

FILED
Court of Appeals
Division II
State of Washington
2/20/2020 3:35 PM

No. 53492-4-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SEAN L. LAIR,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
SEAN BRITTAIN/WSBA 36804
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The Appellant's conviction should be affirmed because:

- (1) He did not suffer a manifest error affecting a constitutional right, when the jury was properly instructed on the law and he failed to raise the issue at trial that he now raises for the first time on appeal; and
- (2) His attorney was not ineffective when the he did not object to a jury instruction that was appropriate based on the facts of the case.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Did the Appellant suffer a manifest error affecting a constitutional right when the jury was appropriately instructed on lawful use of force, and he did not object to the instructions given at trial?**
- B. Was the Appellant's attorney ineffective for not objecting to a jury instruction that was appropriate based on the facts of the case?**

III. STATEMENT OF THE CASE

On November 18, 2018, Scott Mallow, Brendan Byman, Todd Bartlett and Sean Lair, the Appellant, intended on playing a round of golf at the Mint Valley Golf Course in Kelso, WA. RP at 36-37. The four men all worked with each other out of the same union hall and at Capstone. RP at 35-37. They had planned to meet at the Appellant's house in Longview, WA at around 9:30 a.m. RP at 37-38. Mr. Mallow arrived at 9:30 a.m. and observed that Mr.

Byman and the Appellant were at the house, intoxicated. RP at 38. Mr. Bartlett showed up a few minutes later and the four men traveled to the golf course. RP at 39.

The round of golf did not go as planned. RP at 40. All four men were drinking alcohol as they attempted to play golf. RP at 40. Mr. Mallow drank about two-thirds of a pint of whiskey. RP at 41. The Appellant continued to drink vodka. RP at 41. Mr. Byman was still intoxicated. RP at 42. Only four out of eighteen holes of golf were completed before the four men decided to cancel their outing. RP at 41.

Due to his intoxication, Mr. Mallow did not feel comfortable driving back to the Appellant's house and rode back in Mr. Bartlett's car. RP at 42-43. The Appellant, despite being intoxicated, drove Mr. Mallow's car back to his house. RP at 43. Upon arriving at the Appellant's house, Mr. Mallow, Mr. Byman and the Appellant went inside. RP at 43. Mr. Bartlett did not stay at the Appellant's house. RP at 43.

After approximately twenty to thirty minutes of hanging out at the Appellant's house, Mr. Mallow went to the backyard and observed an altercation between the Appellant and Mr. Byman. RP at 44. The Appellant and Mr. Byman were on the ground and the

Appellant had Mr. Byman in a rear-naked choke hold with his arm around Mr. Byman's neck. RP at 44. Mr. Mallow did not see how this altercation started. RP at 44. Mr. Mallow noticed that Mr. Byman was gasping for air and appeared to be in pain. RP at 45. Mr. Mallow asked the Appellant, "Sean, what are you doing?" The Appellant responded "this is like my son." Mr. Mallow told the Appellant to let go of Mr. Byman. RP at 45. The Appellant did not let go of Mr. Byman; instead, the Appellant began to squeeze Mr. Byman tighter. RP at 46. At this point, it appeared to Mr. Mallow that the Appellant was choking out Mr. Byman, who was beginning to turn blue. RP at 46; RP at 77.

Mr. Mallow, now concerned about Mr. Byman's safety, physically attempted to get the Appellant to release Mr. Byman. Mr. Mallow tried to grab the Appellant's hands and pry them apart, but did not succeed. RP at 46. Mr. Mallow then decided to place the Appellant in a rear-naked choke hold and force the Appellant to release Mr. Byman. RP at 46. The Appellant released Mr. Byman, and Mr. Mallow released the Appellant. RP at 47. Mr. Byman made a statement about his injured arm, and then went inside of the Appellant's house. RP at 47; RP at 78.

Both Mr. Mallow and the Appellant got up from the ground. Mr. Mallow initially had his back to the Appellant. When he turned around, Mr. Mallow saw the Appellant swipe at him with a knife and cut him on the thumb. RP at 48. Mr. Mallow began to retreat back towards a fence while asking the Appellant what he was doing. RP at 49. The Appellant then lunged at Mr. Mallow and stabbed him in the chest. RP at 49. Mr. Mallow observed blood starting to form on his shirt and realized he had been stabbed. RP at 49.

