Roberts or stop seeing him romantically. RP 150, 152, 271.

¹ Because Anjela Hasseries and Patrick Hasseries have the same last name this brief will refer to each by their first name for ease of reference. No disrespect is intended.

The argument escalated and Patrick demanded she leave the home. RP 204, 262, 271. Anjela stated that she did not have to leave because her name was on the deed; she went upstairs to Patrick's bedroom where they kept their important documents to retrieve it. RP 272. Patrick followed Anjela upstairs and told her he hid the box of important papers. RP 204, 272. Anjela testified the upstairs bedroom is the full length of the home and the sleeping area is divided from the closet area by a step. RP 298-99.

After that point Anjela and Patrick testified to different versions of events. Anjela testified that she squatted down to look for the deed in the closet area and Patrick put his hand on her head and threw her off the step. RP 274. Anjela thought she suffered a concussion because she had a headache and felt nauseous for the next three days. RP 274. Anjela laid on the floor dazed for a little while and then got up to continue looking for the deed. RP 274-75. When Anjela approached the steamer trunk to look for the deed Patrick started to hit and kick her and he threw her to the ground again. RP 275. Anjela sustained some bruising to her leg. RP 275. No pictures were taken on the night of the incident but Anjela submitted two photographs depicting the bruising eight days later when she was released from

custody. RP 275-76; Exh. 26, 27.

After Patrick pushed Anjela the second time she got up and went downstairs. RP 277-78. As Patrick ran after her, Anjela headed for the bathroom which had a locking door. RP 278-79. However, before she reached the bathroom Anjela turned around and observed Patrick right behind her. Anjela believed Patrick was going to hurt her again because she observed a “God awful look” on his face and he “was beelining it” toward her. RP 279-80.

Anjela grabbed the closest object she could to put some space in between them, which happened to be a Lord of the Rings movie replica sword that was on the mantle. RP 280, 317. Anjela held the sword by the handle with both hands. RP 316. According to Anjela, Patrick tried to take the sword away by gripping the blade, and as he pulled the sword toward him, he moved them both toward the kitchen. RP 281. After a struggle, Anjela heard Patrick say, “ow” and then he let go of the sword and ran away. RP 281.

At that point, Anjela felt the danger had subsided and she placed the sword back on the mantle. RP 283, 325. Patrick then came out of the bathroom and called 9-1-1. RP 283. Anjela observed blood in the kitchen and did not want their son to wake up and see it

so she started to mop up the blood. RP 283. When she heard Patrick on the phone and saw the blood, Angela realized Patrick was hurt. Uncertain if she would have to go to the hospital, she went into her bedroom to change out of her pajamas. The police arrived while she was changing clothes and placed her into custody. RP 285.

Patrick testified that before Anjela went upstairs to find the deed she told him she did not enjoy spending time with him and was not sexually attracted to him. She also convinced Patrick to color his hair blond to look more like Roberts. RP 202-03.

When Anjela and Patrick were upstairs, Patrick told Anjela he hid the deed and Anjela responded by throwing a basket of intimate devices at the wall. RP 155. Then, according to Patrick, Anjela attacked Patrick by hitting and kicking him. RP 156. Patrick was not hurt but he grabbed Anjela's foot and pushed her which caused her to fall backward. RP 157. Anjela laid on the floor dazed for a moment and then got up and, according to Patrick, attacked him again. RP 158.

Patrick pushed her foot again and Anjela fell again. RP 158. After falling the second time Anjela went downstairs and according to Patrick he waited about thirty seconds and then also went

downstairs. RP 159. Patrick testified that he stood by the entrance door, which is next to the kitchen, to look out the window to see if Anjela left. RP 169, 170, 217; Exh. 25. According to Patrick, while he looked out the window Anjela came toward him in an offensive maneuver while holding the sword in both hands. RP 170, 172.

Patrick testified the tip of the sword entered his right arm, but he did know how that happened. RP 176. At some point Patrick grabbed the blade of the sword and tried to wrestle the sword out of Anjela's grasp and they engaged in a tug of war. RP 177, 180. During the struggle over the sword, Patrick incurred a second wound on his right arm. Thereafter he successfully took the sword from Anjela's grasp. RP 178, 181. Patrick then went into the bathroom to find something to wrap around his wound. RP 181. When he came out of the bathroom, he called 9-1-1. RP 182. The police arrived shortly after the 9-1-1 call and the officers escorted him to an ambulance. RP 182.

