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Division III
State of Washington
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35716-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN LEE HALL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in giving a first aggressor instruction.
2. The defendant received ineffective assistance of counsel if counsel did not object to the giving of the first aggressor instruction.

II. ISSUE PRESENTED

Did the trial court err in giving the first aggressor instruction based upon the facts in this case, and if so, was such error harmless?¹

III. STATEMENT OF THE CASE

On December 26, 2015, Mr. Hall, went to the residence of his ex-girlfriend,² Ms. Melissa Wilson, at W. 411 Central, Spokane, knocked on the door of the residence, and with premeditation,³ entered the residence

¹ Mr. Hall also argues that if there was no objection to the giving of the instruction, that the error is either manifest and meets the requirements for review, or that counsel was ineffective for failing to raise an objection to the instruction. A review of the record establishes there was ample objection, dispute, and discussion regarding the giving of the instruction. RP 1270-80. It is apparent that the trial court decided to give the instruction, and its ruling seems to address the defendant's objection. RP 1300. Therefore, the trial court's ruling to give the instruction, and its almost full-page explanation of its reasons for giving the instruction, eliminates the necessity for further objection by defense counsel to preserve the issue for appeal. *See State v. Weber*, 159 Wn.2d 252, 272, 149 P.3d 646 (2006).

² Mr. Hall was the ex-boyfriend of Ms. Wilson. They had broken up in the summer of 2014. RP 524.

³ Mr. Hall testified that he never displayed the gun, that it was in his pocket when the door was answered, that he only shot in self-defense as Mr. Dennis

and murdered Demetrius Dennis, the then-boyfriend of Ms. Wilson, by shooting the unarmed Mr. Dennis with a gun Mr. Hall had recently purchased. RP 509-27.

Ms. Wilson testified that, after fatally shooting Mr. Dennis, Mr. Hall turned the gun and, contrary to his testimony that he did not enter the residence,⁴ pointed it directly at Ms. Wilson who was standing near the doorway, holding the child that had blessed her and Mr. Dennis' relationship. RP 519-22, 530. Mr. Hall stood there with the gun pointed at

lunged at him. However, the jury was instructed on premeditation as follows:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 414 (Instruction 11).

The jury found that Mr. Hall murdered Mr. Dennis, and did so *with premeditation*. In doing so, the jury rejected Mr. Hall's assertions that he shot in self-defense and that his hand-gun never left his pocket, and that he did so without aiming the gun.

⁴ Mr. Hall stated that he never entered the residence and never saw Ms. Wilson before, during, or after he shot Mr. Dennis. The jury also rejected this testimony and convicted Mr. Hall of first degree burglary, for unlawfully entering the home with the intent to commit a crime against a person or property, while armed with a deadly weapon. CP 419 (Instruction 16).

Ms. Wilson's face for approximately 30 seconds, and then departed. RP 519-22.

After the murder and the burglary, Mr. Hall fled and disposed of the clothes he was wearing during the murder and threw the murder weapon into the river. RP 1200-01.

Prior to the murder of Mr. Dennis, Mr. Hall and Ms. Wilson had dated for a period of time before finally ending the relationship sometime between the summer of 2014 and the end of that year. RP 516, 524, 1154-56. They had resided together for eight months at the 411 W. Central Avenue residence. RP 511, 524.

After the breakup with Mr. Hall, Ms. Wilson began dating Mr. Dennis in early 2015, and became pregnant with his child.⁵ RP 510-11, 530. Mr. Dennis bought Ms. Wilson a 2003 Jaguar, which she drove to work at the Paul Mitchell Salon School. RP 531.

On October 2, 2015, Mr. Hall slashed all four of Ms. Wilson's car tires while she was pregnant and working at the salon school. RP 825-26, RP 1207. At the time, Mr. Hall knew she was pregnant with Mr. Dennis's child. RP 1162, 1207. The next day, police responded to a call involving

⁵ Ms. Wilson had also dated a Mr. Mulvey after breaking up with Mr. Hall – Mr. Hall became upset and, on Ms. Wilson's birthday, went to her W. 411 Central address and assaulted Mr. Mulvey because he still "had some feelings for her." RP 528-30, 1216-17.

Mr. Hall having found three bullet holes in the driver's door of his car, which was parked out front of the residence which he had shared with his mother. RP 851.

