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NO. 36031-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOLENE MENEGAS,

Appellant.

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

The Honorable Timothy B. Fennessy, Judge

BRIEF OF APPELLANT

E. RANIA RAMPERSAD
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court's Jury Instruction No. 13 misstates the law of self-defense, conflicts with other instructions, and reduces the State's burden of proof.

2. Trial counsel's performance was deficient for failing to object to the erroneous instruction.

3. The trial court's imposition of the \$200 criminal filing fee on an indigent defendant must be stricken under *State v. Ramirez*.¹

Issues Pertaining to Assignments of Error

1. Where the assault "to-convict" instruction failed to include an element requiring the State to disprove self-defense, did the instruction misstate the law, conflict with other instructions, or reduce the State's burden to disprove a disputed element? If yes, does the error require reversal?

2. Given the above, does trial counsel's failure to object constitute ineffective assistance of counsel?

3. Where the Washington Supreme Court published the Ramirez decision after the trial court imposed a \$200 criminal filing fee, must the fee be stricken?

¹ State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (2018).

B. STATEMENT OF FACTS

1. Pretrial Facts

The Spokane County Prosecutor's Officer charged Jolene Menegas with one count of third-degree assault-DV against Michael Menegas.² CP

3. The State alleged Jolene pepper sprayed her ex-husband Michael after a custody dispute over their two children. CP 1-2.

Jolene pled not guilty, raised a claim of self-defense and defense of others, and argued Michael's allegation of harm was not credible. RP 113. The case was tried by a jury. RP 79.

2. Trial Evidence

At trial, the State presented the testimony of Michael and two police officers, photos taken of Michael by the officers, and a can of pepper spray. Jolene testified on her own behalf, and presented testimony from her sons, her therapist, a neighbor, and a third law enforcement officer who responded to the scene.

Michael testified he arrived at Jolene's house sometime in the late afternoon to pick up his boys for spring break. RP 118-20. He brought a copy of the court order, which noted visitation was to begin at 3:00 P.M. RP 129. He testified that in his opinion, the order did not compel him to arrive at a specified time, and permitted him to pick the boys up at any

² This brief refers to the appellant and alleged victim by their first names because they share a last name.

time after 3:00 P.M. RP 129. He was unable to arrive sooner because he had responsibilities as a second-year law student. RP 120. He knocked on the door, but no one answered, so he left for about an hour to get food and returned. RP 120-21. When he returned, he knocked again. RP 121. However, Jolene immediately opened the door, shouted obscenities, shouted at him to leave, and told him he could not take the boys. RP 122. He knocked again, saying he brought the court order and would be forced to involve law enforcement if she did not send the boys out. RP 122. After some back and forth, Jolene stuck her arm out of the door and sprayed pepper spray at his face. RP 123. In the fraction of a second he had to react, he turned his head. RP 123, 136. He returned to his car and immediately called police. RP 123-24. His sunglasses protected his eyes, but the spray got into his throat and lungs, and the side of his face and neck became red and irritated for "several days." RP 123, 125.

Jolene testified that she sprayed Michael with pepper spray because she feared for the safety of her children and herself. RP 228-29, 233. She testified Michael had procured the court visitation order by means of false statements, he had physically harmed her in the past, and he had become increasingly aggressive toward their boys. RP 232-33, 236, 238. As a result of this behavior, she had been diagnosed with post-traumatic stress disorder (PTSD), the boys did not want to go with their

father for visitation, and she did not want to force them to go. RP 231, 238-39. Michael arrived two hours late, at around 5:00 P.M., despite the order stating he should arrive at 3:00 P.M. and despite oral instruction from the family court judge that he should arrive within one hour of the stated time or he would not be entitled to visitation. RP 221, 235. Michael did not knock civilly on the door, but rather “pounded” for 30-40 minutes, and with so much force that it shook the door and left crescent shaped dents from his watch. RP 222-24, 226. Before he arrived, the boys had texted him that they did not want to go with him. RP 221. As a result, when she didn’t immediately answer the door, Michael began “escalating,” by pounding on and shouting through the door. RP 221-22. Jolene repeatedly told him to get off her property, the boys did not want to go, and she would pepper spray him if he did not leave. RP 224-25. At one point during the argument, Michael put his hand on the door and she was afraid he would push his way past into the house to assault her and the boys. RP 226, 228. She also testified she was afraid for her and her children’s physical safety because Michael had physically injured her in the past. RP 228-29, 233. She conceded Michael had never been convicted of assaulting her. RP 233.