Mr. Mallow began to yell at the Appellant “what the fuck?” and “leave me alone.” RP at 49. The Appellant’s eyes got big, he took a few steps back, then proceed to enter his house. RP at 50. Mr. Byman recalled hearing the Appellant tell him “something along the lines of he had done it for me and I had to go or I had to help him, help him out.” RP at 79. At no point during the entirety of this altercation was Mr. Mallow armed with a weapon or intend on harming the Appellant. RP at 50.

Mr. Mallow retrieved his items and left the Appellant’s house. Mr. Mallow eventually went to the hospital for treatment. RP at 54. He observed the treating doctor place her finger about an inch deep into the wound. RP at 54. Mr. Mallow was stitched up and given medication for the pain. RP at 54. The day following the

stabbing, the Appellant called and text messaged Mr. Mallow numerous times attempting to apologize. RP at 57-62.

The State charged the Appellant by amended information with Assault in the Second Degree with Deadly Weapon Enhancement. CP 8-9. At trial, the Appellant sought a defense of denial and self-defense. RP at 5. The Appellant proposed the standard self-defense instruction. CP 34-38. The State proposed WPIC 16.04, the “aggressor” instruction. RP at 87; CP 27. The Appellant did not object to the State’s proposed instructions, including the “aggressor” instruction. RP at 119-129. The Appellant was convicted of Assault in the Second Degree with Deadly Weapon Enhancement. RP at 178. He was given a standard range sentence. CP 29. The Appellant filed a timely appeal. CP 31.

IV. ARGUMENT

C. THE APPELLANT DID NOT SUFFER A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT WHEN THE COURT GAVE THE AGGRESSOR INSTRUCTION TO THE JURY.

The Appellant did not object to the aggressor instruction at trial; he may not raise this issue for the first time on appeal because he did not suffer a manifest error affecting a constitutional right. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error

affecting a constitutional right.” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *See also* RAP 2.5. “Application of RAP 2.5(a)(3) depends on the answer to two questions: ‘(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?’” *State v. Grott*, ___ Wn.2d ___, ___ P.3d ___ (February 20, 2020) (citing *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

1. The alleged error does not suggest a constitutional issue.

The giving of an aggressor instruction alone does not suggest a constitutional issue, because whether the aggressor instruction is appropriate requires an evidentiary determination. “We hold that erroneously given first aggressor instructions are not necessarily constitutional errors, and reaffirm that constitutional errors are not necessarily manifest.” *Grott*, at 20. “[A]ppellate courts should determine on a case-by-case basis whether an unpreserved claim of error regarding a self-defense jury instruction constitutes a manifest constitutional error.” *State v. O’Hara*, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) (abrogating *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Instructional errors are not of constitutional magnitude when they allow for possible

justifications for defense counsel's failure to object or when they still permit the jury to come to the correct conclusion. *Id.*

The Appellant assumes the giving of the aggressor instruction necessarily suggests a constitutional issue. However, giving the aggressor instruction requires an evidentiary determination, which the trial court was best-positioned to make. Further, even if the facts had not supported the aggressor instruction, the giving of the instruction would not have involved a constitutional error. There were possible justifications for the Appellant's attorney's decision not to object to the aggressor instruction and the instructions as a whole still permitted the jury to come to the correct conclusion.

The Appellant's attorney chose not to object for two reasons. First, because there was sufficient evidence for the jury to find the Appellant was the aggressor, an objection would have been futile. Second, considering the testimony, it was likely the Appellant's attorney saw the benefit of the language in this instruction. Had there been no aggressor instruction the sole issue would have been whether it was reasonable and necessary for the Appellant to stab Mr. Mallow in the chest. Mr. Mallow testified that the Appellant stabbed him in the chest after the altercation with between the Appellant and Mr. Byman ceased. The Appellant admitted that he stabbed Mr. Mallow in the chest. Without the aggressor instruction, it would have

been difficult to convince the jury that this was a reasonable and necessary use of force.

The Appellant's attorney argued that Mr. Mallow was the aggressor. Because the Appellant's justification for using the weapon against Mr. Mallow was based on a claim that Mr. Mallow was the aggressor, it was likely the Appellant's attorney sought to focus the jury's attention on the aggressor instruction's language that stated: "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, offer, or attempt to use force upon or toward another person." Such language could have served to focus the attention of the jury on Mr. Mallow's acts, which the Appellant claimed precipitated his use of the knife. Because there were possible justifications for the Appellant's decision not to object to the instruction it did not constitute constitutional error.

