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NO. 35716-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN HALL,

Appellant.

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

The Honorable Raymond F. Clary, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a first aggressor instruction. CP 433 (Instruction 30).

2. In the alternative, Appellant was deprived of his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Did the trial court err in giving a first aggressor instruction when the act that constitutes the charged crime cannot be the act that warrants the instruction and when there were no other contemporaneous aggressive acts by Appellant prior to the act alleged to constitute the crime?

2. Does instructing the jury on the first aggressor doctrine when evidence does not support the instruction constitute manifest constitutional error affecting a constitutional right that may be raised for the first time on appeal?

2. If the trial court erred in instructing the jury on the first aggressor doctrine but it does not arise to manifest constitutional error that may be raised for the first time on appeal, then did Appellant's trial counsel fail to provide Appellant with effective assistance of counsel by initially objecting to the instruction, but later deferring to the court on whether it should be provided?

B. STATEMENT OF FACTS

1. Procedural Facts

The Spokane County Prosecutor charged appellant Brian Hall with premeditated first degree murder with a firearm enhancement, first degree burglary with a firearm enhancement, second degree assault with a firearm enhancement, and first degree unlawful possession of a firearm. CP 345-46. The prosecution alleged Hall went into Demetrius Dennis's place of business armed with a firearm, shot and killed Dennis with premeditated intent, then pointed the gun at Dennis' girlfriend, Melissa Wilson, before fleeing. CP 490-94 (Sub No. 2, Statement of Investigating Officer Affidavit of Facts, filed 12/28/15).

Hall pled guilty to the unlawful possession of a firearm charge. CP 347-57; RP<sup>1</sup> 225-36. A trial was held on the remaining charges October 23, 2017 through November 3, 2017, before the Honorable Judge Raymond F. Clary. RP 237-1384. A jury found Hall guilty of the murder and burglary but acquitted him of the assault. CP 436, 439, 441; RP 1378-80. On November 30, 2017, the trial court imposed standard range sentences. CP 453-81. An order correcting the judgment and sentence was entered February 2, 2018. CP 494-95. Hall appeals. CP 482-83.

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<sup>1</sup> There are seven consecutively paginated volumes of verbatim report of proceedings cited herein at "RP."

2. Substantive Facts

Brian Hall and Melissa Wilson dated for a couple of years before breaking up sometime between the summer of 2014 and the end of the year. RP 516, 524, 1154-56. They had lived together for approximately eight months in a house at 411 W. Central Ave., Spokane, Washington (hereafter “Central House”). RP 511, 524.

In early 2015, Wilson began dating Demetrius Dennis, and was soon pregnant with his child. RP 510-11, 530. Dennis bought Wilson a 2003 Jaguar, which she drove to work at the Paul Mitchell Salon School. RP 531. At some point in 2015, Dennis began using the Central House, which Wilson still rented but did not live at, as a marijuana dispensary and music studio. RP 511, 870.

On October 2, 2015, one of the salon school students was in her car in the school parking lot when she saw a man slash all four tires on Wilson’s Jaguar. RP 825-26. It was Hall. RP 1168. Wilson was pregnant with Dennis’s child at the time, and Hall knew it. RP 1162, 1207. According to Hall, Dennis confronted him about the tire slashing “and started threatening about going to my mom’s house at West 5711 Old Fort Road,” (hereafter “Old Fort House”), which was where Hall was living in 2015 and where his father had died approximately two weeks earlier. RP 1165, 1172-73.

Hall's father's funeral service was the following day, October 3, 2015, starting at 2 p.m. 2RP 1175. At about 3 a.m. that morning, Hall heard gunshots outside the Old Fort House. RP 1174. Police responded and found three bullet holes in the driver's door of Hall's car, which was parked out front. RP 851.

At about 9 a.m. on October 3, 2015, Hall started receiving text messages from Dennis threatening him with harm, claiming Hall was a "cancer" to his own family, and that if Hall would tell him where the funeral services was being held for Hall's father, he would come bury the entire Hall family. RP 1175-76.

On October 15, 2015, Hall attended a music event where he saw Dennis during a break in the music. RP 1181-82. Hall admitted he "sarcastically called out to Dennis, "Hey De, what's up?" When Dennis immediately took a fighting stance, Hall hit him. RP 1182. One of Dennis' companion then brandished a knife and told Hall that if he hit him, Hall would die that night, then headed towards a nearby SUV, so Hall left the event. RP 1182. Shortly thereafter Hall started receiving text messages from Dennis threatening to go to the Old Fort House and suggesting Hall hurry home to save his mother. RP 1182, 1184-86. Hall rushed to the Old Fort House but decided to park his car a block away, so Dennis would not know he was there, but when he was walking from his

car to the house he saw a suspicious car out front, so when he got inside he called 911. RP 1187-88. While he was on the phone with the 911 dispatcher, Hall learned his car had been set on fire. RP 1189.