Officer Jared France testified that Patrick told France he ran up to Anjela as she grabbed the sword. RP 211-12, 255. By contrast, Patrick testified that he did not tell the police he ran after Anjela when she went downstairs or that he ran up to Anjela as she grabbed the

sword. Id. Patrick was flown to Harborview Medical Center where he underwent surgery on his arm to regain finger dexterity. RP 186-87.

At trial, the state proposed Washington Pattern Instruction (WPIC) 16.04, the First Aggressor instruction, as instruction number 14 as follows:

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use or attempt 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 41; RP 342.

Defense counsel did not object to the language in the instruction. RP 342.

In closing argument, the prosecutor stated the following:

You can't be the aggressor in this case. And we're talking about actions here. She's – she's stirring him up. She sat there that day and said some very hurtful things to him, according to her own statement. She tried to take the deed. I mean, essentially, she says, no, I'm not giving up this guy I'm seeing and I'm not giving up the house. I'm going to stay here and have an affair with that guy and you just have to put up with it.

RP 379.

During deliberations the jury submitted the following question:

If person (1) has person (2) cornered with a weapon, and person (2) becomes cut in the process of self-defense/struggle to disarm/escape from person (1), is person

(1) at fault for assault?
CP 66.

The court answered by instructing the jury to review the written instructions. CP 66. After deliberations the jury found Anjela guilty as charged. RP 3-4 (3/4/19).

At sentencing the trial court stated that Anjela's reaction was grossly disproportionate to what was occurring at the time. Over defense objection, the court imposed a mental health evaluation as a condition of community custody. RP 6, 11 (3/22/19); CP 78. The court also imposed drug and alcohol prohibitions over the defense's objection. RP 6, 11 (3/22/19); CP 78.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ANJELA HASSERIES COMMITTED ASSAULT IN THE SECOND DEGREE UNDER RCW 9A.36.021(1)(a)

The state failed to prove beyond a reasonable doubt that Anjela Hasseries committed assault in the second degree under RCW 9A.36.021(1)(a) because (1) there was insufficient evidence to prove intent and (2) there was insufficient evidence to prove Anjela did not act in self-defense.

This Court must reverse the conviction if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State, v. Melland*, __ P.3d __ (Aug. 19, 2019). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

a. There was insufficient evidence of intent

“[S]econd degree assault comprises two discrete acts, each with its own mental state—intentional assault and reckless infliction of substantial bodily harm. *State v. Sullivan*, 196 Wn. App. 314, 324, 382 P.3d 736 (2016) (citing *State v. McKague*, 159 Wn. App. 489, 509, 246 P.3d 558, *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011)). Although assault is an alternative means crime, the instant case is not an alternative means case because the state only charged Anjela with intentional assault under RCW 9A.36.021(1)(a). *State v. Smith*, 159 Wn.2d 778, 790, 154 P.3d 873 (2007) (Smith II); CP 12.

Thus, to convict Anjela of assault in the second degree the jury had to find Anjela intentionally assaulted Patrick. *Sullivan*, 196

Wn. App. at 324 (citing RCW 9A.36.021(1)(a)).

“A person acts with intent or intentionally when [she] acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). In other words, the defendant must intend to “make physical contact with the victim.” *See State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011) (the intent required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act). Thus, it necessarily follows that an accidental touching negates criminal intent. *Cf. Jarvis*, 160 Wn. App. at 119.

In the instant case, the testimony indicates that Anjela armed herself with the sword in self-defense –based on her fear of Patrick. Even when viewing the evidence in the light most favorable to the state, the evidence does not suggest that Anjela intentionally struck Patrick.

Patrick did not testify that Anjela intentionally struck or cut him. According to Patrick, Anjela was standing in an offensive position but he did not know how his arm was first struck. RP 170, 172, 176. Both Anjela and Patrick testified that Patrick grabbed ahold of the blade of the sword and a struggle ensued. Patrick’s arm was struck during

that struggle. RP 177, 180-81.

There was no testimony Anjela intentionally struck Patrick with the sword and the photographs of Patrick's wounds were consistent with self-defense. Patrick only had minor cuts on his palms, but by his own testimony, he held onto the blade of the sword, thus, Anjela's testimony that he pulled her into the kitchen by the blade is consistent with an unintentional act. CP 66.

