

**FILED**  
May 26, 2017  
Court of Appeals  
Division III  
State of Washington

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No. 34360-0-III

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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STATE OF WASHINGTON

Respondent

v.

MICHAEL L. GEHRKE,

Appellant

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**Reply Brief of Appellant**

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Appeal from Spokane County Superior Court No. 15-1-04223-9

The Honorable Michael P. Price

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i  
TABLE OF AUTHORITIES ..... i  
ARGUMENT..... 1  
CONCLUSION..... 3

TABLE OF AUTHORITIES

**Cases**

*State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973)..... 1, 2

## ARGUMENT

Contrary to the State’s assertion, the record *does* provide sufficient evidence to support the rejected instruction regarding the revival of self-defense, and so the trial court’s first-aggressor instruction became an inaccurate or incomplete statement of the law.

In its brief, the State argues that there was “no evidence suggesting the defendant withdrew from the affray at any time.” Br. of Respondent at 13. This statement of the case is not only inaccurate as a matter of record, is also contains a finding of fact by the State – a finding to which Mr. Gehrke was denied the opportunity to have a the jury make at trial when his proposed instruction was declined.

The testimony adduced at trial stated that, while Mr. Gehrke kicked Mr. Pineyro’s bicycle, it was Mr. Pineyro who drew the first weapon – a hammer – to which Mr. Gehrke responded by pulling out his knife while backing away a distance of approximately 17 feet as Mr. Pineyro continued rushing at him. VRP at 513-14, 686-89. It is the mere existence of this testimony which creates a question of fact under the law as to whether Mr. Gehrke’s actions were intended to be a wary withdrawal, thereby reviving his right to self-defense.<sup>1</sup> *E.g., State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d

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<sup>1</sup> This would also have been a subject upon which a self-defense expert could have been called to testify, thereby heightening the prejudice of the trial court’s decision to permit the State to amend the information as discussed in the Initial Brief of Appellant.

151 (1973). This question of fact then, merited the proposed defense instruction and the trial court erred in declining to so instruct.

While in its brief the State chooses to characterize the retreat and ultimate engagement in a manner that has Mr. Gehrke “dodging and parrying d’Artagnan-like while looking for his opportunity to strike a knife blow,”<sup>2</sup> is it precisely this ability to weigh the relevant testimony *in light of its legal significance* that was denied to Mr. Gehrke at trial.

Critically, the issue at Bar is not whether the jury would have actually found Mr. Gehrke’s retreat to be a withdrawal from conflict. Rather, the issue is that the jury was not advised it had the ability to make this finding in the first instance, and so the result of its verdict must be called into question when viewed in light of the applicable law.

It is possible that, given the length of the trial, the court simply overlooked the importance of the relevant testimony when making its decision. Regardless, when viewing the instruction as a whole, the omission of an instruction informing the jury that the right of self-defense could be revived meant that the trial court ostensibly required that the jury convict Mr. Gehrke if it found him to be the first aggressor – regardless of his subsequent conduct.

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<sup>2</sup> Br. of Respondent at 16.

In practice, the result of the trial court's instructions was that the jury's focus was redirected from the question of who aggressed in the escalated hand-to-hand conflict to the question of whether Mr. Gehrke kicked Mr. Pineyro's bike – thereby initiating physical conflict, albeit not with deadly weapons. As discussed previously, this was error,<sup>3</sup> and the resulting verdict merits vacation by this Court for the reasons discussed.

## CONCLUSION

The trial court's failure to properly instruct the jury on the law was an abuse of discretion, and mandates a vacation of Mr. Gehrke's conviction.

Respectfully submitted this 26<sup>th</sup> day of May, 2017 by:

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<sup>3</sup> It is also one of the reasons that first-aggressor instructions are to be rarely used.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this REPLY BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

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**Transmittal Letter**

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Court of Appeals Case Number: 34360-0

Party Represented: Appellant

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