



No. 291723

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ALEKSANDR PAVLIK,

Appellant.

**APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
THE HONORABLE JEROME J. LEVEQUE**

BRIEF OF APPELLANT

PAUL J. WASSON
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TABLE OF CONTENTS

	<u>Page</u>
I. <u>APPELLANT’S ASSIGNMENTS OF ERROR</u>	
No. 1	1
No. 2	1
No. 3	1
<u>Issues Pertaining to Assignments of Error</u>	
No. 1	1
No. 2	1
No. 3	2
II. <u>STATEMENT OF THE CASE</u>	2
III. <u>ARGUMENT</u>	15
A. <u>THE TRIAL COURT VIOLATED MR. PAVLIK’S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE BY EXCLUDING STATEMENTS MADE REGARDING DEFENDING HIMSELF AT THE TIME OF HIS ARREST UNDER THE RESPONDENT’S ARGUMENT THAT IT WAS ‘SELF-SERVING HEARSAY’</u>	15
B. <u>THE “FIRST AGGRESSOR” INSTRUCTION, COURT’S NO. 23, WAS GIVEN IN THE ABSENCE OF EVIDENTIARY SUPPORT AND DENIED MR. PAVLIK A FAIR TRIAL BY LIMITING HIS ABILITY TO ARGUE HE ACTED IN SELF DEFENSE (CP 129)</u> . .	19

C. THE TRIAL COURT ERRED BY DENYING MR. PAVLIK'S MOTION FOR NEW TRIAL AND/OR ARREST OF JUDGMENT 26

IV. CONCLUSION 27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	20
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	16
<u>Davis v. Alaska</u> , 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974)	16
<u>District of Columbia v. Heller</u> , 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)	24
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006)	16
<u>State v. Allery</u> , 101 Wn.2d 591, 595, 682 P.2d 312 (1984)	20
<u>State v. Alvarez</u> , 128 Wn.2d 1, 9, 904 P.2d 754 (1995)	27
<u>State v. Anderson</u> , 144 Wn. App. 85, 89, 180 P.3d 885 (2008)	22, 23
<u>State v. Arthur</u> , 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)	22
<u>State v. Birnel</u> , 89 Wn. App. 459, 473, 949 P.2d 433 (1998), <u>rev. denied</u> , 138 Wn.2d 1008 (1999)	21, 23, 24, 25

<u>State v. Brower</u> , 43 Wn. App. 893, 902, 901 P.2d 12 (1986).....	26
<u>State v. Darden</u> , 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).....	16
<u>State v. Finch</u> , 137 Wn.2d 792, 824, 975 P.2d 967 (1999)	18
<u>State v. Hardy</u> , 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)	17
<u>State v. Kidd</u> , 57 Wn. App. 95, 100, 786 P.2d 847, <u>rev. denied</u> , 115 Wn.2d 1010 (1990)	23, 25
<u>State v. Le Faber</u> , 128 Wn.2d 896, 900, 913 P.2d 369 (1996) <u>abrogated on other grounds</u> , <u>State v. O’Hara</u> , 167 Wn.2d 91, 101, 217 P.3d 756 (2009).....	20, 21
<u>State v. Maupin</u> , 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).....	16
<u>State v. McCullum</u> , 98 Wn.2d 484, 495, 656 P.2d 1064 (1983).....	20, 21
<u>State v. Painter</u> , 27 Wn. App. 708, 710, 620 P.2d 1001 (1980), <u>rev. denied</u> , 95 Wn.2d 1008 (1981)	17
<u>State v. Powell</u> , 126 Wn.2d 244, 259-61, 893 P.2d 615 (1995)	17
<u>State v. Riley</u> , 137 Wn.2d 904, 909, 976 P.2d 624 (1999)	19, 21, 22, 23

<u>State v. Sieyes</u> , 168 Wn.2d 276 (2010).....	24
<u>State v. Stark</u> , 158 Wn. App. 952, 244 P.2d 433 (2010).....	26
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977)	17
<u>State v. Wasson</u> , 54 Wn. App. 156, 161, 772 P.2d 1039, <u>rev. denied</u> , 113 Wn.2d 1014 (1989)	21, 23, 24, 26

Constitutional Provisions:

U.S. Constitution, Amends. VI, XIV	16, 20
U.S. Constitution, Art. 1 §§ 3, 22	16, 20
U.S. Constitution, Amend II	23
U.S. Constitution, Art. 1 § 24	24
U.S. Constitution, Fourteenth Amendment	20
U.S. Constitution, Sixth Amendment	20
Washington State Constitution, Art. 1, Sect. 3	20
Washington State Constitution, Art. 1, Sect. 22	20