Self-defense negates the intent element of assault in the second degree. *State v. Tullar*, 9 Wn. App. 2 151, 156, 442 P.3d 620 (2019) (citing *State v. Acosta*, 101 Wn.2d 612, 616-18, 683 P.2d 1069 (1984)).

In this case even if the jury did not believe self-defense, the evidence was insufficient to establish an intent to strike under RCW 9A.36.021(1)(a) because it does not show Anjela intended to make physical contact with Patrick.

b. There was insufficient evidence to prove Anjela did not act in self-defense

Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the state must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007) (citing *Acosta*, 101 Wn.2d at

615–16).

Self-defense has both an objective and subjective element: “the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do.” *Woods*, 138 Wn. App. at 198 (citing *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)).

The jury need not find actual imminent harm. *Woods*, 138 Wn. App. at 199. Instead, it may look to the defendant's “reasonable belief of imminent harm from the victim.” *Woods*, 138 Wn. App. at 198. (citing *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996) (abrogated on other grounds by *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010)).

For example, in *State v. Graves*, 97 Wn. App. 55, 56, 58, 63, 982 P.2d 627 (1999) the Court of Appeals held the state failed to prove the defendant did not act in self-defense when the defendant's father entered his room, called him a “punk,” grabbed his chin and “put a hold” on the defendant. The Court reversed the defendant's conviction even though the defendant was not scared when his father

first walked into the room and was not in pain when his father pinned him down, because the defendant thought his father “was going to do something.” *Graves*, 97 Wn. App. at 55, 59, 63.

Here, even by Patrick’s testimony, and similar to the father in *Graves*, Patrick entered Anjela’s space by following her upstairs where they had an altercation. Patrick again followed Anjela downstairs. RP 153, 155. According to Anjela, when Patrick followed her downstairs, he had a “God awful look” on his face and made a “beeline” toward her. RP 275, 279-80. Just as the defendant in *Graves* thought his father was “going to do something,” Anjela believed Patrick was going to hurt her, so she grabbed the closest object she could to put some space between herself and Patrick. RP 280.

Based on the testimony at trial Anjela picked up the sword out of fear in an effort to defend herself. Reviewing the evidence in the light most favorable to the state, the state did not present sufficient evidence to prove beyond a reasonable doubt that Anjela did not act in self-defense. *Graves*, 97 Wn. App. at 63.

Because there was insufficient evidence of intent or that Anjela did not act in self-defense, this court should reverse her

conviction for assault in the second degree and remand for dismissal with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (“A defendant whose conviction has been reversed due to insufficient evidence cannot be retried.”).

2. DEFENSE COUNSEL WAS
INEFFECTIVE FOR FAILING TO
OBJECT TO THE LANGUAGE IN THE
FIRST AGGRESSOR INSTRUCTION

Defense counsel was ineffective when he failed to object to the language in the first aggressor instruction because the instruction permitted the jury to determine that Anjela was the first aggressor based on her words.

A first aggressor instruction was appropriate in this case because there was conflicting evidence about whether Anjela provoked the need to act in self-defense. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Although a defendant cannot invoke a self-defense claim when she is the first aggressor and provokes an altercation, words alone cannot be the provoking conduct that justifies a first aggressor instruction. *State v. Kee*, 6 Wn. App. 2d 874, 879, 431 P.3d 1080 (2018) (citing *Riley*, 137 Wn.2d at 909-912).

The wording in question in the first aggressor instruction provided the jury could refer to an “intentional act” and “defendant’s

acts” CP 41. This wording was inadequate to convey the law on self-defense because it permitted the jury to find Anjela was the first aggressor based on her words alone. *Kee*, 6 Wn. App. 2d at 879.

In *Riley*, 137 Wn.2d at 911, the defendant called the complainant a “wanna-be, which insulted the complainant who said he would shoot Riley, which prompted Riley to draw his gun. *Riley*, 137 Wn.2d at 906. There was conflicting testimony about the subsequent events, but it was undisputed that Riley drew his gun first and shot the complainant *Riley*, 137 Wn. 2d at 906. Although the Court held that words alone are insufficient provocation, it also held the first aggressor instruction was proper because it was not based on words alone but on Riley’s aggressive conduct as well. *Riley*, 137 Wn.2d at 909. Further the Court held the language of pattern instruction 16.04 was sufficient because it did not tell the jury that words alone would be sufficient provocation. *Riley*, 137 Wn.2d at 913.

