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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

SEAN LAIR

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

The trial court erred by giving a first aggressor jury instruction.

Defense counsel failed to provide effective assistance of counsel when he failed to object to the first aggressor jury instruction.

Issues Pertaining Assignments of Error

Assuming the facts most favorable to the State, Mr. Lair twice assaulted the victim with a knife as part of a single course of conduct with no prior aggressive actions. Under these facts, was the State entitled to a first aggressor jury instruction?

Did Mr. Lair receive effective assistance of counsel when his counsel failed to object to the first aggressor jury instruction?

B. Summary of Argument

This case started as a drunken misunderstanding between a group of friends that quickly escalated. What happened next is disputed, but it is undisputed that the incident ended when Sean Lair stabbed his friend Scott Mallow in the chest. The question for the jury was whether Mr. Lair was acting in self-defense and his actions were lawful. The question for this Court is whether this single course of conduct justified a first aggressor jury instruction.

### C. Statement of Facts

Sean Lair was charged by amended information with second degree assault while armed with a deadly weapon. CP, 8. The jury convicted him as charged. RP, 178. At sentencing the Court imposed a standard range sentence plus 12 months for the deadly weapon enhancement. RP, 187. He filed a timely notice of appeal. CP, 79.

Sean Lair, Scott Mallow, Todd Bartlett, and Brendon Byman all work together in the Local 36 Union as mechanical insulators, either as apprentices as a journeymen. RP, 35-36. Mr. Mallow is 205 pounds. RP, 68. Mr. Lair suffers from significant physical problems, including hearing impairment, a chronic heart condition, and lung disease. RP, 101-02. Mr. Lair's weight does not appear in the trial transcript, but according to the Information (which usually reflects Department of Licensing records), his weight is 210 pounds. CP, 2. Mr. Lair is 46 years old, and Mr. Byman is 20 years old. RP, 102, 70. Mr. Mallow's age does not appear in the trial transcript, but according to the judgment and sentence, his birthday is November 8, 1982, which would make his ten days shy of his thirty-sixth birthday on November 18, 2018. CP, 74.

On November 18, 2018, the four of them agreed to play a game of golf together. RP, 36. They met at Mr. Lair's residence at 9:30 in order to make a 10:30 tee time. RP, 37. When Mr. Mallow arrived, he discovered

Mr. Lair and Mr. Byman had started drinking earlier that morning and were already starting to show signs of intoxication. RP, 38. Mr. Lair was acting outgoing and friendly. RP, 39.

The golf game deteriorated quickly as the four participants drank alcohol. RP, 40. After three hours of golfing, the group of had only completed four holes and they kept getting passed by other groups, including families with children. RP, 41. On one hole, after Mr. Barlett teed off, he could not find his ball, only to discover he had missed the ball entirely and not realized it. RP, 40. Mr. Mallow, in his testimony stated he “purchased a pint which [he] didn’t finish.” RP, 40. He claimed he drank two-thirds of the “pint.” RP, 41. Later, on cross-examination, he clarified that the “pint” was not beer, but Fireball, a cinnamon flavored whisky. RP, 65, 69. Mr. Mallow brought his own Fireball because the golf course does not sell it. RP, 83. By the end of the game, the bottle of Fireball was completely empty. RP, 100. After four holes, they decided to abandon the golf game and return to Mr. Lair’s residence. RP, 43. Mr. Mallow opined he was too intoxicated to drive so he allowed Mr. Lair to drive his car. RP, 42.

Once at the house, Mr. Lair showed them his “clean bachelor pad” and the guys watched TV for a short while. RP, 43, 75. After about twenty to thirty minutes, Mr. Mallow went to use the restroom while the

other guys went to the backyard to smoke cigarettes. RP, 43, 75-76.

According to Mr. Byman, when they got to the backyard, he and Mr. Lair started “roughhousing a little bit.” RP 76. Mr. Byman described it as “play-fighting, wrestling around the yard.” RP, 76. During the roughhousing, Mr. Lair put Mr. Byman into an “arm bar,” which he described as Mr. Lair’s arm going around “part of his head.” RP, 76-77. Mr. Byman testified he had some “air restriction,” but he was not at the point of black out. RP, 77. During the wrestling, Mr. Byman’s arm got dragged, causing him pain. RP, 76.

At about that point Mr. Mallow exited the restroom, according to his testimony, observed Mr. Lair and Mr. Byman on the ground wrestling with Mr. Lair holding Mr. Byman in a “rear naked choke hold.” RP, 44. Mr. Mallow did not see the start of the “altercation.” RP, 44. From Mr. Mallow’s perspective, Mr. Byman was having trouble breathing and “gasping for air.” RP, 45.