Jolene’s counselor also testified that Jolene was diagnosed with PTSD, and this had the effect of making her hyper-vigilant, fearful, and

prone to being triggered by stimulus that reminded her of prior abuse. RP 245, 248. The counselor conceded that her diagnosis was based solely on Jolene's statements to her, and that it arose out of past incidents with Michael, as well as some incidents in Jolene's past that did not involve him. RP 253, 256.

Three police officers testified, saying they arrived at the scene in response to Michael's call and took statements from Michael and Jolene. RP 149, 164, 172-74, 281. The officers testified Michael declined medical treatment, and they took pictures of his neck and face to document redness, but his sunglasses had protected his eyes. RP 150, 154. Two officers also testified to the effects of pepper spray, stating that being sprayed directly in the face was part of their training. RP 152, 177-78. They characterized the effects as extremely painful, lasting anywhere from several hours to a couple of days, and explained there was no available medical treatment, other than rinsing one's eyes with baby soap in response to a direct spray. RP 152-53, 155, 177-79. In conjunction with the officer testimony, the State presented the can of pepper spray and several photos of Michael on the day of the incident. RP 161, 167.

Jolene and Michael's teenaged boys both testified. The elder son stated he was in his bedroom playing videogames for much of the encounter. RP 212-13. He heard his father arrive late, bang on the door

for about 20 minutes, and try to push his way in through the door. RP 212, 214. He only came out of his room after police had arrived. RP 213. The younger son testified he was home with a cousin when his father arrived two hours late and pounded on the door for 30-45 minutes. RP 207-08. His mother warned his father numerous times before pepper spraying him. RP 208. Both boys testified they did not want to go with their father for visitation and their mother did not prevent them from going. RP 207, 213, 215. Both also stated they were not afraid during the incident. RP 210-11, 217.

On the day of the incident, Corporal Jamieson interviewed Brita Barsness, a neighbor who lived two doors down from Jolene. RP 271, 283. The corporal testified Barsness talked to him on the day of the incident and told him Michael had knocked on the door in a "civil" manner, and Jolene opened the door, immediately began yelling at Michael, opened and slammed the door another three times, and then pepper spray Michael. RP 289. Contrary to the corporal's description of her statements to law enforcement, at trial Barsness testified she arrived home and saw Michael was loudly and continuously knocking on Jolene's door for about 15-20 minutes. RP 271-72. She denied seeing Jolene open and close the door, yell at Michael, or pepper spray him, but she did say "this has happened before." RP 275.

3. Jury Instructions

The trial court declined to provide the ‘no duty to retreat’ instruction (WPIC 17.05), and combined an instruction that actual danger was not necessary (WPIC 17.04) with the instruction defining self-defense (WPIC 17.02). RP 265-68. The court reasoned the issue of retreat was not applicable to the facts of Jolene’s case, and the instructions as given were necessary to avoid “overemphasizing the defense side of the case.” RP 266 (citing WPIC 17.05), 267-68. Defense counsel objected, both to the exclusion of the ‘no duty to retreat’ instruction (WPIC 17.05), and to the instructions as given. RP 268.

Prior to closing argument, the jury was instructed as follows:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 24 (Instruction No. 1).

“The order of these instructions has no significance as to their relative important. They are all important.” CP 25 (Instruction No. 1).

It is a defense to a charge of Assault 3rd Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that she is about to be injured, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

A person is entitled to act on appearances in defending herself, if she believes in good faith and on reasonable grounds that she is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 34 (emphasis added) (Instruction No. 10).

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 31, 2017, the defendant caused bodily harm to Michael N. Menegas;

(2) That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering;

(3) That the defendant acted with criminal negligence; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 37 (emphasis added) (Instruction No. 13).