Additionally, the jury instructions still permitted the jury to come to the correct conclusion. Lawful force was fully defined for the jury, and the jury was instructed that the State had the burden of proving the Appellant's use of force was not lawful beyond a reasonable doubt. The aggressor instruction itself contained the additional safeguard of requiring the jury to find the Appellant was the aggressor beyond a reasonable doubt before deciding self-defense was unavailable. The jury was thus required to either

find Appellant was the aggressor beyond a reasonable doubt or to find the State had proved the absence of lawful force by Appellant beyond a reasonable doubt. Had there had not been sufficient evidence that Appellant was the aggressor, the jury would not have found so beyond a reasonable doubt. And if the jury did not make this finding, it was still required to find the State had proved the absence of lawful force beyond a reasonable doubt. Thus, even if the evidence had been insufficient for the aggressor instruction, the instructions still permitted the jury to come to the correct conclusion.

2. The alleged error was not manifest because it had no practical and identifiable consequence on the trial.

Because the Appellant deliberately chose not to challenge the aggressor instruction at trial, and his rights were not actually affected, the alleged constitutional error was not manifest; therefore it should not be considered for the first time on appeal. To raise a constitutional challenge for the first time on appeal “[t]he error must be ‘manifest’ and not a constitutional issue that the appellant *deliberately* chose not to litigate below.” *State v. Trout*, 125 Wn. App. 313, 318, 103 P.3d 1278 (2005) (emphasis in original) (citing *State v. Valladareas*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983); *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994)). “Without a showing that the defendant’s rights were actually

affected by the alleged constitutional error, the alleged error is not ‘manifest’ under RAP 2.5(a)(3), and the claimed error may not be raised for the first time on appeal.” *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995) is not intended to afford criminal defendants a means for obtaining a new trial whenever they can identify some constitutional issue not raised in the trial court.” *McFarland*, 127 Wn.2d at 333. “The defendant must identify a constitutional error and show how in the context of the trial the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest[.]’” *McFarland*, 127 Wn.2d at 333.

Here, the constitutional error the Appellant alleges was not manifest, as there was no practical and identifiable consequence on his trial. To show the alleged error was manifest and raise the issue for the first time on appeal, the Appellant must show that his rights were actually prejudiced. He does not. The Appellant argues that he was simply engaging in horseplay as he was physically assaulting Mr. Byman. Mr. Mallows observed Mr. Byman in obvious pain and distress and attempted to have the Appellant release Mr. Byman. The Appellant did not release Mr. Byman and continued to harm him. Mr. Mallow then acted in defense of Mr. Byman and forced the Appellant to release Mr. Byman. The Appellant’s response was to pull out a knife and stab Mr. Mallow in the chest.

Thus, there was evidence that the Appellant was the primary aggressor by physically harming Mr. Byman. He continued to harm Mr. Byman despite Mr. Mallow's requests to stop. The Appellant's "self-defense" claim was in response to Mr. Mallow defending Mr. Byman. Therefore, the Appellant was the primary aggressor. Taking the evidence in the light most favorable to the State there was sufficient evidence for the court to give the aggressor instruction.

Further, at trial, when given the opportunity to object, the Appellant deliberately chose not to, stating the instruction was a correct statement of the law. The Appellant argues that because his attorney did not propose the aggressor instruction, that would be sufficient to preserve this issues for review. That argument is without merit. The instruction contained language that allowed the Appellant's attorney to focus the jury's attention on Mr. Mallow's actions, rather than the Appellant's assault of Mr. Byman or his decision to stab an unarmed Mr. Mallow in the chest. Thus, the Appellant's attorney deliberately sought not to challenge the instruction. For these reasons, the alleged error was not manifest, and the Appellant may not raise the issue for the first time on appeal.

3. There is no merit to the Appellant's claim because the aggressor instruction was appropriate.

Because there was sufficient evidence to support giving the aggressor instruction, the Appellant's claim of error has no merit. "A court properly submits an aggressor instruction 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 provoked the fight; or (3) the evidence shows the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). The initial altercation between the Appellant and Mr. Byman ended because Mr. Mallow intervened on Mr. Byman's behalf. In other words, Mr. Mallow stopped the Appellant from further harming Mr. Byman. The Appellant responded to Mr. Mallow's intervention by stabbing him in the chest with a knife. As was obvious to the trial court, and even the Appellant's attorney, the aggressor instruction was entirely appropriate under the facts of the case.