According to Mr. Mallow, he said, “Sean, what are you doing?” RP, 45. Mr. Lair answered, “This is my son.” RP, 45. Mr. Mallow said, “That’s great. Let him go.” RP, 45. Instead, from Mr. Mallow’s perspective, Mr. Lair tightened his grip. RP, 46. Mr. Mallow reached down to try and release Mr. Lair’s hands, but, after being unsuccessful, decided to put Mr. Lair into a rear naked choke hold. RP, 46. Mr. Mallow

applied pressure to Mr. Lair's neck. RP, 46. His stated goal was to "break up the commotion." RP, 47. Eventually, Mr. Lair let go of Mr. Byman, at which time Mr. Mallow let go of Mr. Lair. RP, 47.

When Mr. Mallow stood up and turned around, he saw Mr. Lair swipe at him with a knife, cutting his left thumb. RP, 48. Mr. Mallow said, "What are you doing," and took a step back. RP, 49. Mr. Lair then "lunged forward" and stabbed Mr. Mallow in the chest area. RP, 49. Mr. Mallow started to scream at Mr. Lair. RP, 49. Mr. Lair eyes got big and he turned around and walked into the house. RP, 50. Mr. Mallow collected his belongings and left. RP, 52. Mr. Mallow later went to the hospital where he received five stitches. RP, 54.

In Mr. Byman's account, at some point he asked Mr. Lair to release him from the hold and he did. RP, 77. Mr. Byman did not see Mr. Mallow intervene or put Mr. Lair in a choke hold. RP, 77. After being released, Mr. Byman went promptly into the house to rest his arm on the couch. RP, 78. The next thing he knew, someone was yelling from the back yard that he had been stabbed. RP, 78. Right after that, he saw Mr. Lair enter the house. RP, 78. Mr. Lair looked frightened, but not angry. RP, 79. Mr. Lair said, "I did this for you." RP, 79. When he saw Mr. Mallow, he was holding his side and appeared shook up. RP, 80.

Mr. Lair testified on his own behalf. He described having a relationship with Mr. Byman for over two years that included frequently included roughhousing. RP, 98. On November 18, 2018, he and Mr. Byman went outside to smoke and started wrestling around. RP, 102-03. Mr. Lair put Mr. Byman into a wresting hold, with no intent of hurting him. RP, 103. Mr. Lair believes Mr. Byman asked him to stop, but with his hearing loss, he did not hear him. RP, 103. Suddenly, he felt Mr. Mallow grab him by the throat. RP, 103. Mr. Lair tried to get him Mr. Mallow to let go, but he kept squeezing harder and harder. RP, 103. Finally, Mr. Lair's head hit the ground and Mr. Mallow let go. RP, 104. Mr. Lair lost consciousness. RP, 104.

When Mr. Lair regained consciousness, he and Mr. Mallow had a heated exchange. RP, 105. Mr. Mallow accused Mr. Lair of trying to hurt Mr. Byman, called Mr. Lair a bitch and a pussy, and told him he had no balls. RP, 105. Mr. Mallow wanted to fight. RP, 106. Mr. Lair told Mr. Mallow to get the "F" off his property. RP, 105. He then told him to leave a second time. RP, 107. Mr. Lair reached into his pocket and realized he was carrying a two-inch pocket knife. RP, 106. He frequently carries a pocket knife to open boxes for work. RP, 106. At that point, Mr. Mallow lunged at him and Mr. Lair pulled the knife out and stabbed him once. RP, 107. Mr. Lair did not follow up the stabbing with any other assaultive

type behavior, such as hitting or kicking him. RP, 112. Mr. Lair went into the house and saw Mr. Byman, telling him he and Mr. Mallow had been in a fight over him. RP, 108.

Corporal Brandon McNew interviewed Mr. Mallow after the fact and filed a police report. RP, 92. He observed a penetrating stab wound in Mr. Mallow's rib area. RP, 92, 96. Corporal McNew did not recall seeing any sort of injury to his thumbs or hands. RP, 96.

Both parties submitted proposed jury instructions relevant to self-defense and lawful force. The State proposed a jury instruction, often called a first aggressor instruction, based upon WPIC 16.04 that read:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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, 27. The defense's proposed instructions did not include a first aggressor instruction. See CP, 34 et.seq. The Court twice addressed jury instructions with the parties. At the first instruction colloquy, the parties pointed out to the judge that the first aggressor instruction was proposed by the State by not the defense. RP, 87. There was no further discussion of the first aggressor instruction at the second colloquy except to propose which order the instructions should be placed. RP, 125-26. It does not

appear the defense ever specifically objected to the first aggressor instruction.