4. Closing Arguments

In closing, the State argued Jolene had pepper sprayed Michael out of frustration over the court order. RP 312-14, 321. Notably, the State argued:

... [Jolene] knew about this court order. She was served with it. She even told him it's a false order. Okay. You can have that opinion. But a judge signed an order, saying he gets the kids. You don't have to like it but you have to deal with it. That's the rules of society, and that applies to everybody. Whether you think it applies to you or not, it still does. That's the reasonable-person standard. That's what we expect of other members of our society.

RP 319 (emphasis added).

The State also emphasized both boys had testified they were not afraid. RP 320. It did not dispute Jolene's diagnosis, but argued her decision to spray Michael was a deliberate act, not a snap judgment resulting from PTSD. RP 320.

Defense counsel argued Michael's testimony was not credible. RP 323. Although he had attempted to portray his actions as calm and reasonable, there were many things he "couldn't remember" during testimony. RP 323. After 20 minutes of pounding, with enough force to leave dents in the door, Jolene finally panicked and acted out of fear and a desire to protect herself and her children. RP 327. The jury must put itself in Jolene's shoes, with full awareness of the fact that Michael was physically much larger, had previously assaulted Jolene, and was

exhibiting escalating behavior. RP 325, 327. Jolene didn't take aim and intentionally spray him directly in the face. RP 327. Rather, she had hidden behind the door and sprayed quickly, using just enough force to stop Michael from threatening her and to get him to leave her porch. RP 327-28.

5. Conviction, Sentence & Appeal

The jury unanimously found Jolene guilty as charged. CP 43-44; RP 338-43.

At sentencing, the court imposed four days of jail, with credit for time served, twelve months of community custody, and anger management class. CP 55-57. The court also imposed \$800 in fees, including a \$200 criminal filing fee, on a payment schedule of \$15 per month. CP 57-58.

Jolene timely appealed and alleged she was indigent, citing \$12,000 in deferred student loans, no assets, and an income including only Section 8 housing and \$1,316 per month in public assistance to provide for herself and her two dependents. CP 77, 78-79. The court found Jolene indigent and entitled to pursue her appeal at public expense. CP 81.

C. ARGUMENT

1. THE COURT'S "TO CONVICT" INSTRUCTION OMITTED AN ESSENTIAL ELEMENT AND CONFLICTED WITH OTHER INSTRUCTIONS.

The trial court's Jury Instruction No. 13 omitted an essential element of the crime, relieved the State of its burden of proof, and created a conflict with Instruction No. 10. The instructions were inadequate. Jolene's conviction must be reversed.

Unclear jury instructions, particularly those relevant to a defense, implicate a defendant's constitutional rights to due process and to present a defense. See State v. LeFaber, 128 Wn.2d 896, 898, 913 P.2d 369 (1996) (abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 104, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010))³ ("the jury instruction failed to make manifestly clear the law of self-defense and thereby prevented Defendant from obtaining a fair trial"); U.S. CONST., AMENDS. VI, XIV; WASH. CONST., ART. I, §§3, 22.

In general, jury instructions when read as a whole must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present her theory of the case. O'Hara, 167 Wn.2d at 105. In the self-defense context, jury instructions must do more than adequately

³ The part of LeFaber abrogated by O'Hara was the reasoning addressing the standard of review for instructional errors raised for the first time on appeal under RAP 2.5(a)(3). O'Hara, 167 Wn.2d at 104.

convey the law. State v. Walden, 131 Wn.2d 469, 473, 478, 932 P.2d 1237 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). They must “make the relevant legal standard manifestly apparent to the average juror.” Id. When instructions defining self-defense are ambiguous, confusing, or misleading, reversal is required. O’Hara, 167 Wn.2d at 108 (discussing LeFaber, 128 Wn.2d 896); Walden, 131 Wn.2d at 477-79.

Here the jury instructions relevant to self-defense were misleading as well as ambiguous and confusing.

- i. The jury instructions were misleading where they misstated the law of self-defense.*

First, the instructions were misleading where they provided an incorrect statement of law. The “to convict” instruction listed the four elements of third-degree assault, but made no reference to the additional self-defense element. CP 37 (Instruction No. 13). This was a misstatement of law. The correct legal standard is as follows. The State must prove each element of a crime beyond a reasonable doubt. WASH. CONST., ART. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To raise the issue of self-defense, a defendant must “produce some evidence demonstrating self-defense.” Walden, 131 Wn.2d at 473 (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495

(1993); State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984)). Once raised, the absence of self-defense becomes an additional element the State must prove beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16.