"Each party at trial is entitled to have the trial court instruct upon its theory of the case if there is sufficient evidence to support the theory." *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987) (citing *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). "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. Riley*, 137 Wn.2d 904, 910,

976 P.2d 624 (1999) (citing *Thompson*, 47 Wn. App. at 7). “An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *State v. Wingate*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Although “words alone” do not constitute sufficient provocation for giving an aggressor instruction, “[w]here 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.” *Riley*, 137 Wn.2d at 909-910.

Here, the aggressor instruction was appropriate. According to testimony of both Mr. Byman and Mr. Mallow, the Appellant was physically harming Mr. Byman when Mr. Mallow got involved. Once Mr. Byman was freed from the Appellant’s grasp, the Appellant stood up, pulled a knife out of his pocket and stabbed an unarmed Mr. Mallow. Because there was credible evidence that the Appellant made the first move by drawing a weapon, the aggressor instruction was appropriate.

The entirety of this altercation began because Mr. Byman was being assaulted by the Appellant. Mr. Mallow tried to verbally stop the Appellant from harming Mr. Byman. It was only upon the Appellant’s refusal to stop his conduct did Mr. Mallow get physically involved on behalf of Mr. Byman. Thus, there was sufficient evidence to find the Appellant’s acts provoked the altercation. Accordingly, there is no merit to the Appellant’s

claim that there was insufficient evidence to support the aggressor instruction.

4. The claimed error was harmless because no rational jury would have found that stabbing Mr. Mallow was a reasonable and necessary use of force under the circumstances.

The Appellant's act of stabbing an unarmed Mr. Mallow in the chest provided overwhelming evidence of unlawful use of force; therefore, even absent the aggressor instruction the result of the trial would have been the same. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). Because the Appellant's use of force was not reasonable and necessary, a jury would have found him guilty regardless of whether the aggressor instruction had been given. Further, the jury was instructed that the State had to disprove the Appellant's use of force was lawful beyond a reasonable doubt and could only avoid this if it found he was the aggressor beyond a reasonable doubt.

Even absent the aggressor instruction, to find this use of force to be lawful the jury would still have had to find it was reasonable and necessary. It was unreasonable for the Appellant to pull out a knife and stab Mr.

Mallow in the chest. That conduct went far beyond what anyone would reasonably find to be a necessary use of force. Thus, had the aggressor instruction not been given the outcome of the trial would not have been any different.

The claim that the aggressor instruction relieved the State of the burden to disprove self-defense beyond a reasonable doubt is flawed. The jury was instructed: “The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.” The jury was also instructed that only “if you find beyond a reasonable that the defendant was the aggressor, and the defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.” Thus, the jury was informed it was the State’s burden to disprove self-defense beyond a reasonable doubt. The aggressor instruction similarly held the State to a reasonable doubt standard before it could find self-defense to be unavailable. The reason self-defense becomes unavailable to an aggressor is because one who is the aggressor is necessarily not acting in self-defense.

The inclusion of the aggressor instruction with the other use of force instructions provided the jury with a comprehensive understanding of the law regarding use of force. In this case, either the jury found beyond a reasonable doubt the Appellant was the aggressor and was therefore not

acting in self-defense, or it found beyond a reasonable doubt that stabbing Mr. Mallow in the chest was an unreasonable or unnecessary use of force.

D. THE APPELLANT DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT OBJECT TO THE AGGRESSOR INSTRUCTION.

The Appellant did not suffer ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the

entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

1. Legitimate trial tactics supported the Appellant’s attorney’s decision not to object to the jury instruction.

There were legitimate tactical reasons for the Appellant’s attorney not to object. First, an objection would not have been sustained because the aggressor instruction was appropriate. Second, the aggressor language was helpful to the Appellant’s attorney’s closing argument, in which he argued Mr. Mallow was the aggressor.