Relying on the law of self-defense set forth in *Riley*, the Court of Appeals in *Kee* re-examined whether the language in pattern instruction 16.04 is sufficient when there is evidence the defendant provoked an altercation with words and there is a dispute over who

first acted aggressively. *Kee*, 6 Wn. App. 2d at 882.

In *Kee*, the defendant initiated a verbal altercation with Ostrander. *Kee*, 6 Wn. App. 2d at 876-77. A physical altercation ensued, and although there were conflicting accounts about who struck the first blow, Kee hit last and broke Ostrander's nose *Kee*, 6 Wn. App. 2d at 877. The trial court submitted the same jury instruction submitted in *Riley*, which referenced an "intentional act" and "defendant's acts".

However, the conflicting accounts about who struck the first blow and the prosecutor's emphasis on Kee's verbal provocation in closing argument permitted the jury to find that verbal abuse constituted an act. *Kee*, 6 Wn. App. 2d at 882. The Court held that because the instruction did not specify that words alone were insufficient to negate self-defense, it impermissibly permitted the jury to find Kee's words could have negated her self-defense claim. Therefore, it was reversible error. *Kee*, 6 Wn. App. 2d at 881-82.

Here, the facts are similar to *Kee*, and defense counsel also failed to object to the same flawed language which was disapproved in *Kee*. CP 41. Similar to *Kee*, the testimony at trial showed Anjela initiated the altercation with her words by insulting Patrick's

masculinity, but there was conflicting testimony about who initiated the physical altercation. Further, as in *Kee*, the prosecutor emphasized that Anjela initiated the entire incident by insulting Patrick. RP 379. Here, the prosecutor went even further than the prosecutor in *Kee* when she stated, “[a]nd we’re talking about actions here. She’s – she’s stirring him up.” RP 379. This statement instructed that the jury could find that “stirring him up” with words constituted a sufficiently provocative act.

Under *Kee*, evidence of Anjela’s verbal provocation coupled with the conflicting accounts about who struck the first blow required the trial court to further instruct the jury that words alone were insufficient provocation to make Anjela the first aggressor. *Kee*, 6 Wn. App. 2d at 882. Without the additional language the jury was not properly instructed on the law of self-defense. *Kee*, 6 Wn. App. 2d at 882.

This error may be raised for the first time on appeal as an ineffective assistance claim. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

a. Ineffective assistance of counsel

The Sixth Amendment to the United States Constitution and

Wash. Const. art. I, § 22, guarantee the right to effective assistance of counsel. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). This Court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance that falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Woods*, 138 Wn. App. at 197. (quoting *Studd*, 137 Wn.2d at 551 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995))). The defendant must also demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *McFarland*, 127 Wn.2d at 336.

An attorney has a duty to research the relevant law.

Strickland, 466 U.S. at 690–91. Failing to object to this detrimental instruction, even though it was a WPIC, constituted ineffective assistance of counsel because *Kee* was published before Anjela’s trial and there was no strategic or tactical reason for counsel to agree to submit an instruction that incorrectly stated the law and negated the defendant’s self-defense claim. *Woods*, 138 Wn. App. at 197–98 (citing *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999)).

In *Woods*, the Court of Appeals held counsel was ineffective when he proposed a pattern jury instruction that misstated the standard for determining whether a defendant was entitled to act in self-defense based on appearances. *Woods*, 138 Wn. App. at 200-01 (The instruction mis-stated the defendant could act if he believed he was in actual danger of great bodily harm rather than correct standard the he believed he was about to be injured). The Court held the instruction prejudiced the defendant by lowering the state’s burden of proof because the jury may have applied the more stringent erroneous standard to find the defendant’s use of force was not lawful. *Woods*, 138 Wn. App. 191, 202.

Here, the erroneous language in the first aggressor instruction similarly prejudiced Anjela by allowing the jury to find she was the

first aggressor based on words alone, which lowered the state's burden of having to prove the absence of self-defense beyond a reasonable doubt.

Therefore, defense counsel's performance was deficient and actually prejudiced Anjela. Under these facts, this Court should reverse Anjela's conviction and remand for a new trial. *Kee*, 6 Wn. App. 2d at 882; *Riley*, 137 Wn.2d at 911; *Woods*, 138 Wn. App. at 202.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME RELATED

The trial court abused its discretion when it imposed community custody conditions that are not crime related.