#### D. Argument

A first aggressor instruction is erroneous if the only evidence supporting it is the charged conduct or the claimed self-defense. *State v. Riley*, 137 Wn.2d 904, 908-09, 976 P.2d 624 (1999). The seldom-required first aggressor instruction must be based on a preceding, separate act of aggression by the defendant. *Id.* at 908-09, 910 n.2. That preceding act must be sufficient to entitle another (the named victim) to respond in lawful self-defense. *Id.* at 909-10. Courts may provide first aggressor instructions only under these circumstances because they vitiate the defendant's right to have the prosecution prove the absence of self-defense beyond a reasonable doubt. *Id.*

In *Riley*, the Court clearly indicated the aggressor instruction was proper because evidence showed Riley acted aggressively before the charged act of assault. 137 Wn.2d at 909. Although the evidence varied as to what occurred before Riley's assault on Jaramillo, it consistently showed "Riley drew his gun first and aimed it at Jaramillo" well before the charged assault. *Id.* at 906-07, 909.

This division of the Court of Appeals recently relied on *Riley* to reverse a conviction. *State v. Grott*, 50415-4-II, (March 5, 2019) (unpublished), *review granted*, 193 Wash.2d 1029 (2019). The Court said:

In order to issue a first aggressor jury instruction, the State was required to produce *some* evidence that Grott made an intentional act—*prior to the shooting*—that a jury could reasonably assume would provoke a belligerent response from the victim.

The State argues that the first aggressor instruction was proper because Grott fired the first shot. This argument fails because the State concedes that the first shot is part of the actual charged incident to which self-defense is claimed. To support a first aggressor instruction the evidence would have to show that Grott made an intentional act *before* the shooting that a jury could reasonably assume would provoke a belligerent response.

*Grott* (emphasis in original). As noted, the Supreme Court has granted review of this unpublished case, so we should have further input from that Court before Mr. Lair's case is final. *Accord State v. Wingate*, 155 Wn.2d 817, 820, 823, 122 P.3d 908 (2005) (relying on *Riley* to find first aggressor instruction supported because evidence showed, first, defendant drew his gun and aimed it at the named victim's friends, then, the named victim approached and was shot); *State v. Bea*, 162 Wn. App. 570, 577-78, 254 P.3d 948, *review denied*, 173 Wn.2d 1003, 271 P.3d 248 (2011) (holding first aggressor instruction must be supported by conduct separate from the charged assault and upholding instruction because such preceding conduct existed in that case); *State v. Stark*, 158 Wn.App. 952,

244 P.3d 433 (2010). (holding that it was error to give first aggressor instruction when victim was hiding in kitchen while her husband searched for her, threatened to kill her, and was trying to arm himself with a knife).

Conduct that arises after a defendant's need to act in self-defense cannot be used to justify a first aggressor instruction. When a defense is based in self-defense, the defendant asserts his actions were lawful. RCW 9A.16.020 (3) (actions in self-defense are not unlawful); *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). Conduct that is lawful cannot then be used to remove that lawfulness.

Where a trial court determines evidence supports a lawful force instruction, it is incumbent on that court to instruct the jury correctly on the law of self-defense. Allowing the State to interpose a first aggressor instruction for conduct that chronologically follows the defendant's need to act in self-defense would render irrelevant whether the defendant acted in self-defense. This would eviscerate the right to act in self-defense.

To hold otherwise also relieves the State of its constitutional duty to prove the conduct charged. *Riley*, 137 Wn.2d at 910 n.2; *Acosta*, 101 Wn.2d at 616-18, 625. When a defendant adequately raises self-defense, the State bears the ultimate burden of proof on the issue. *Acosta*, 101 Wn.2d at 625. The State must prove beyond a reasonable doubt that the defendant's conduct was unlawful, wrongful or without justification or

excuse. *Id.* at 618. That is, the State must prove the absence of self-defense beyond a reasonable doubt. *Id.* A first aggressor instruction relieves the State of this burden. *Riley*, 137 Wn.2d at 910 n.2. Without a preceding act of aggression, the jury must simply decide whether there is an act of lawful self-defense or a crime.

If a single course of conduct could be used to support a first aggressor instruction, the instruction could be provided in all self-defense cases. At trial, the charge is always supported by some evidence the defendant committed an aggressive criminal act. If that same act, or a portion of that act, could be used to justify a first aggressor instruction, it is clear there is no case in which a first aggressor instruction would not be warranted. Not only would this outcome be illogical, it is directly controverted by this state's case law. *E.g.*, *Riley*, 137 Wn.2d at 909-10 (first aggressor instructions are warranted in three limited circumstances).

Two Court of Appeals cases amply demonstrate the distinction. In *State v. Sampson* the first aggressor instruction was properly provided based on conduct that preceded both the charged act and the defendant's alleged need to act in self-defense. *State v. Sampson*, 40 Wn. App. 594, 699 P.2d 1253 (1985). Kenneth Sampson shot Bryant Conrad at a gas station and was charged with assault. The conflict arose when Sampson, the attendant, insisted Conrad owed more than he paid. *Id.* at 595.