The next morning Hall received a text from Dennis stating, “Are we through yet, because you’re losing, laugh out loud, hah-hah-hah.” RP 1190. Hall did not respond, but he did move out of the Old Fort House, fearing for his mother’s safety if he stayed and moved into what he described as “roach motels”. RP 1190-91. Hall checked into the Knight’s Inn approximately two weeks before Christmas 2015. RP 1191. Hall also acquired a gun, got a new cell phone number and new service provider so Dennis could not contact him. RP 1192.

At some point prior to December 26, 2015, Hall accidentally discharged the gun in his room at the Knight’s Inn, which caused damage to his room and the room next door. RP 821-22, 1193-94. Hall admitted his lack of familiarity with firearms led to the accidental discharge. RP 1193-94. The following day Hall’s mother paid for the damaged. RP 822.

By December 26, 2015, Hall was depressed by his father’s death and his ongoing conflict with Dennis, which left him spending both Thanksgiving and Christmas alone, so when he learned Dennis was throwing a party that night at the Central House, he decided to attend. RP 1195, 1226. Hall testified that he was hoping they could reach a “peaceful

resolution” so that both could carry on with their lives without fear for themselves or their families. RP 1195, 1218.

Hall admitted he took his gun with him but denied ever intending to use it. RP 1195-97. Instead, Hall explained he took the gun because despite hoping for a “peaceful resolution” with Dennis, he noted, “I was familiar that they were dangerous people and I just had a gun for protection.” RP 1196; see also RP 1219-20 (Hall explains his fear of Dennis and his “goons”).

His car having been destroyed by fire, Hall walked the several blocks from the Knight’s Inn to the Central House. RP 1195-96. Hall feared Dennis, so it took some time for him to work up the courage to knock on the door. RP 1196. Once he finally worked up the courage, Dennis opened the front door after Hall knocked. RP 1198.

Hall recalled Dennis acting surprised to find him standing at the door, but “immediately got hostile.” RP 1198. Specifically, Dennis asked Hall, “[W]hat the F. What the F are you doing here?,” and then lunged at Hall as he appeared to Hall to be reaching for a gun from his waistband. RP 1199, 1221. In response, Hall, who had his gun inside his coat pocket, fire a single shot, then saw Dennis run around a corner in the house. RP 1222. Hall was scared, so he fled on foot back to the Knight’s Inn. RP

1199. Hall denied seeing anyone else at the Central House during his encounter with Dennis and denied ever entering the home. RP 1199.

Melissa Wilson, Dennis' girlfriend, at the time, claimed she was at the Central House when Hall came to the door. RP 515. She claimed that when Dennis opened the door, Hall stepped inside, raised his gun and shot Dennis in the chest, then turned towards her and her child and pointed the gun at them before fleeing the house. RP 515, 518.

The single shot fired by Hall struck Dennis in the chest and caused his death. RP 751-52, 757.

Not knowing if Dennis had been shot or not, Hall was "scared and freaked out," so he disposed of both the gun and his coat before returning to the Knight's Inn where he was later arrested without incident the following morning. RP 923, 1201-02, 1222.

C. ARGUMENT

THE "FIRST AGGRESSOR" INSTRUCTION DEPRIVED HALL OF A FAIR TRIAL.

The act which constitutes the charged offense cannot serve to support giving a first aggressor instruction. Nor can the fact Hall had a concealed weapon justify giving a first aggressor instruction. Unfortunately, the trial court failed to recognize these limitations and gave the instruction. This Court should reverse and remand for a new trial.

Washington courts disfavor aggressor instructions. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), overruled on other grounds as stated in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Aggressor instructions make self-defense claims more burdensome, which is counterintuitive because the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). “Few situations come to mind where the necessity for an aggressor instruction is warranted.” State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

This case did not present a situation warranting a first aggressor instruction. By giving the instruction, the jury was permitted to conclude Hall was the first aggressor because he shot Dennis. But the act of aggression justifying the instruction cannot be the charged assault. And the evidence did not otherwise support an aggressor instruction.

1. Giving the aggressor instruction was error because the assault itself cannot form the evidentiary basis for the instruction

“[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.” Riley, 137 Wn.2d at 912. Courts should give an aggressor instruction only where there is credible evidence from which a jury can reasonably determine the defendant provoked the

need to act in self-defense. Id. at 909-10. This Court recently summarized the law on what must be in the record to support a first aggressor instruction:

A first aggressor instruction may be issued in circumstances 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's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.”