Other Authorities:

ER 803 (a)(2)	17
ER 803(a)(3)	18

CrR 7.4 (a)(3).....	27
CrR 7.5 (a)(7).....	27
CrR 7.5 (a)(8).....	27

I. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pavlik's constitutional right to present his defense by excluding statements he made regarding self-defense at the time of his arrest, under Respondent's argument that it was "self-serving" hearsay.
2. The "First Aggressor" Instruction, Court's No. 23, was given to the jury in the absence of evidentiary support and thus denied Mr. Pavlik a fair trial by limiting his ability to argue he acted in self-defense. (CP 129)
3. The trial court erred by denying Mr. Pavlik's motion for new trial and/or arrest of judgment.

Issues Pertaining to Assignments of Error

1. When the accused raises self-defense, the jury must be allowed all relevant testimony from all parties bearing on that issue. Did the trial court improperly restrict the defendant and his counsel from presenting all relevant testimony on the question of self-defense as excited utterances and state-of-mind evidence, by excluding said testimony under the self-serving hearsay ruling? (Pertaining to Assignments of Error Nos. 1-3)
2. The Court may instruct a jury that the defendant cannot claim self-defense if he provoked the conflict only if that instruction is supported by the evidence. Did the trial court improperly give a first aggressor

instruction thereby denying Mr. Pavlik the ability to argue he acted in self-defense? (Pertaining to Assignments of Error Nos. 1-3)

3. Should the trial court have granted the motion for new trial and/or arrest of judgment based on the insufficiency of the evidence as well as these inconsistent verdicts? (Pertaining to Assignments of Error Nos. 1-3)

II. STATEMENT OF THE CASE

Procedural History

The appellant, Aleksandr Pavlik, was originally charged by an Information filed in Spokane County Superior Court on May 21, 2008, with two (2) felony counts: Count I, attempted first degree murder, RCW 9A.32.030(1)(A), while armed with a firearm under RCW 9.94A.602 and 9.94A.533(3); and Count II, first degree assault, RCW 9A.36.011(1)(A), with a firearm (again) under RCW 9.94A.602 and 9.94A.533(3). Both counts alleged the same victim, i.e. Gabriel Leenders, as well as the same date, i.e. May 19, 2008. (CP 1-2)

Mr. Pavlik appeared for arraignment on June 3, 2008, on these charges (CP 1-7) before the pre-assigned Judge, the Honorable Jerome J. Leveque. (CP 18; RP 5-6) At no time during said first hearing was the appellant advised, in writing or orally, about the mandatory minimums

attendant to the firearm portion of the charges. Id.; RCW 9.94A.533(3); 9.94A.602.

Assistant Public Defender Anna Nordtvedt was assigned to the case from the beginning (CP 8) and she gave written Notice of Intent to Rely on Self-Defense pursuant to RCW 9A.16.110 in the pre-trial stages. (CP 16)

The parties exchanged the typical omnibus and discovery request/answers as the case progressed toward trial, including several witness lists (with amendments), together with several trial date amended settings. (CP 9-17; 19-28).

As the eventual trial date approached, both parties filed and argued extensive pre-trial motions, including a hearing pursuant to CrR 3.5. (CP 29-53; RP 8-65). The trial court ruled on some motions in the State's favor, some in the appellant's favor, and, on a limited number, the trial court reserved rulings until more evidence was adduced. Id.

A jury was empaneled. (CP 143-146; RP 65) Both parties gave opening statements. (RP 66-74) The State called several witnesses (RP 74-308) and, following the denial of a defense motion to dismiss (RP 309-312), the defense called several more witnesses, including appellant Aleksandr Pavlik himself. (RP 312-443)

Both parties submitted proposed jury instructions (CP 54-85; 87-103) and, following argument and exceptions on the record (RP 447-455), the trial judge instructed the jury. (CP 104-136; RP 458-75) Following the Court's giving of said instructions, the parties gave their closing arguments. (RP 475-515) The jury then retired to deliberate on its verdict(s). Id.