This court reviews sentencing conditions for abuse of discretion. *State v. Munoz-Rivera*, 190 Wn. App. 870, 890, 361 P.3d 182 (2015) (citing *State v. Crockett*, 118 Wn. App. 853, 856, 78 P.3d 658 (2003)). The trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Munoz-Rivera*, 190 Wn. App. at 890 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The trial court may impose crime related prohibitions as conditions of community custody. RCW 9.94A.505(9). However, the conditions imposed must be supported by evidence in the record or found by the trial court to be reasonably related to the underlying offense. *Munoz-Rivera*, 190 Wn. App. at 892 (citing *State v. Jones*, 118 Wn. App. 199, 207-09, 76 P.3d 258 (2003)).

In *Munoz-Rivera*, the Court of Appeals struck the conditions of community custody that prohibited Munoz-Rivera from possessing or using drug paraphernalia or committing the offense of loitering for the purpose of engaging in drug related activity because evidence at trial showed that Munoz-Rivera escalated to physical violence when he drank alcohol but there was no evidence drug use played any part in committing the crime. *Munoz-Rivera*, 190 Wn. App. at 876.

Similarly, in *Jones*, the Court of Appeals struck community custody conditions requiring the defendant to participate in mental health treatment and counseling because the trial court did not obtain or consider a presentence report, a mental status evaluation, or make a finding that Jones was a person whose mental illness contributed to his crimes. *Jones*, 118 Wn. App. at 209.

Here, the trial court imposed several alcohol and drug related prohibitions, ordered Anjela to undergo a mental health evaluation, and to comply with all treatment recommendations. CP 78. However, the only evidence of drug use was testimony from Patrick that on the night of the incident Anjela smoked some marijuana.

Similar to *Munoz-Rivera* there was no testimony that drug use contributed to the incident. RP 148. Further, similar to *Jones*, the court did not consider a presentence report, a mental status evaluation, or find that Anjela was a person whose mental illness contributed to her crimes. RP 5-11 (3/22/19). Instead, the trial court sua sponte expressed concern about Anjela's mental health based on the court's opinion that Anjela's reaction was grossly disproportionate to what was occurring at the time. RP 11 (3/22/19).

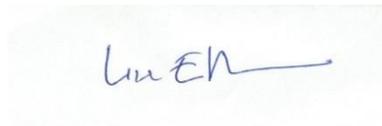
Under *Munoz-Rivera* and *Jones*, the alcohol and drug related prohibitions and the imposition of the mental health evaluation are not reasonably crime related. Thus, the trial court exceeded its authority in imposing those conditions which must be stricken. *Munoz-Rivera*, 190 Wn. App. 870, 892; *Jones*, 118 Wn. App. 199, 209.

E. CONCLUSION

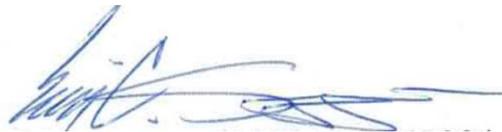
Anjela Hasseries respectfully request that this court reverse her conviction for assault in the second degree along with the special findings of domestic violence and that the assault was committed with a deadly weapon and remand for dismissal with prejudice. In the alternative, Hasseries requests that this court remand for a new trial where the jury can be properly instructed on the law of self-defense.

DATED this 27th day of September 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Erin C. Spenger", is written on a light-colored rectangular background.

ERIN C. SPERGER, WSBA No. 45931
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Anjela Hasseries/DOC#415026, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed on September 27, 2019. Service was made by electronically to the prosecutor and Anjela Hasseries by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

September 27, 2019 - 10:06 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53133-0
Appellate Court Case Title: State of Washington, Respondent v. Anjela Hasseries, Appellant
Superior Court Case Number: 18-1-01169-6

The following documents have been uploaded:

- 531330_Briefs_20190927100545D2842082_0285.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Hasseries AOB .pdf
- 531330_Designation_of_Clerks_Papers_20190927100545D2842082_9287.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Hasseries Supplemental Designation of Clerks Papers.pdf
- 531330_Other_Filings_20190927100545D2842082_6207.pdf
This File Contains:
Other Filings - Appearance
The Original File Name was Hasseries Notice of Appearance.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- erin@legalwellspring.com
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20190927100545D2842082