According to the State, Sampson was the initial aggressor because he grabbed Conrad, withdrew a gun and aimed it at the ground while emitting a big, serious stare, refused to put the gun away, and became physically hostile. 40 Wn. App. at 595-96. Conrad then pushed Sampson, which formed the basis for Sampson's self-defense claim. *Id.* Only after Sampson's physically aggressive conduct and Conrad's push, did the charged assault occur: Sampson's gun discharged and hit Conrad in the stomach. *Id.* at 596.

Because, under the State's theory, Sampson pulled his gun and acted with force and/or threat of force before Conrad used force, the first aggressor instruction was proper. *Id.* at 600. Sampson could claim Conrad's push provoked the need for Sampson to act in self-defense. But the State could also argue that Sampson created his own "need" to act in self-defense through his prior acts of physical aggression.

In *State v. Wasson*, on the other hand, the Court of Appeals held the trial court improperly provided a first aggressor instruction because the defendant committed no act of aggression aside from the charged conduct. *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039 (1989). Wasson and a friend began fighting outside a bar, and Wasson removed a gun from the backseat of his car. *Id.* at 157. A neighbor, Thomas Reed, told them to be quiet, and entered the fray by knocking down Wasson's friend. *Id.* at 158.

After physically defeating Wasson's friend, Reed turned and took several steps towards Wasson. *Id.* Wasson responded by shooting Reed in the chest, and was charged with assault. *Id.* Wasson claimed he shot Reed in self-defense after Reed knocked down his friend and came toward him. *Id.* at 158.

Unlike *Sampson*, even under the State's evidence, Wasson did not initiate an act toward the named victim until the charged assault. Although Wasson made noise while he was fighting with his friend, he committed no aggressive act toward Reed until the charged shot to the chest. 54 Wn. App. at 159. Therefore, the court held the first aggressor instruction was erroneous and unfairly denied Wasson his claim of self-defense. *Id.*

In Mr. Lair's case, it is undisputed that he and Mr. Byman were horsing around and play wrestling when Mr. Mallow came out of the bathroom, although Mr. Mallow did not know they were playing around. Mr. Mallow then put Mr. Lair into a choke hold and held him until Mr. Lair released Mr. Byman. According to Mr. Lair, the choke hold was so tight that he lost consciousness and hit his head. At this point the two accounts differed significantly. According to Mr. Mallow, as soon as Mr. Lair stood up, he swiped him with a knife, cutting his left thumb, and then lunged at him and stabbed him. According to Mr. Lair, after recovering from his black out, he stood up and he and Mr. Mallow had a heated

exchange, with Mr. Mallow calling him a bitch and a pussy. Mr. Lair told him twice to leave, at which point Mr. Mallow lunged at him. Mr. Lair responded by stabbing Mr. Mallow in the chest once. Corporal McNew only observed one injury, the stab wound to the chest, and could not recall seeing a thumb injury.

Assuming the truth of Mr. Mallow's account, Mr. Lair first assaulted Mr. Mallow by swiping him with the knife, nicking his thumb. But the two alleged stabbings to the thumb and chest occurred in quick succession and were part of a single course of conduct. A single course of conduct cannot be used to justify a first aggressor instruction. To paraphrase this Court in *Grott*, the argument that the first aggressor instruction was proper because Mr. Lair stabbed first fails because the first stab is part of the actual charged incident to which self-defense is claimed. The trial court erred by giving the first aggressor instruction. As was the case in *Grott*, the error was not harmless.

The final issue that needs to be addressed is whether this error is preserved. First, Mr. Lair submitted a packet of jury instructions that included every other self-defense instruction, including instructions defining lawful force of personal property (WPIC 17.02), lawful force of your person (17.02), a defendant's right to act on appearances (WPIC 17.04), and a defendant's right to stand one's ground (WPIC 17.05). CP,

34-38. But he did not propose a first aggressor instruction (WPIC 16.04). It was the State that submitted the proposed instruction. Under the circumstances, this should be sufficient to preserve the error.

Second, assuming defense counsel should have objected more forcefully to the first aggressor instruction, it constituted ineffective assistance of counsel not to object. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). One of the issues for which the Supreme Court granted review in *Grott* is whether it constitutes ineffective assistance of counsel to fail to object to a first aggressor instruction.

There is no strategic reason to fail to object to the instruction given the relevant case law. This is amply demonstrated by the fact that, although defense counsel submitted every other self-defense instruction in the WPICs, he declined to submit the first aggressor instruction. He clearly knew that the first aggressor instruction undercut his theory of the case and should not be used. The fact that the instruction was given prejudiced the defense and prevented Mr. Lair from receiving a fair trial.

E. Conclusion

This Court should reverse and remand for a new trial.

DATED this 30<sup>th</sup> day of October, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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Attorney for Defendant/Appellant

**THE LAW OFFICE OF THOMAS E. WEAVER**

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