On October 15, 2015, Mr. Hall attended a music event where he saw Mr. Dennis. RP 1181-82. Mr. Hall admitted he sarcastically called out to Mr. Dennis, "Hey De, what's up?" When Mr. Dennis immediately took a fighting stance, Mr. Hall hit him. RP 1182. Shortly thereafter, Mr. Hall started receiving text messages from Mr. Dennis threatening to go to his mother's house and suggesting Mr. Hall hurry home to save his mother. RP 1182, 1184-86. Mr. Hall rushed to his mother's residence, but decided to park his car a block away, so Mr. Dennis would not know he was there, and when he got inside the residence he called 911. RP 1187-88. While he was on the phone with the 911 dispatcher, Mr. Hall learned his car had been set on fire. RP 1189.

The next morning, October 16, 2015, Mr. Hall received a text from Mr. Dennis stating, "Are we through yet, because you're losing, laugh out loud, hah-hah-hah." RP 1190. Mr. Hall did not respond, but did move out of his mother's residence, and began residing at motels. RP 1190-91. After purchasing a gun in early December,⁶ Mr. Hall checked into the Knights Inn

⁶ Mr. Hall stated he got the gun three weeks before shooting Mr. Dennis. RP 1217.

approximately two weeks before Christmas 2015. RP 1191. He confessed that while he was at the Knights Inn, he accidentally fired his recently purchased semi-automatic pistol twice inside his motel room, “boom, boom,” with one bullet going through the mirror. RP 1193. However, he denied that he was practicing with the weapon with any intent to shoot someone. RP 1194.

On December 26, 2015, Mr. Hall determined, from following posts on his smart phone, that Mr. Dennis and his group of friends, known as the “Kush Kingz,” were having a party at the 411 West Central residence. RP 1223-24. Mr. Hall took his gun and walked to that address. Before approaching the front door, he walked around the residence looking at the residence and the garage. RP 814-817. Mr. Hall then went to the door and shot Mr. Dennis after Mr. Dennis answered the door. RP 514-517. Mr. Hall claimed that he was just going to the residence, hoping for a “peace resolution,” but took the gun for protection from dangerous people. RP 1196, 1218.

During the instruction phase of the trial, the trial court decided to give a first aggressor instruction to the jury over the defendant’s objection. RP 1275-83, 1299-1300. The trial court stated:

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. An aggressor instruction

is appropriate if there's conflicting evidence as to whether the defendant, here, Mr. Hall's conduct precipitated the fight. Here, one version of the evidence summarily stated is that Mr. Hall bought a handgun, went to 411 West Central after two-and-a-half months of no contact or conflict with Mr. Dennis. Mr. Dennis opened the door, and as described by Ms. Wilson, Mr. Hall raised his hand and shot Mr. Dennis in the chest and he then died. In my reading of the cases and listening to this case, these facts fit squarely within the aggressor instruction, albeit an instruction that the courts have asked us to utilize only sparingly. I will be giving the aggressor instruction.

RP 1300.

IV. ARGUMENT

THE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO GIVE THE FIRST AGGRESSOR INSTRUCTION.

As relevant here, the trial court instructed the jury on justifiable homicide,⁷ justifiable homicide in the actual resistance of an attempt to commit a felony upon the slayer,⁸ that a person is entitled to act on appearances in defending himself,⁹ and, over the defendant's objection, gave the "first aggressor" instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill or use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked

⁷ CP 428 (Instruction 25).

⁸ CP 430 (Instruction 27).

⁹ CP 431 (Instruction 28).

or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 433 (Instruction 30). Mr. Hall claims the trial court erred by instructing the jury in this manner.

1. Standard of review.

The appellate courts review de novo whether sufficient evidence justifies an aggressor instruction. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011). Whether the State produced sufficient evidence to justify a first aggressor instruction is a question of law subject to de novo review. *Id.* (citing *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008)). When determining if evidence at trial was sufficient to support the giving of an instruction, this Court views the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Wingate*, 155 Wn.2d 817, 823 n. 1, 122 P.3d 908 (2005) (citing *State v. Fernandez–Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). Here, that party is the State. The State need only produce *some evidence* that Mr. Hall was the aggressor to meet its burden of production. *Id.* at 823 (citing *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)); *see generally State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

A trial court does not err by giving a first aggressor instruction where “there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *Riley*, 137 Wn.2d at 910.

2. Analysis.

Mr. Hall contends that the jury either had to either believe him entirely – that Mr. Dennis lunged at him and Mr. Hall responded by shooting the gun without taking it out of his pocket – or believe Ms. Wilson’s testimony entirely – that Mr. Hall entered the home and shot Mr. Dennis without provocation or time to react.¹⁰ However, Mr. Hall is not entitled to this limitation on the jury’s consideration of the facts in this case. Jurors are the sole judges of what testimony or *portions* of testimony¹¹ they

¹⁰ See Br. of Appellant at 9-10:

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.