Here, Jolene had raised the issue of self-defense as supported by her own testimony and that of several witnesses. RP 206 (younger son's testimony), 214-15, 217 (older son's testimony), 248-49 (counselor's testimony), 222 (Jolene's testimony). Thus, the State bore the burden to disprove self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16. By failing to include this element, Instruction No. 13 misstated the law. Id.; CP 37. The error was further compounded because the instruction informed the jury that where the four listed elements had been proven, the jury had a "duty" to convict. CP 37. By omitting a required element, the instruction misstated the law in a manner that relieved the State of its burden of proof, and compounded the error by mandating conviction without reference to the missing element. On this basis alone, the instructions were inadequate. O'Hara, 167 Wn.2d at 108 (discussing LeFaber, 128 Wn.2d 896); Walden, 131 Wn.2d at 477-79.

- ii. *The instructions were ambiguous and confusing where they directly contradicted one another.*

Second, the instructions were ambiguous and confusing where two instructions provided contradictory mandates. Instruction No. 10 mandated that where the State had not disproven self-defense beyond a reasonable doubt, the jury had a “duty” to acquit. CP 34. This was directly contrary to the mandate in Instruction No. 13, instructing where all elements of assault had been proven, the jury had a “duty” to find Jolene guilty. CP 37. If the jurors concluded all elements of assault were proven, and self-defense was not disproven, they were presented with a conflict. No instruction addressed how to resolve this conflict. In fact, Instruction No. 1 stated the order of instructions was of no relevance and no instruction was more important than another. CP 25. Thus, the instructions were contradictory and ambiguous. For this additional reason, the instructions were in error. O’Hara, 167 Wn.2d at 108 (discussing LeFaber, 128 Wn.2d 896); Walden, 131 Wn.2d at 477-79.

- iii. *The instructional error is constitutional, presumed prejudicial, and requires reversal.*

Instructional errors come in many varieties, and are subject to a variety of standards of appellate review. However, Washington courts have articulated at least three independent circumstances in which an error is constitutional and is presumed prejudicial to the defendant: preserved

self-defense instructional errors; errors reducing the State's burden to disprove self-defense, and errors involving inconsistent jury instructions arising out of a misstatement of law. LeFaber, 128 Wn.2d at 902 (abrogated on other grounds by O'Hara, 167 Wn.2d at 101-03); O'Hara, 167 Wn.2d at 108; State v. Irons, 101 Wn. App. 544, 559, 4 P.3d 174 (2000). The latter two reasons apply here.⁴

First, the error reduced the State's burden of proof. In O'Hara, the Washington Supreme Court recognized where a self-defense instructional error reduces the State's burden to disprove self-defense, the error is constitutional and presumed prejudicial. O'Hara, 167 Wn.2d at 105. This rule applies to the State's burden to disprove self-defense, because a colorable self-defense claim creates an additional element. Id. Here, by failing to include any reference to self-defense in the "to convict" instruction, the court relieved the State of its burden to disprove self-defense. CP 37. This is particularly true where Instruction No. 13 informed jurors they had a duty to convict if the four stated elements were proven. CP 37. According to O'Hara, the instruction reduced the State's

⁴ With respect to the error addressed above, the appellant concedes the first circumstance does not apply. While counsel generally objected to the court's instructions, the objection was focused on other issues; i.e. the on the failure to provide a 'no duty to retreat' instruction, and the combining of two WPICs into one self-defense instruction. RP 265-66, 268. However, the instructional error must still be presumed prejudicial for the remaining two reasons.

burden to disprove self-defense and so is a constitutional error and presumed prejudicial.

The error is also constitutional and presumed prejudicial because it created inconsistencies based on a misstatement of the law.

Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law. Where the inconsistency is the result of a misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant

Irons, 101 Wn. App. at 559 (citing Walden, 131 Wn.2d at 478, 932 P.2d 1237 (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977); State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980))).