During deliberation the jury sent out a written inquiry. (CP 138) The trial court reconvened court, advised the parties about the question, brought the jury back into court for a colloquy with the foreperson, and sent them back to then continue deliberations. (RP 523-531) Later, the jury returned a verdict as to Attempted First Degree Murder with a "not guilty" verdict (RP 532; CP 139), but at that same time found appellant "guilty" as to first degree assault. (RP 532-33; CP 141) The jury also found Mr. Pavlik to have been "armed with a firearm" as to the second count. (CP 142)

The trial court allowed defendant to remain free on bond pending sentencing. (CP 154) Several post-trial motions were filed and argued just before sentencing. (RP 538-560; CP 155-188) Although the Court denied the motion for new trial/arrest of judgment on several various and sundry grounds (CP 213-214), see infra, the trial court did enter an

exceptional sentence downward on the remaining count of assault. (CP 215-218; RP 577-580) This appeal followed sentencing (CP 219-235), while again defendant remained free on bond. (CP 200)

Motions, Trial, and Sentencing

Just prior to jury selection and trial, the court held a hearing on the Motions in Limine and the required CrR 3.5 hearing as to statements made by appellant at the scene. (RP 7-64; CP 29-53) At said hearing the testimony was conceded to by both parties during the CrR 3.5 portion of the hearing (RP 9-11), that certain statements were made at or near the scene, and immediately thereafter, and that the appellant's rights were read to him as soon as possible. Id. The question of voluntariness was not the issue at this hearing; rather the admissibility of those statements was the issue at the motions in limine portion of said hearing. The challenged portion of Mr. Pavlik's statements was argued in the record by the State this way:

Just briefly, Mr. Pavlik when he was --- after the second shot, which is the shooting where Mr. Leenders was struck in the chest, Officer Arredondo from the Spokane Police Department was actually right at the intersection within yards of the shooting when it occurred. He observed much of that second shot and the shot that ultimately resulted in the injury to Mr. Leenders. He immediately responded to the scene. Guns drawn. Ordered Mr. Pavlik to have his hands out the window. Ordered everybody to get to the ground. The defendant starts yelling, "You saw it, it was self-

defense.” Another officer responds, again without questioning the defendant, as he’s yelling “It was self-defense, he was punching me. Relax, guys, I have a concealed pistol license.” Another officer is there to assist. Defendant is yelling ‘You saw him punch me in the face. I shot in self-defense.’ He also asked if he shot the victim in the front of the chest.

The defendant is transported to the major crimes office where he’s interviewed by Detective Gilmore ... (who) just introduces himself to the defendant, says he’ll be back to interview him shortly. In that brief contact the defendant says without questioning, “I was just defending myself. An officer saw me getting punched.” He’s recontacted by Detective Gilmore, read his rights, validly waives those rights, again claims that he acted in self-defense and that he was trying to, quote, “not aim for a fatal area.”

(RP 11-12)

The State argued all those statements in the quotes were “self-serving” hearsay under the rules and case law and should be excluded from the officers’ testimony and only included later, if and when, the appellant chose to testify on his own behalf. The defense argued those statements in quotes were admissible as “excited utterances” and/or “state of mind” exceptions to the rules. (RP 10-23) The trial court ruled for the State. (RP 21-22)

The parties both gave opening statements (RP 66-74) before the first witness for the plaintiff testified.

Mr. Gabriel Leenders, the alleged victim in both counts, was the State’s first witness. (RP 74 ff) He and his friend, Brad Smith, had

decided on May 18th and 19th, 2008, to go on a bicycle ride around midnight. (RP 74-77) On their way toward the Centennial Trail, they stopped at Zip Trip on Perry and Illinois in Spokane and each bought (and drank) one Hurricane Beer outside the convenience store. (RP 77) They then rode their bikes South on Perry toward Mission Park. Id. While riding in dark clothing on the darkened street down Perry, Mr. Leenders testified, a car driven by appellant came up behind them and “swerved” in getting around them on the roadway. (RP 78-80) Leenders said that Brad Smith said something to appellant as he passed them, but he couldn’t recall what, just that Smith used a “raised voice.” Id.

Mr. Pavlik stopped his car, and “him and Mr. Smith started exchanging words, yelling at each other.” (RP 81) Mr. Leenders testified he “couldn’t remember” what they yelled to each other! Id. Mr. Leenders said he next walked up to the driver’s side of the car and yelled at him through his window to just “leave, nobody’s hurt ... told them they were both being stupid.” (RP 82) He thought Mr. Smith started to pick up his bike sometime during this encounter. Id.

Mr. Pavlik drove on Perry toward Mission, turned left and got his gun out of his trunk, Leenders said. (RP 83) Smith and Leenders were riding their bikes again and Mr. Pavlik fired one shot when the riders were

a block away. (RP 84-85) Mr. Leenders just kept riding, yelling something like “you better kill me” toward Mr. Pavlik, who instead got back in his car and went east on Mission. Id.