¹¹ See, e.g., *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (even if there is uncontradicted testimony on a victim’s credibility, the jury is not bound by it); *State v. Gaul*, 88 Wash. 295, 302, 152 P. 1029 (1915)

choose to consider credible, and as in every criminal case, they were so instructed:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 402-03; RP 1306-07; WPIC 1.02. Indeed, the trial court noted the very possibility that the jury was free to find the existence of some or all or none of the facts argued by either party:

MR. NAGY: The jury doesn't come back and say we go State or we go with the defense argument. They say here is what we find the facts to be listening to all.

THE COURT: They wouldn't have to believe all or either one of them.

("Nevertheless, it is still the province of the jury to determine the facts and to judge the credibility of every witness. It is the law that the testimony of a witness who has been impeached ought not to be wholly disregarded by the jury, if the jury feel justified, from the deportment of the witness on the stand or the probability of his testimony, in believing it or any part of it, even if he receives no other corroboration").

MR. NAGY: It may be one or the other or --

THE COURT: *Or pieces of both.*

RP 1281 (emphasis added).

Here, the jury could have found that Mr. Hall pointed the gun at Mr. Dennis, provoking him; that Mr. Dennis, in dismay, stated, “what the f---” and lunged at Mr. Hall; that Mr. Hall shot Mr. Dennis knowing Mr. Dennis was unarmed; and that the lunge by Mr. Dennis was only an attempt by him to prevent being shot. Mrs. Wilson could have been mistaken as to whether or not Mr. Dennis lunged, as she could have been transfixed by the gun that she saw, knowing that trouble was at hand. In any event, there was contradictory testimony as to whether Mr. Hall pointed the gun at Mr. Dennis and then shot him, or whether he never displayed the weapon and only shot when Mr. Dennis lunged at him.¹²

¹² To the extent Mr. Hall argues that “the act which constitutes the charged offense cannot serve to support giving a first aggressor instruction,” he conflates the pointing of the weapon with the murder. The pointing of the gun at Mr. Dennis was not charged, it was the pulling of the trigger that resulted in the murder. Similarly, if person “A” pulled a knife and threatened person “B” with death, causing “B” to also pull a knife, and B was subsequently stabbed and killed by “A”, “A” would be the first aggressor and not entitled to a claim of self-defense unless he withdrew from the affray. *Cf. State v. Dennison*, 115 Wn.2d 609, 617, 801 P.2d 193 (1990) (noting the right of self-defense may be revived if the aggressor in good faith withdraws from the combat “at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist”).

Because Mr. Hall denied pointing the gun, and Ms. Wilson testified he drew and pointed the gun, the evidence was disputed as to who precipitated the confrontation. Therefore, an aggressor instruction was appropriate. An aggressor instruction is appropriate “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.” *Stark*, 158 Wn. App. at 959. If a reasonable juror could find from the evidence that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016), *review denied*, 187 Wn.2d 1023 (2017). That is the situation in this case.

Mr. Hall’s reliance of *Brower*¹³ and *Birnel*¹⁴ as supporting his argument is misplaced. Br. of Appellant at 10, 12. In *Brower*, this Court concluded that an aggressor instruction was not appropriate because there was *no* evidence that Brower engaged in any provoking act toward the victim. 43 Wn. App. at 902. Moreover, *Brower* dealt with an aggressor

¹³ *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986).

¹⁴ *State v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998), *review denied*, 138 Wn.2d 1008 (1999), *abrogated on other grounds by In re Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007).

instruction that addressed an “unlawful act” that created a necessity to respond in self-defense, rather than an intentional act that is reasonably likely to provoke a belligerent response. *Id.* at 901. The “unlawful act” language appearing in the aggressor instruction in *Brower* was later found to be unconstitutionally vague by Division One of this Court in *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985). That case held the “unlawful act” language was unconstitutionally vague and the provoking act must be intentional and one which a “jury could reasonably assume would provoke a belligerent response by the victim.” *Id.* at 124.