Here, as discussed above, Jury Instruction No. 13 misstated the law by omitting the self-defense element. This misstatement of law created inconsistent mandates between Instruction Nos. 13 and 10. This inconsistency arose out of the misstatement of law contained in Instruction No. 13, and so “must be presumed to have misled the jury in a manner prejudicial to the defendant.” Irons, 101 Wn. App at 559.

For each of these two independent reasons, articulated in O’Hara and Irons, the instructional error was constitutional and must be presumed prejudicial to Jolene.

iv. The omitted element was not corrected by other instructions.

The State may argue the omission in the “to convict” instruction was harmless or otherwise corrected because the self-defense instruction supplied the missing element. This argument has been rejected by the Washington Supreme Court and so is unavailing.

In general, jury instructions must, when read as a whole, provide an accurate statement of the law. O’Hara, 167 Wn.2d 91, 105. However, an “internally inconsistent instruction” misstating the law cannot be saved by looking to other instructions. Walden, 131 Wn.2d at 477-78. Even more specifically, appellate courts must not “look[] to the other instructions to supply the element missing from the ‘to convict’ instruction.” State v. Smith, 131 Wn.2d 258, 262, 930 P.2d 917 (1997). The Court has “held that a ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” Id. at 263 (quoting State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). “[A]n instruction purporting to list all of the elements of a crime must in fact do so.” Smith, 131 Wn.2d at 263 (citing Emmanuel, 42 Wn.2d at 819-20). The Washington Supreme Court has “held on numerous

occasions that jurors are not required to supply an omitted element by referring to other jury instructions.” Smith, 131 Wn.2d at 262-63.

Here, Instruction No. 13 purported to list all the elements necessary to convict Jolene of assault, but it did not do so. CP 37. The State cannot rely on Instruction No. 10, or any other instruction, to supply the missing element from the “to convict” instruction.

v. *The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.*

Where an error is constitutional and presumed prejudicial, the burden shifts to the State to prove beyond a reasonable doubt the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)); see also O’Hara, 131 Wn.2d at 105; Irons, 101 Wn. App. at 559. Reversal is required unless the State can meet its burden. O’Hara, 131 Wn.2d at 105; Irons, 101 Wn. App. at 559.

To determine whether an error is harmless, appellate courts utilize the “overwhelming untainted evidence” test. Guloy, 104 Wn.2d at 426 (citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); Brown v. United States, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)). Under this test, reversal is required “where there is any reasonable possibility” the error “was necessary to reach a guilty verdict.”

Guloy, 104 Wn.2d at 426 (emphasis added). Where a harmless error analysis is “[a]ppplied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence.” Jennings, 111 Wn. App. at 64 (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder, 527 U.S. at 15, 18); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Under this test, ““where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the reviewing court] should not find the error harmless.”” Jennings, 111 Wn. App. at 64 (quoting Neder, 527 U.S. at 19).

The omitted element here was the self-defense claim in its entirety. See CP 37 (Instruction No. 13). Jolene contested this element. See CP 327 (arguing self-defense in closing). At trial, she presented evidence that was more than sufficient to support her defense—including testimony from herself, her children, and her counselor—to support her claim that her fear and her response were reasonable. RP 206 (younger son), 214-15, 217 (older son), 248-49 (counselor), 222 (Jolene).

The State essentially conceded the sufficiency of Jolene’s self-defense claim by declining to object to the self-defense instruction. See RP 265 (State noting it did not object to the instructions). In closing, the State attacked Jolene’s credibility, not the sufficiency of her testimony. For

example, the State argued Jolene knew what she did was wrong, and was using her PTSD diagnosis as an excuse. RP 320. The State never argued that even if Jolene's testimony were true, it would not excuse the alleged assault.

Where, as here, the omitted element was disputed and the defendant raised sufficient evidence to support her defense, the State cannot prove the instructional error harmless beyond a reasonable doubt. Jennings, 111 Wn. App. at 64 (citing Neder, 527 U.S. at 18; Chapman, 386 U.S. 18). Where the State cannot meet its burden to show the error was harmless, reversal of Jolene's conviction is required. O'Hara, 131 Wn.2d at 105; Irons, 101 Wn. App. at 559.