Smith and Leenders then stopped in the parking lot of Mission Park and talked to a couple of people there, (see infra for their testimony). (RP 86) Mr. Pavlik’s car came back into the parking lot and parked some five feet from them. Id. Mr. Leenders testified he wasn’t scared away (RP 88) and instead walked towards the open driver’s window and then told Mr. Pavlik “it’s probably a good idea for him to leave because he just shot at me and somebody probably called the police.” Id.

At that point he was right next to the car and when he saw the gun, he said, he reached in to grab it. (RP 88-89) He couldn’t remember if this gun went off before or after he struck Mr. Pavlik. Id. When the gun went off he was struck in the upper right chest. It was Mr. Leender’s testimony that after he was shot, he then “hit him (Pavlik) like four or five more times.” (RP 89) An officer was already at the scene at the intersection light just a little ways away, and he secured Mr. Pavlik and got help to get Mr. Leenders to the hospital for medical attention. (RP 88-91) Officer Stephen Arredondo was first “on the scene” because he was eastbound and stopped for the traffic light at Mission and Perry. (RP 132) When he

looked over to his right and a silver car was sitting there with one occupant (Pavlik), driver of the vehicle, and “there was a male (Leenders) standing along the driver’s side door and there was another male (Smith) at the back of the silver Honda straddling a bicycle.” (RP 133) Officer Arrendondo then observed Smith reach in through the driver’s window and started to punch at the driver. Id. Officer Arrendondo “then heard a gunshot, saw the flash bang, you know, totally taken back what I just witnessed.” (RP 134)

Officer Arrendondo radioed for more units, yelled at the driver to show his hands and called for medical assistance. (RP 134-135) (N.B. Because of the pre-trial ruling on the motions in limine, the officer could not testify on direct or cross-examination about any “self-defense” statements made to him at this time). When additional police units were present and Mr. Leenders was being transported to the hospital, several other civilian witnesses were interviewed as to what they had seen and heard.

Two Gonzaga University students, Kelly Patrick Scharber and Christopher Santucci, were walking along Mission Avenue in Mission Park when they saw “a car coming down South on Perry and two men on bicycles behind them ... and then he came down here and stopped his

car... and got out of the vehicle and got a pistol out of the trunk. The two men on bicycles continued to come up behind him and they were yelling at him. He took the gun and fired down and to the side towards the two gentlemen on bikes ... got back in his car and continued east on Mission ...” (RP 280-306) Because they walked over by the Avista building then, they were not physically present for the second confrontation, so they “heard” rather than saw the second gunshot. Id.

Brad Smith, Mr. Leender’s companion on the night in question, testified he rode his bicycle over to his friend’s house “to have a few beers.” (RP 110) After “one” beer each at Leender’s residence, (RP 110-111) they set out on their bikes to the Zip Trip where Smith bought two more beers. Id. They drank those beers on the sidewalk behind the Illinois Tavern. (RP 111) Smith said they were later riding their bikes down Perry to “(g)o downtown to a bar” (RP 112), when a car came up in their lanes and had to swerve to avoid hitting them. (RP 112-113) Smith yelled some obscenities at the car driver, but didn’t recall picking his bicycle up to throw at the car. (RP 114-118) The driver stopped a short distance away, got something from his trunk, and then Smith heard a noise that sounded like a firecracker. Id.

The car drove off and Smith went into the parking lot at Mission Park where he and Leenders were smoking a cigarette when the car came back into the parking lot by them. (RP 118 ff) He was standing some distance away when Mr. Leenders approached Mr. Pavlik's driver's window, didn't hear anything that was said, and the next thing he heard was a "pop" sound, "and then Gabe (Leenders) stumbled back and fell." (RP 118) Several police officers almost immediately responded to the scene, secured medical help for Leenders, photoed the scene, interviewed witnesses, etc. (RP 145-202; 211-239; 243-277)

When the State rested (RP 308) the defense moved to dismiss (RP 309-318) which was denied. Id.