State v. Richmond, 3 Wn. App.2d 423, 432-33, 415 P.3d 1208 (2018) (quoting State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008)).

Whether evidence was sufficient to support giving of a first aggressor instruction is a question of law reviewed de novo. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). “The provoking act cannot be the actual assault.” Id. (citing State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)).

Here, there was no aggressive act that provoked a belligerent response, only the shooting itself. Wilson’s testimony indicates Hall immediately pulled out his gun and shot Dennis as Dennis was stepping back from opening the door. RP 515. Hall’s testimony was that he never took the gun from his pocket, and only fired when Dennis lunged at him. RP 1198-99. This evidence did not support the aggressor instruction.

If Wilson’s testimony is believed, Hall shot Dennis immediately and constituted the charged act of premeditated murder. This act cannot

be considered the intentional act provoking a belligerent response entitling the State to an aggressor instruction because the provocative act must be an act separate and apart from the assault itself. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

Nor was there conflicting evidence about whether Hall's conduct provoked Dennis to lunge and appear to reach for a weapon. Richmond, 3 Wn. App.2d at 433. The only conflict was whether Hall immediately pulled out his gun and shot Dennis, or instead only fired when Dennis lunged at him and appeared to reach for a gun in his waistband.

2. A concealed weapon cannot provoke a belligerent response and therefore cannot support an aggressor instruction

That Hall was armed with a concealed weapon when he went to the Central House was insufficient to justify the aggressor instruction. This is true for the simple reason that Dennis would have been unaware Hall was armed when he lunged at him because the gun was concealed in Hall's coat pocket. There is no evidence Hall said anything when Dennis opened the door, much less anything that would serve as an initial aggressive act by Hall, as "words alone do not constitute sufficient provocation" to warrant an aggressor instruction. Riley, 137 Wn.2d at 911. If words by themselves were sufficient to justify use of force, the "victim" could respond to words

with force and the speaker could not thereafter lawfully defend himself. Id. at 911-12.

Similarly, the act of carrying a concealed weapon, on its own does not justify giving a first aggressor instruction. This is because the concealed nature of that act cannot reasonably be interpreted as likely to provoke a belligerent response. It is axiomatic that if it cannot be seen, it cannot provoke a belligerent response.

This case is like Brower, supra. In Brower, this Court held a first aggressor instruction was inappropriate where the defendant's only act toward the victim was brandishing a previously concealed firearm after the victim approached him. This Court noted Brower had not displayed the weapon until the time of the alleged assault, and noted the act constituting the charged assault cannot serve as the basis for giving a first aggressor instruction. 43 Wn. App. at 901-02. The same conclusion is warranted here.

Hall either immediately pulled out his gun and shot when Dennis opened the door, as Wilson claimed, or he never revealed the gun in his pocket and instead only shot when Dennis lunged at him and appeared to reach for a weapon in his waistband. RP 515, 1198-99. Under either scenario a first aggressor instruction was unwarranted and the trial court erred in providing one to Hall's jury.

3. The erroneous aggressor instruction is prejudicial constitutional error requiring reversal

The error in giving an aggressor instruction is constitutional in nature and must be deemed prejudicial unless the State proves the error was harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473; State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433 (2010). The State cannot show the error was harmless here.

An improper aggressor instruction is prejudicial because it eviscerates a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. at 902. The first aggressor instruction negated Hall's self-defense claim, improperly removing it from the jury's consideration. Evidence showed that Hall had good reason to fear violence from Dennis. The jury may have believed Hall acted in self-defense, but nonetheless was forced to conclude from the aggressor instruction that it could not acquit him merely because he carried a concealed weapon to his meeting with Dennis, as the prosecution encouraged the jury to do in its closing remarks. See RP 1344-45 (prosecutor encourages jurors to conclude Hall was the first aggressor because he brought a gun to the Central House). The aggressor instruction erroneously precluded Hall's self-defense claim.

The trial court instructed that "self-defense is not available as a defense" if Hall was the first aggressor. CP 433. But the trial court did so

without supporting evidence to justify giving the aggressor instruction, thereby preventing Hall from fully asserting his self-defense theory. E.g., Stark, 158 Wn. App. at 960-61 (“[W]ithout supporting evidence to justify giving the aggressor instruction, the court prevented Ms. Stark from fully asserting her self-defense theory.”); Wasson, 54 Wn. App. at 160 (unjustified aggressor instruction “effectively deprived Mr. Wasson of his ability to claim self-defense”); Arthur, 42 Wn. App. at 124-25 (without directing jury to intentional acts “which the jury could reasonably assume would provoke a belligerent response,” the aggressor instruction “effectively vitiated any claim of self-defense to be considered by the jury”). The aggressor instruction relieved the State of its burden of proving lack of self-defense beyond a reasonable doubt. This error requires reversal of Hall’s murder conviction and remand for a new trial.