“The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). “If trial counsel’s conduct can be characterized as legitimate trial strategy

or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn. App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel’s conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.*

Using jury instructions containing language supportive of a defense attorney’s closing argument, is an example of a strategic decision made concerning what is helpful to the overall defense. *Cf. State v. Piche*, 71 Wn.2d 583, 589-90, 430 P.2d 522 (1967) (“[T]rial practice, despite persistent efforts toward its advancement, remains more of an art than a science....the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics.”). “Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point...which in retrospect may seem important to the defendant.” *Id.* at 590.

With regard to jury instructions, trial attorneys must make several strategic decisions—these decisions are presumed to be reasonable. *See Grier*, 171 Wn.2d at 33. For example, “[n]ot requesting a limiting

instruction can be a legitimate tactic to avoid reemphasizing damaging evidence.” *State v. Embry*, 171 Wn. App. 714, 762, 287 P.3d 648 (2012). Also, the decision not to request a lesser included offense instruction has been found to be part of a legitimate trial strategy to obtain acquittal. *Id.* (citing *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009)). Moreover, when evidence would not support a self-defense claim, a defense attorney’s decision not to request a self-defense instruction constitutes a “clear strategic reason” for such action. *See State v. Calvin*, 176 Wn. App. 1, 14, 316 P.3d 496 (2013).

Here, the Appellant’s attorney’s decision not to object to the aggressor instruction was a legitimate trial strategy because the evidence supported giving the instruction, and the language of the instruction was helpful to the Appellant’s attorney’s closing argument. The entire thrust of the Appellant’s attorney’s closing argument was that the Appellant was justified in stabbing Mr. Mallow because Mr. Mallow was the aggressor. The Appellant’s attorney argued:

- **“They’re two men in the backyard roughhousing...so what does he do? He takes my client and renders him unconscious, He actually chokes my client until my client said I don’t even know how long I was out.” RP at 159-160.**
- **“My client says he then reached up as though he was going for his throat. At that point, my client has to then escalate his level of defense and he does display**

the weapon and he actually uses the weapon. RP at 160.

- **“Clearly, my client had very good reason to believe he was about to be injured. He had already been choked out. He told this gentlemen twice to leave his property, and the gentleman came back at him.” RP at 164.**
- **“He has a drunk person in his backyard that just choked him out that won’t leave and is coming at him again...He needs something else to intervene to protect himself and he happens to have a little two-inch blade in his pocket.” RP at 165.**
- **“So again what did my client see as he’s coming out of his haze with this drunk individual that’s just assaulted him in an extreme manner still coming at him, still not leaving his property, what is his impression at that time.” RP at 167.**

The Appellant’s attorney’s closing argument demonstrates that his strategy was to justify the Appellant’s use of force by claiming he had only done so to respond to an aggressor.

The aggressor instruction’s first sentence stated: “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, offer, or attempt to use force upon or toward another person.” The “no person” language was supportive of the Appellant’s attorney’s argument, as it did not merely apply to the Appellant but to any person. Without the aggressor instruction, the Appellant’s attorney would have been left with arguing it

was reasonable and necessary to stab Mr. Mallow. The Appellant's attorney's strategy was to change the jury's focus from the reasonableness of his actions to a claim that Mr. Mallow was the aggressor. This was a legitimate trial strategy.

2. The Appellant did not suffer any prejudice.

Because the outcome of the trial would have been the same even if the aggressor instruction had not been given, the Appellant did not suffer any prejudice. With regard to the second prong of the *Strickland* test: "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The Appellant did not suffer any prejudice. The jury was still instructed that the State had the burden of disproving the lawful use of force beyond a reasonable doubt. There is not a reasonable certainty that "but for" the aggressor instruction the result of the trial would have been different. No jury would have found the Appellant's conduct was a reasonable and necessary use of force, even had there not been an aggressor instruction. Because the Appellant did not suffer any prejudice his ineffective assistance claim fails.

V. CONCLUSION

For the above stated reasons, The Appellant's conviction should be affirmed.

Respectfully submitted this 20th day of February, 2020.



SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent

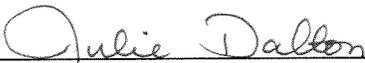
CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was electronically served RESPONDENT'S BRIEF via the Division II portal:

Thomas E. Weaver, Jr.
PO Box 1056
Bremerton, WA 98337-0221
tweaver@tomweaverlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 20, 2020.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

February 20, 2020 - 3:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53492-4
Appellate Court Case Title: State of Washington, Respondent v. Sean L. Lair, Appellant
Superior Court Case Number: 18-1-01722-7

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