Detective Gilmore testified that after receiving a call about the shooting at about 1:30 a.m. on May 19, 2008, he went to the Public Safety Building to interview Mr. Pavlik . (RP 319-341) Appellant was calm, was not intoxicated, and was cooperative in the interview. (RP 324-326) Detective Gilmore verified that Mr. Pavlik did have a concealed pistol license, (RP 326-27) as well as an alien firearms license. Id. (N.B. Again the Detective was limited to what he could or could not say because of the State's motion-in-limine. See supra, RP 322-25, and infra in Argument section). At the hospital Mr. Leenders had told this officer that "he

(Leenders) didn't have any alcohol to drink until after he was shot." (RP 335) (emphasis added)

The appellant testified on his own behalf. (RP 354 ff) He moved to this country from Ukraine when he was 13 years old in 1997. (RP 354) After midnight on May 19, 2008, he was visiting his girlfriend on the North side and then he was heading home to his father's house in the Spokane Valley when he took a route to get to Hamilton and the freeway, that went South on Perry. (RP 355-357) He didn't drink or consume drugs. (RP 357) As he was driving down Perry toward Avista he noticed two bicyclists in dark clothing who wouldn't let him pass. (RP 357-358) He stopped his car and one of the people raised up his bicycle and proceeded toward his car, while the other one tried to get into the car. Id. Mr. Pavlik warned them that he was armed, but when that didn't have any effect he drove off quickly. As he was driving off, "something hit" his car with "a loud bang ..." (RP 358-60)

Mr. Pavlik drove a safe distance, inspected his car, got out his gun from the trunk, warned them again that he was armed ("that didn't have no effect on them at all"), and when they kept advancing on him, he fired a warning shot. Id. He got back in his car, drove a short distance away, and then thought he should go back to tell the police his side of the case. (RP

360-62). He parked in the middle of the driveway in Mission Park in full view, to wait for the police. Almost immediately a person ran up to his window and started punching him and trying to reach for his gun and telling Mr. Pavlik that he (Leenders) was going to shoot him with that gun. (RP 363-65) His companion was behind the car as Pavlik was punched four-five times. Id. Mr. Pavlik testified he was scared of dying and shot Mr. Leenders once, trying to protect himself. (RP 365-66) He had more bullets than that but he tried to aim only for his right shoulder. The person stopped punching him and the police arrived. (RP 366) Mr. Pavlik gave a statement at the police station. He denied any intent to kill or assault, saying he was trying to shoot Mr. Leenders in the shoulder (a non-lethal) area, but because of the intrusion all the way into the car, the shot went into his chest instead. (RP 366-387)

Two other important defense witnesses were: (a) Dr. Robert Julien who testified that given Mr. Leenders blood alcohol level was 0.14 indicated he had drunk the equivalent of seven-eight beers given the high alcohol content of the beer he acknowledged drinking. (RP 415-23) He said that level of blood alcohol would definitely impair a person's behavior. Id., and (b) Troy Bunke, the investigator for the Public Defender's office who was present at the interviews (with defense

counsel) with both Msrs. Smith and Leenders. (RP 423-443) Mr. Bunke testified that both individuals gave differing stories during these interviews as to their drinking on the night in question, as well as to the confrontation. Id.

Following all this evidence and the parties rested and, out of the jury's presence took up exceptions to the jury instructions. (RP 447-455) The defense specifically objected during that hearing to the Court's giving of Instruction No. 23, the first aggressor instruction. (CP 129; RP 447-449) After the Court instructed the jury (RP 458-75; CP 104-136), the jury heard closing arguments (RP 475-515) and later returned a verdict of "not guilty" to attempted first degree murder and "guilty" to first degree assault. (RP 532-33; CP 139-142) The jury also found Mr. Pavlik was armed with a firearm at the time of the first degree assault. (CP 142)

Counsel filed and argued motions for new trial and/or arrest of judgment. (CP 155-188; RP 538-560) The trial court later denied said motions, infra, imposed an exceptional sentence downward on the remaining Count II of first degree assault, and allowed appellant to remain free on bond on appeal. (CP 201-218; RP 577-580) Appellant Pavlik then appealed to this Court. (CP 219-235)

III. ARGUMENT

A. THE TRIAL COURT VIOLATED MR. PAVLIK'S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE BY EXCLUDING STATEMENTS MADE REGARDING DEFENDING HIMSELF AT THE TIME OF HIS ARREST UNDER THE RESPONDENT'S ARGUMENT THAT IT WAS "SELF-SERVING" HEARSAY.