An examination of case law supports this conclusion. For example, in Brown, the trial court instructed the jury that the defendants were guilty as accomplices if they knew their actions would facilitate or promote "a crime" rather than "the crime" specifically charged. Brown, 147 Wn.2d at 338. The Washington Supreme Court found this was a misstatement of law. Id. The Court applied the Neder test to determine "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 341 (quoting Neder, 527 U.S. at 15) (additional citations omitted). The Court upheld all convictions where each defendant was the principal, but remanded for retrials on all cases involving each

defendant as an accomplice because the erroneous accomplice instructions may have affected those verdicts. Id. at 341-43.

The Court of Appeals applied this same test in Jennings, 111 Wn. App. at 65-66. Jennings was convicted of five counts of first-degree and one count of second-degree robbery. 111 Wn. App. 54, 64. The jury was instructed that a defendant “displays” a weapon if by conduct or speech he leads a person to believe he is armed “even though no weapon is seen.” Id. at 60. On appeal, the Court concluded this instruction was in error, because “display” of a weapon requires some physical manifestation, not speech alone. Id. at 62 n.5. The Court examined each count to determine whether Jennings had contested the element in question, i.e. whether he displayed a weapon through some physical manifestation with respect to that count. Id. at 65-66. Aside from one conviction, which the State conceded, the Court upheld the convictions because the State had presented evidence of physical display for each count and Jennings had not contested any of that evidence at trial. Id.

Both Brown and Jennings provide examples of how Washington courts have applied the Neder rule, and both show that the critical aspect of the analysis is whether the instructional error affected an element of the crime disputed at trial. Jolene’s case involves an instructional error that completely vitiates her argument regarding the contested self-defense

element. Thus, her conviction, like the accomplice convictions in Brown, and unlike the robbery convictions in Jennings, was affected and must be reversed.

The case of Irons is particularly relevant. Irons, 101 Wn. App. 544. Irons was charged with a homicide offense after he stabbed Jenkins, a member of a rival gang. Id. at 546-47. Trial testimony from several witnesses supported that Irons and his friend were involved in a fight with several members of Jenkins' rival gang. Id. at 547-48. Irons asserted self-defense, disputed the State's theory that he had instigated the fight, and argued he had defended himself against multiple attackers. Id. at 552, 558-60. Over counsel's objection, the trial court gave WPIC 16.02, and instructed the jury that Irons had acted in self-defense if he "reasonably believed that the victim intended to commit a felony and inflict death or great personal injury [.]'" Irons, 101 Wn. App. at 549 (emphasis added) (quoting instruction). The court also gave WPIC 16.07, instructing the jury that "[a] person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm ..." Id. at 551 (emphasis added) (quoting instruction).

On appeal, Division One cited the heightened standards for self-defense instructions and held that under the facts of this case, WPIC 16.02

instruction was erroneous. Id. at 550 (quoting LeFaber, 128 Wn.2d at 902, 903 (quoting Acosta, 101 Wn.2d at 622)), 552. The correct standard allowed Irons to respond if he reasonably believed that the group of rival gang members acting in concert intended to inflict the injury. Id. at 552. However, the instruction restricted the jury's consideration to Jenkins' actions alone. Id. The court found the correct legal standard had been conveyed by the other instruction, WPIC 16.07, because it informed the jury Irons was entitled to act on his reasonable belief he was in "actual danger of great bodily harm," and this instruction did not restrict considerations to a threat posed by one individual. Id. at 552. However, this instruction did not save the flawed and contradictory instruction, WPIC 16.02. Id. at 552-53. Rather, in the context of a case involving multiple assailants acting in concert with the alleged victim, the two instructions "become internally inconsistent and, therefore, ambiguous." Id. at 553. "Although the instruction allowed Irons to argue his theory of the case, it left him with the burden of overcoming" the flawed and inconsistent instructions. Id. at 559.