4. This challenge may be raised for the first time on appeal because it involves manifest constitutional error.

Defense counsel initially objected to the aggressor instruction. RP 1270-80. After further discussion about whether the act of bringing a gun to the Central House supported the aggressor instruction, defense counsel stated he would “defer to the Court’s decision.” RP 1282. Nonetheless, the error may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). A constitutional error is

manifest "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

A defendant has the constitutional right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). In the absence of an objection at trial, "an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The aggressor instruction invaded Hall's fundamental right to present a complete defense and the right to hold the prosecution to its burden of proof. The defendant has the constitutional right to defend against the State's allegations by presenting a complete defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22. In this case, the right to present a complete defense encompassed Hall's claim of self-defense.

Due process also requires the prosecution to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d

496, 502, 120 P.3d 559 (2005); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007); State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). That is, a self-defense jury instruction "creates an additional fact the State must disprove beyond a reasonable doubt." State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); see State v. McCullum, 98 Wn.2d 484, 488, 493-94, 656 P.2d 1064 (1983) (jury instruction improperly placed burden of proving self-defense on defendant; right to due process is implicated by instruction that improperly shifts the burden of proof and therefore the issue could be raised for the first time on appeal).

Based on these constitutional guarantees, Hall had the right to have the jury fully consider his claim of self-defense. The aggressor instruction undermined that right by directing the jury to ignore his claim of self-defense if it found that he was the aggressor. See Riley, 137 Wn.2d at 910 n.2 ("an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt."). This instruction had the effect of relieving the State of its burden of proving the absence of self-defense beyond a reasonable doubt. It improperly permitted the jury to disregard his self-defense claim by finding him to be the first

aggressor. The misleading aggressor instruction, if applied by the jury, deprived Hall of fully arguing his theory of the case that he acted in self-defense. See O'Hara, 167 Wn.2d at 107 (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) as a case where error assigned to an ambiguous self-defense instruction was a manifest error affecting a constitutional right because it deprived the defendant of his ability to argue his theory of the case).

In determining whether actual prejudice is present under the manifest error analysis, the focus is on "whether the error is so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d 91 at 99-100.

The instructional error in Hall's case is obvious. The trial court could have avoided the error based on simple awareness of established law in Bea and Kidd (the assault itself does not justify the instruction), and in Brower (a concealed weapon is not an act of first aggression when not revealed until used in the charged act). Had it applied established law to the facts before it, the court would not have given a first aggressor instruction. The court failed to use the requisite care with this disfavored instruction. The improper aggressor instruction constitutes a manifest constitutional error that may be raised for the first time on appeal.

5. In the alternative, defense counsel was ineffective for failing to object to the first aggressor instruction.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Id. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); Kylo, 166 Wn.2d at 869.

Counsel has a duty to research the relevant law. Kyllo, 166 Wn.2d at 862. Based on cases such as Bea, Kidd, and Brower, counsel should have known the shooting itself could not justify the first aggressor instruction and that carrying a concealed weapon does not either. Competent counsel would have objected to the aggressor instruction on those grounds.

The aggressor instruction did nothing to advance the defense theory; instead it undermined Hall's defense and assisted the prosecution in arguing its case. The jury having been instructed on self-defense, there was no point in permitting the jury to disregard the self-defense theory by permitting an instruction that essentially told the jury that the defense was unavailable. The only purpose of an aggressor instruction is to remove self-defense from the jury's consideration. Having ultimately argued that defense, there would be no legitimate tactical reason for defense counsel not to object to the instruction.

There is a reasonable probability the outcome would have been different but for counsel's failure to object. As argued above, had counsel objected to the aggressor instruction, the trial court would have been required under the law and the evidence to reject it. The jury then at least would have had to evaluate the self-defense claim fully. There is a reasonable probability the outcome of the trial would have been different because a reasonable jury could have concluded Hall's fear was reasonable

in light of his history of violent conflict with Dennis. Because counsel did not object, however, the aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor) that Hall provoked the incident and was thus not entitled to his claim of self-defense. This error undermines confidence in the outcome of the trial.

D. CONCLUSION

The first aggressor instruction deprived Hall of a fair trial because it unfairly negated his self-defense claim. In the alternative, deprivation of Hall's right to effective assistance of trial counsel deprived Hall of a fair trial. Therefore, this Court should reverse and remand for a new, fair trial.

DATED this 24<sup>th</sup> day of August 2018.

Respectfully submitted,

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