As set out above in the Statement of the Case section, supra, the Respondent submitted a separate brief at the time of the motions in limine hearing (RP 11-23; CP 46-51) to exclude certain statements made by the defendant, Mr. Pavlik at the time of his arrest and immediately thereafter. Specifically, the statements the Respondent wanted excluded were to the arresting officer, Stephen Arrendondo, and to the main investigating detective, Chet Gilmore, at the time of Mr. Pavlik's interview at the police station. (RP 11-12; CP 46-51) Specifically, the State wanted (and ultimately received) an Order excluding Mr. Pavlik's statement to Arrendondo "You saw it, it was self-defense," and to another officer at the scene, "It was self-defense, he was punching me," and to Detective Gilmore a short time later, "I was just defending myself. An officer saw me getting punched." Id. All these statements were essential to Mr. Pavlik's ability to tell the jury the full story about his self-defense. Not only were they not excludable as self-serving hearsay, instead those

statements were all admissible under exceptions to the hearsay rule. Their exclusion requires reversal of his first degree assault conviction.

a. The federal and state constitutions provide the accused the right to present a defense. The federal and state constitutions provide the accused the right to present a defense. The right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. U.S. Const. amends. VI, XIV; Const. Art. 1, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, a defendant must be permitted to introduce relevant, probative evidence. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). Relevancy is a low bar. "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The three or four statements Mr. Pavlik made to officers at the scene were admissible on several grounds. First, they were excited

utterances. ER 803 (a)(2); State v. Powell, 126 Wn.2d 244, 259-61, 893 P.2d 615 (1995). Hearsay statements are admissible as excited utterances if they are related to a startling event and made while the declarant was under the influence of that event so that he does not have any opportunity to make a calculated statement based upon his self-interest.¹ ER 803 (a)(2); State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Additionally, the statements were part of the res gestae of the crime. Powell, 126 Wn.2d at 263-64. The Powell Court found the trial court properly permitted witnesses to testify about what a murder victim said and did on the day she died to explain the hostilities between the victim and defendant prior to the murder. Id. See State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977) at 226 (quoting what victim said upon entering defendant's home); State v. Painter, 27 Wn. App. 708, 710, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981) (defendant and witness testified as to what the murder victim said immediately prior to being shot).

Additionally, ER 803(a)(3) creates an exception to the hearsay rule for statements that describe the declarant's then-existing mental,

¹ ER 803(a)(2) reads:

- (a) The following are not excluded by the hearsay rule, even though the declarant is not available as a witness:...
- (2) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

emotional or physical condition.² Mr. Pavlik's existing state of mind at that moment and the moments thereafter was that he was acting to defend himself and he should have been allowed to convey that to his jury. To do otherwise, as the respondent convinced the trial court to do here, is to stand logic and the defendant's right to a fair trial on its head. These statements are not the "self-serving" hearsay type contemplated by the rules and the case law. Even the case relied on by the State in its motion, State v. Finch, 137 Wn.2d 792, 824, 975 P.2d 967 (1999) is inopposite to the situation here in case sub judice. In Finch, that defendant told a friend after a shooting that he did not intend to kill the officer. That was clearly self-serving and not anything like the present case. This appellant was telling people at the scene that he was just defending himself, that the alleged victim was punching him and that he tried to aim for a non-vital spot so as to just get Leenders to back off. This case is clearly distinguishable from the Finch decision. This Court should reverse the motion in limine and order a new trial with all of Mr. Pavlik's statements

² ER 803(a)(3) creates a hearsay exception for then existing mental, emotional or physical condition:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's Will.

at the scene ordered admissible from any witness, police or otherwise, as excited utterances and descriptions of his then-existing mental, emotional, and/or physical condition.

B. **THE “FIRST AGGRESSOR” INSTRUCTION, COURT’S NO. 23, WAS GIVEN IN THE ABSENCE OF EVIDENTIARY SUPPORT AND DENIED MR. PAVLIK A FAIR TRIAL BY LIMITING HIS ABILITY TO ARGUE HE ACTED IN SELF-DEFENSE. (CP 129)**

Washington law permits a person who reasonably believes he is in danger of imminent bodily harm to defend himself, even with the use of deadly force, but a person who provokes an altercation may not claim self-defense unless he first withdraws from the combat. When instructing the jury concerning self-defense, the court may give an aggressor instruction only if there is evidence to show the defendant “started the fight,” the improper use of an aggressor instruction effectively denies the defendant the ability to claim he acted in self-defense. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Here, the trial court denied Mr. Pavlik the ability to effectively present his defense where there was no evidence to support the giving of the first aggressor instruction, and his sole first degree assault conviction must be reversed.

a. Jury instructions on self-defense must clearly explain the correct legal standard, and an aggressor instruction is rarely justified. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.³ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends VI, XIV; Const. Art. 1, §§ 3, 22. Where a defendant raises self-defense in a criminal prosecution in Washington, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). The jury instructions must accurately inform the jury of the law of self-defense. State v. Le Faber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O’Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). A jury

³ The Fourteenth Amendment states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

Article 1, Section 3 of the Washington Constitution states, “No person shall be deprived of life, liberty, or property, without due process of law.”