Having concluded the instructions were inconsistent, and that the inconsistency arose from a misstatement of law, the court applied the rule from Walden that such errors are presumed prejudicial to the defendant, unless they are "declared harmless beyond a reasonable doubt." Irons,

101 Wn. App. at 559 (citing Walden, 131 Wn.2d at 478 (additional citations omitted)). The court evaluated the trial evidence, and noted it was undisputed that Irons had faced multiple assailants when he acted. Id. at 559-60. Thus, the element of the crime affected by the error in law – i.e. the reasonableness of his fear when faced with multiple assailants – was at issue. See id. at 560. The error could not be deemed harmless and required reversal for retrial. Id. at 560.

The error in Irons is very similar to that in Jolene’s case. Both involved misstatements of law, both involved an error in the self-defense element, and both errors affected aspects of the case that were disputed at trial. In Irons, it was the reasonableness of the defendant’s fear in light of multiple assailants. In Jolene’s case, it is her entire claim of self-defense, and whether such a defense can as a matter of law be effective against a proven assault. In both instances, the State cannot meet its burden to prove the error harmless beyond a reasonable doubt and the conviction cannot stand.

In response, the State may argue the instructions still permitted Jolene to argue her theory of the case and that Jolene actually did so. But the law requires more. Merely allowing a defendant to argue her theory of the case is still prejudicial where it leaves the defendant with the burden of overcoming inconsistencies between the theory argued and the instructions

as written. Irons, 101 Wn. App. at 559. ““The defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is.”” LeFaber, 128 Wn.2d at 903 (quoting Acosta, 101 Wn.2d at 622).

Here, the jury was expressly instructed to “disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court’s] instructions.” CP 24 (Instruction No. 1). Instruction No. 13 mandates conviction without reference to self-defense. CP 37. This mandate conflicts with the mandate in Instruction No. 10. See CP 34. It is unknown which mandate the jury followed; either possibility is equally likely. While Jolene was free to argue that she was acting to protect herself and her children, there is more than a reasonable doubt the jury felt compelled by the mandate in Instruction No. 13 to disregard this argument. This prejudiced Jolene’s chosen defense.

This Court should find the affected element was disputed, the State cannot meet its burden to prove beyond a reasonable doubt the erroneous instructions did not affect the verdict, and reversal of Jolene’s conviction is required.

2. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

The record here is somewhat ambiguous regarding whether counsel in fact proposed an identical instruction or whether counsel simply failed to object to the State's proposed instruction. See RP 265-66. The file contains the State's proposed instructions, including a "to convict" instruction identical to that adopted by the court, but contains no instructions proposed by defense. ___ Supp. CP (Sub. no. 27, "Plaintiff's Proposed Instructions to the Jury," at 10 (WPIC 35.24)). When drafting the jury instructions, the parties discussed some draft instructions which appear to have been offered by defense. RP 265-66. It is unclear whether defense counsel proposed other instructions, and if so, which ones. However, this Court need not resolve the ambiguity. As discussed below, counsel was ineffective for failing to address the misstatement of law in the "to convict" instruction offered by the State and adopted by the court.

The State may argue appellate review of the instructional error is precluded by the invited error doctrine because defense counsel did not adequately object to the instruction. However, because counsel's performance was deficient, this doctrine does not apply and review is not precluded. State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. CONST., AMEND. VI; CONST., ART. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel is established when (1) counsel's representation was deficient, and (2) the representation prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Pers. Restraint Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Here, both requirements are met.

Here, the State proposed a flawed "to convict" instruction that omitted the self-defense argument, and that ultimately became Instruction No. 13. ___ Supp. CP (Sub. no. 27, "Plaintiff's Proposed Instructions to the Jury," at 10 (WPIC 35.24)). Defense counsel objected to the instructions as given. RP 268. However, the objection focused on the court's combination of the self-defense instruction with the 'actual danger not necessary' instruction, and the omission of a 'no duty to retreat' instruction. RP 265-68. The defense never identified the erroneous omission of the self-defense element in the 'to convict' instruction. The State may argue the invited error doctrine precludes review, or alternatively, that counsel's performance was not deficient where she relied on standard instructions.