Likewise, in *Birnel*, this Court found that the evidence did not support an aggressor instruction. 89 Wn. App. at 473. In that case, after discovering that the defendant had gone through her purse, the defendant’s wife attacked him with a kitchen knife; the two struggled with the knife, and the defendant eventually killed his wife, who suffered 31 wounds about her body. *Id.* at 463, 466. The defendant claimed self-defense at trial, but he was convicted of second degree murder. *Id.* at 466. This Court concluded such evidence could not support giving an aggressor instruction because even if the defendant knew that his wife did not want him to search her purse, “a juror could not reasonably assume this act and these questions would provoke even a methamphetamine user to attack with a knife.” *Id.* at 473.

Mr. Hall's actions in this case more closely resemble those in

Wingate and *Riley*:

It is also undisputed that *Wingate* was the only person to draw a gun and aim it at another person. In *Riley*, there was similar evidence that the defendant drew his gun first and aimed it at someone that he later shot. The defendant in *Riley* also asserted that he drew his gun in order to secure a weapon that he believed the shooting victim had concealed. *See Riley*, 137 Wn.2d at 906-07, 976 P.2d 624. We held that in light of the presence of evidence of the defendant's "aggressive conduct"—that is, the defendant drawing his gun first and aiming it at another person—the giving of an aggressor instruction was proper. *See Riley*, 137 Wn.2d at 909-10, 976 P.2d 624. The same is true here.

Wingate, 155 Wn.2d at 823.

There was no error in the present case in the giving of a first aggressor instruction.

3. Harmless error.

In order to successfully argue self-defense, a defendant must demonstrate a reasonable apprehension of imminent harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). In a murder prosecution, the defendant must prove both a subjective, good faith belief that he or she was in imminent danger of great bodily harm and that this belief, viewed objectively, was reasonable. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). Thus, even if the trial court erred by giving the first aggressor instruction, the error is harmless if, given the evidence at trial, no reasonable

jury could have determined that Mr. Hall possessed a subjective, good faith apprehension of great bodily injury that was reasonable at the time that he killed Mr. Dennis.

Here, the evidence presented at trial demonstrates that no reasonable jury could have determined that the shooting by Mr. Hall was an act of lawful self-defense. The undisputed evidence indicates that Mr. Hall and Mr. Dennis had an ongoing rivalry and that acts of aggression and violence between these two had occurred in the months preceding the shooting. Nothing suggests that Mr. Hall's approach to the W. 411 Central residence would be other than an aggressive act.

Finally, the jury must have disbelieved Mr. Hall's version of events – he claimed he never entered the residence and never saw Ms. Wilson on the day of the murder, and never pulled the gun out of his pocket, yet the jury found him guilty of the entry (burglary) and the firearm enhancement for that burglary. CP 440. The jury found Mr. Hall guilty of premeditated murder, and in doing so, it also rejected his claim that he just reacted to Mr. Dennis's lunging by shooting his weapon located in his pocket. The finding of premeditation is a finding that in committing the murder, Mr. Hall thought about killing Mr. Dennis beforehand, and that this thought

process involved more than a moment in time.¹⁵ If the jury believed Mr. Hall was just reacting, but unjustified in using the deadly force, they would have convicted him of the lesser-included offense of second degree murder instead of first degree murder. The jury was so instructed:

Instruction No. 12: Mr. Hall is charged in Count I with murder in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that Mr. Hall is guilty, then you will consider whether Mr. Hall is guilty of the lesser crime of murder in the second degree. When a crime is proved against a person and there exists reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

RP 1313-14.

Because the jury specifically found Mr. Hall guilty of premeditated murder, any giving of the first aggressor instruction was harmless because the jury discredited Mr. Hall's story that he went to the residence on a

¹⁵ The trial court orally instructed the jury:

Instruction No. 11: Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

RP 1313.

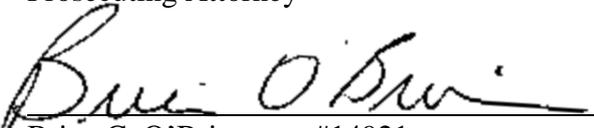
peace-keeping mission, never entering the residence, never seeing Ms. Wilson, and never taking the gun out of his pocket when he fired it.

V. CONCLUSION

There was no error in the present case in the giving of a first aggressor instruction. Because the jury found Mr. Hall guilty of premeditated murder, any giving of the first aggressor instruction was harmless because the jury did not believe Mr. Hall's story that he went to the residence on a peace-keeping mission, never entering the residence, never seeing Ms. Wilson, and never taking the gun out of his pocket.

Dated this 10 day of December, 2018.

LAWRENCE H. HASKELL
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A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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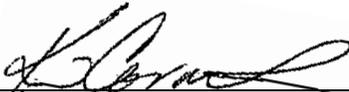
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on December 10, 2018, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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