Article 1, Section 22 provides specific rights in criminal cases. “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ... to testify in his own behalf, to meet the witnesses against him face to face, to have a compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury...”

instruction misstating the law of self-defense is presumed prejudicial. Le Faber, 128 Wn.2d at 900; McCullum, 98 Wn.2d at 487-88.

Under Washington law, a person who provokes an altercation may not claim self-defense unless he in good faith first withdraws from the conflict at a time and manner that informs the other person that he is withdrawing from further aggressive activity. Riley, 137 Wn.2d at 909. The aggressive act in question must be such that it entitles the victim to act in self-defense. Riley, 137 Wn.2d at 911-12. “[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force.” Id. at 912.

Instructions defining this concept, commonly referred to as aggressor instructions, may be given only in the limited circumstance that they are supported by credible evidence. Riley, 137 Wn.2d at 910 n.2; State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), rev. denied, 138 Wn.2d 1008 (1999). “Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction.” State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039, rev. denied, 113 Wn.2d 1014 (1989) (quoting State v. Arthur, 42 Wn. App.

120, 125 n. 1, 708 P.2d 1230 (1985)). Whether the State has produced sufficient evidence to support the giving of an aggressor instruction is a question of law reviewed de novo. State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

b. The State did not produce sufficient evidence to support the giving of Instruction 23. Over Mr. Pavlik's objection, the trial court instructed the jury that a person may not claim self-defense if he is the first aggressor.⁴ (CP 129; RP 469). Instruction 23 read:

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

(CP 129)

The Court may give an aggressor instruction where (1) there is evidence from which the jury could reasonably determine the defendant provoked the fight, (2) there is conflicting evidence as to whether the defendant provoked the fight, or (3) the evidence shows the defendant made the first move by drawing a weapon. Riley, 137 Wn.2d at 909-10;

⁴ This instruction was also one of the grounds upon which Mr. Pavlik moved for a new trial, infra. (CP 175-183; RP 539 ff)

Anderson, 144 Wn. App. At 89. The provoking act cannot be the act that constitutes the charge itself. Wasson, 54 Wn. App. At 159-60. Nor are words a belligerent act for purposes of that instruction. Riley, 137 Wn.2d at 909-10; Anderson, 144 Wn. App. At 89.

Mr. Pavlik testified that he was scared one of both of these men were going to attack him. (RP 363-365) He testified he was only trying to protect himself. Id. He only did what was necessary to protect himself and was in a place where had a right to be. See CP 131-Instruction No. 25, which imposed no duty on him to retreat from a public park.

First, it is important to remember that the aggressive act must be different from the assault itself. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, rev. denied, 115 Wn.2d 1010 (1990); Wasson, 54 Wn. App. At 159-60. Thus, the fact that Mr. Pavlik shot Leenders with a gun does not mean he was the aggressor.

Second, the provoking act must be an intentional act reasonably likely to provoke a belligerent response from the victim. Birnel, 89 Wn. App. at 473; Wasson, 54 Wn. App. at 159. Mr. Pavlik's action in returning to wait for the police to give his report was not reasonably likely to provoke violence. Additionally, Mr. Pavlik was within his rights by arming himself, and, in fact, was licensed. U.S. Const., Amend. II; Const.,

Art. 1, § 24; District of Columbia v. Heller, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); State v. Sieyes, 168 Wn.2d 276 (2010).

Thus, in Wasson, this Court found a first aggressor instruction was not properly given. The defendant and his cousin were in a fight, and the alleged victim came outside after hearing the commotion, told the two to quiet down, and eventually fought with the defendant's cousin, knocking him to the ground. Wasson, 54 Wn. App. at 157. When the victim then "took several rapid steps" towards the defendant, the defendant shot him in the chest. Wasson, 54 Wn. App. at 157-58. Because the defendant did not initiate any act towards the victim until the final assault, there was no evidence he acted in order to provoke an assault. Id. at 159-60.