The Washington Supreme Court has considered and rejected these very arguments in Kyllo, 166 Wn.2d 856. In Kyllo, the Court held “[i]f instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review.” 166 Wn.2d at 862 (citing State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Rodriguez, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004)). Kyllo was charged with second-degree assault and raised self-defense. Id. at 859. The trial court misstated the law by instructing the jury that self-defense required fear of “great bodily harm” when the correct standard required only reasonable belief of “injury.” Id. at 863 (quoting instructions). Thus, the error lowered the State’s burden of proof. Id. at 860, 864.

The Court of Appeals found where defense counsel had failed to object and had proposed an identical instruction to that offered by the State, and ultimately provided by the trial court, the invited error doctrine precluded review. Id. at 861. The Supreme Court disagreed, and held review was not precluded for several reasons. First, invited error does not apply where the error was due to ineffective assistance of counsel. Id. at 861 (citing Aho, 137 Wn.2d at 745; Rodriguez, 121 Wn. App. at 183-84. Second, ineffective assistance is an error of constitutional magnitude that may be considered for the first time on appeal. Id. at 862 (citing State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007)). Third, the jury

instruction misstated the law of self-defense, reduced the State's burden of proof, and so was an error of constitutional magnitude that could also be raised for the first time on appeal. *Id.* at 862 (citing Acosta, 101 Wn.2d at 615-16); Walden, 131 Wn.2d at 473; LeFaber, 128 Wn.2d at 900; State v. L.B., 132 Wn. App. 948, 952, 135 P.3d 508 (2006)).

The Court found counsel's reliance on a standard WPIC was deficient performance where several published cases already established the form of the WPIC misstated the law. *Id.* at 865-66. The Court reasoned counsel is responsible for researching relevant case law, and the failure to do so was deficient performance. *Id.* at 868-69. The erroneous instruction prejudiced *Kyllo* because the error related to the degree of fear and of threatened injury, an issue that was contested at trial. *Id.* at 869. Even though other instructions provided the correct standard, the erroneous instruction contradicted those instructions, misstated the law, and could have confused the jury. *Id.* at 869-70. There was more than a reasonable probability the outcome of trial was affected by the error. *Id.* Ultimately, the Court held *Kyllo* had received ineffective assistance of counsel and reversal was required. *Id.* at 869-70.

Jolene's case presents the same issues as those in Kyllo, and requires the same outcome. Here, counsel failed to identify the error in the standard WPIC instruction purporting to lay out the elements of the

crime. See RP 265-68. Long-standing case law established it was an error to omit any reference to the self-defense element from the “to convict” instruction. Acosta, 101 Wn.2d at 615-16, 621-23 (finding error where self-defense element was discussed in the “to convict” instruction, but the burden of proof was not allocated clearly to the State). Because, as discussed above, the error reduced the State’s burden of proof, it was one of constitutional magnitude that can be raised for the first time on appeal. Id. at 862. Because adequate research into existing case law would have made the error apparent, the failure to object was ineffective, despite the reliance on the standard instructions. Kyllo, 166 Wn.2d at 865-66. The error prejudiced Jolene both because her claim of self-defense was contested at trial, and because the error reduced the State’s burden with respect to this element. Thus, both prongs of the Strickland test are met and the ineffective assistance requires reversal. Kyllo, 166 Wn.2d at 861 (citing Strickland, 466 U.S. at 687).

3. THE \$200 CRIMINAL FILING FEE MUST BE STRICKEN BASED ON INDIGENCY.

In Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, 426 P.3d at 716, 721.

HB 1763 amended RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment “conclusively establishes that courts do not have discretion” to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, 426 P.3d at 723. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Jolene is indigent under RCW 10.101.010(3). CP 77-79, 81. Because HB 1783 applies prospectively to her case, the sentencing court similarly lacked authority to impose the \$200 filing fee.

In the event this Court declines to remand for retrial, this Court should remand with instructions to strike the \$200 filing fee.

D. CONCLUSION

The jury instruction errors misstated the law, were conflicting and ambiguous, and reduced the State’s burden of proof with respect to the

essential element of self-defense. The failure to object was deficient performance.

For the reasons discussed above, the Appellant respectfully requests that this Court reverse her conviction for third-degree assault and remand for retrial with correct instructions, or in the alternative, remand with instructions to strike the \$200 filing fee.

DATED this 29th day of November, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


E. RANIA RAMPERSAD

WSBA No. 47224

Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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