Also akin to this appellant's case is Birnel, where this Court also addressed the murder of an estranged spouse. There, the defendant had moved out of the family home, but he was sleeping at his wife's house one night because of a child's birthday party and was awakened by noises that caused him to suspect his wife was taking methamphetamine. Birnel, 89 Wn. App. at 462-63. The defendant went through his wife's purse, found drugs, and decided to confront her, waiting for her at the top of the stairs. Id. at 463. The two argued about her drug use and ability to pay the bills, as well as his action in going through her purse. Id. The wife then ran to

the kitchen and returned with a large knife. Id. The defendant claimed he fell over his wife and as he arose from the floor, she attacked him, and a fight over the knife ensued, during which the wife was fatally stabbed in the back. Id. at 463-64.

The defendant argued he acted in self-defense, whereas the State claimed he acted out of rage and should have known how his wife would react when he searched her purse without permission. Id. at 466, 473. This Court found the trial court erred by giving an aggressor instruction, as the defendant did nothing but wait for his wife at the top of the stairs and it was not reasonable to assume searching his wife's purse would provoke the attack. Id. at 473.

Similarly, the evidence in Mr. Pavlik's case does not support a first aggressor instruction. He was in a place where he had a right to be. It is not reasonable to expect someone to come up and punch you five times through your driver's window and reach for your gun!

Mr. Pavlik's first degree assault conviction must be reversed. The improper giving of the "first aggressor" instruction is a constitutional issue, and the State must demonstrate the error is harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473; Kidd, 57 Wn. App. at 101. Mr. Pavlik presented a strong case that he acted in self-defense, but the

prosecution did not have to disprove his self-defense claim in light of the erroneous jury instruction.

The first aggressor instruction deprived Mr. Pavlik of his ability to claim self-defense. Excluding that instruction, and in combination with Instruction No. 25 (CP 131), the jury would have understood that Mr. Pavlik was entitled to “stand his ground” in defending himself. Wasson, 54 Wn. App. at 160; State v. Brower, 43 Wn. App. 893, 902, 901 P.2d 12 (1986). The trial court erred by giving Instruction No. 23. See also this court’s opinion in State v. Stark, 158 Wn. App. 952, 244 P.2d 433 (2010). Appellant’s conviction herein must be reversed and dismissed, or, at a minimum, reversed and remanded for a new trial excluding the first aggressor instruction. Wasson, *supra* at 161.

C. THE TRIAL COURT ERRED BY DENYING MR. PAVLIK’S MOTION FOR NEW TRIAL AND/OR ARREST OF JUDGMENT.

Following the one guilty verdict on first degree assault, the appellant moved for a new trial and/or arrest of judgment on a variety of grounds. (CP 155-156; 173-178; 181-183) Said motion was denied. This was error.

Judgment should be arrested and charges dismissed due to insufficiency of proof of a material element of the crime charged. CrR

7.4(a)(3). Sufficiency of the evidence is a question of constitutional magnitude which an appellant could raise even for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995).

Likewise, a new trial should have been granted when the verdict is contrary to the law and substantial justice has not been done. CrR 7.5(a)(7); CrR 7.5(a)(8). Because of the erroneous giving of Instruction No. 23, supra, that is certainly the case here. Appellant will not reiterate all the arguments from above regarding sufficiency of the evidence and/or the errors in giving the “first aggressor” instruction, but instead adopts those arguments from sections A, B and C of the brief herein as if set out in full. The appellant was denied a fair, constitutional trial for the reasons cited, and should now be granted either a new trial or arrest of judgment entirely on the remaining assault conviction.

IV. CONCLUSION

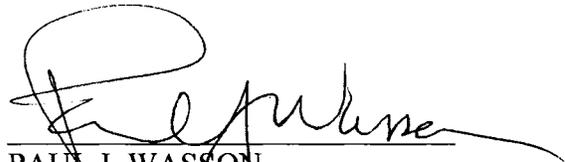
The trial court improperly and incorrectly instructed the jury it could not consider self-defense if it found that Mr. Pavlik was the “first aggressor” under the Court’s Instruction 23 and further violated his constitutional right to present his defense by prohibiting witnesses from testifying to the jury about statements Mr. Pavlik made regarding defending himself under a “self-serving” hearsay ruling when in fact Mr.

Pavlik's statements were "excited utterances" and involved his state of mind at the time he was attacked. By ruling that way the trial court deprived Mr. Pavlik of a fair trial and his constitutional right to present a defense. His conviction for first degree assault must therefore be reversed and dismissed.

Finally, the trial court should have granted the appellant's motion for either a new trial or arrest of judgment on the grounds of sufficiency of the evidence and the inconsistent verdict results.

DATED this 1st day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Wasson", written over a horizontal line.

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